SUPREME COURT OF THE STATE OF NEW YORK
IAS PART XXI - COUNTY OF SUFFOLK

PRESENT:

HON. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

EAST MORICHES PROPERTY OWNERS' ASSOCIATION, INC; JAMES F GLEASON, JR; , and MARY LOUISE GLEASON, Petitioners, - against - **ZONING BOARD OF APPEALS OF THE TOWN OF BROOKHAVEN and PATRICIA GILLARD,** Respondents.	**INDEX NO.:** **2006-35641** MOTION SEQ. NO.: 005 - CASEDISP ORIG. MOTION DATE: 01/12/07 MOTION SEQ. NO.: 006 - MD ORIG. MOTION DATE: 02/12/07 FINAL SUBMIT DATE: 07/11/07

UPON the following papers numbered 1 to 203 read on the Petition and the Motion herein:

- Petition (Pages 1-21 & Exhibits A-F);
- Respondent GILLARD's Answer (Pages 32-45, Exhibits A-B & Transcript);
- Respondent ZBA's Motion (Pages 46-75 & Exhibit A);
- Petitioners' Opposition (Pages 76-148 & Exhibits A-H);
- Respondent ZBA's Reply (Pages 149-177 & Exhibit 1);
- Petitioners' Reply (Pages 178-203);

it is,

ORDERED, that the application of Petitioners is hereby granted to the extent set forth herein below; and Respondent ZBA's application is denied in all respects as same is moot in light of the determination of Petitioners' application.

Petitioners move this Court for a Judgment, pursuant to CPLR Article 78:

a. Annulling Respondent ZBA's decision as they lacked jurisdiction; or in the alternative
b. Should the Court conclude Respondent ZBA had jurisdiction to hear and decide use variances, reversing said its decision because the evidence was insufficient for granting a use variance; or in the alternative
c. Should the Court conclude the variance applied for was an area variance, reversing its decision because the evidence was insufficient for granting an area variance; or in the alternative
d. Remanding the proceeding to Respondent ZBA for further proceedings to include findings of fact with any subsequent decision.

Respondent ZBA moves this Court for an Order, pursuant to CPLR 3211(a)(3) and 7804(f), dismissing the Petition.

Succinctly stated, Respondent GILLARD purchased a vacant parcel of property at 250 Montauk Highway in 1994, in the Hamlet of East Moriches, Town of Brookhaven, County of Suffolk, State of New York, which is located in an A-1 Residential zoning district, upon which she had constructed a two-story Victorian

type dwelling, one-third of the first floor housing her law practice, as legally permitted within that zoning district, in that restricted capacity. In 2004 Respondent GILLARD retained counsel for the purpose of applying for a change of zone to J or J-4, in order to expand her limited use of the premises for office space to 100% use for said purposes, as she desired to live elsewhere but continue to maintain these premises as office space. Allegedly after conversations with the Town of Brookhaven Department of Law, it was determined to proceed with application for an area variance ro convert the premises to 100% office space. Public notice having been published stating that "Applicant requests permission to exceed more than the permitted one third of dwelling for office use (entire dwelling)", said hearing was held on November 15, 2006. The transcript of the hearing reveals that the Suffolk County Planning Commission had reviewed the application on November 1, 2006, and resovled to disapprove it because it: was inconsistent with the 1996 Comprehensive Land Use Plan which designated the area for single family residence purposes; contravened past actions of the Brookhaven Town Board in reclassifying (re-zoning) the area from J-2 Business zoning to single family residence purposes; and would establish a precedent for similar variance requests that would re-introduce business type uses in the locale. Respondent GILLARD stated during her testimony before Respondent ZBA that she not only intended to continue her law practice (and her title abstract company) at the premises, but she also intended to lease space in the portion of said premises to be converted to office area to other occupants. Petitioner JAMES F GLEASON JR testified extensively in opposition to the application, stating among other things that the application was, in reality, a use variance, not an area variance, and that Respondent GILLARD's alleged hardships were self-imposed. Respondent ZBA then approved the application, with the only findings being indicated as "Granted, as presented". Thereafter, Petitioners herein commenced this action.

The Court notes that, while Respondent GILLARD filed an Answer and a transcript of the hearing herein, Respondent ZBA filed a Motion to dismiss, and apparently no Answer nor Return. Respondent GILLARD, in her Answer, and Respondent ZBA, in its Motion, challenge Petitioners' standing to bring the instant action, which this Court must first address, before determining whether further review is necessary.

While Respondent GILLARD maintains that she has never heard of Petitioner EAST MORICHES PROPERTY OWNERS' ASSOCIATION, INC (EMPOA), nor been asked to join, the Court finds that the numerous affidavits submitted by Petitioners in response thereto clearly indicates the prior existence, function, purpose and relevant validity of said organization.

Respondent GILLARD's Counsel cites ***Friends of the Earth, Inc v Laidlaw Environmental Services, Inc***, 528 US 167 [US 2000], regarding when an association has standing to bring suit on behalf of its members: when its members would otherwise have standing to sue in their own right; when the interests at stake are germane to the organization's purpose; and when neither the claim asserted nor the relief requested requires the participation of the individual members in the lawsuit. On the issue of Petitioner EMPOA bringing this action on behalf of its members, Petitioners' Counsel correctly cites ***Douglaston Civic Association v Galvin***, 36 NY2d 1 [1974], ***Defreestville Area Neighborhood Association v Planning Board***, 16 AD3d 715 [2005], ***Clinton v Summers***, 534 NY2d 473 [1988] and ***Round Dune, Inc v Krucklin***, 155 AD2d 668 [1989], and this Court finds the affidavits submitted on behalf of Petitioner EMPOA clearly demonstrate that the interests at stake are germane to the organization; and that neither the claim asserted nor relief requested requires the direct participation of the individual members of Petitioner EMPOA in this action, leaving this issue of Petitioner EMPOA's standing to be determined by whether any of its members possess standing to sue in their own right.

In that regard, this Court has previously written that the Courts have ruled petitioners were not entitled to an inference of injury because they lived within about one-third of a mile, one-half mile, or between 832 to 2,519 feet from the subject property (*See,* ***Olish v Heaney***, 2003 WL 21276342 [NY SupCt]; ***Concerned Citizens for Open Space v City of White Plains***, 2003 WL 22283389 [NY SupCt]; ***Oates v Village of Watkins Glen***, 290 AD2d 758, 736 NYS2d 478 [3 Dept 2002]), the last matter involving a petitioner who resided within 530 feet from a proposed WalMart super center. The status of neighbor does not automatically entitle one to standing for judicial review in every instance (*See,* ***Sun-Brite Car Wash v Board of Zoning & Appeals of the Town of North Hempstead***, 69 NY2d 414, 515 NYS2d 418, 508 NE2d 130 [1987]). That being said, Respondent GILLARD's Counsel states, in their Memorandum of Law dated January 8, 2007, that "When a challenging citizen's property is within the 200 foot radius of the challenged property, he is considered to be within close proximity and does not need to show actual injury or special damages", referencing ***Johnston v Town Board of the Town of Brookhaven***, 206 NY SlipOp 50828(U) [SupCt, Suffolk County 2006] *citing* ***Society of Plastics Indus, Inc v County of Suffolk***, 77 NY2d 761 [1991]. Rejecting the recalculation of distances proffered by Respondent ZBA's Counsel, the Court notes that Petitioner EMPOA members Leigh-Ann and David Rosen and Doreen Mosso, all of whom submit affidavits herein on behalf of Petitioner EMPOA, own property across Montauk Highway from the subject property, within approximately 67 and 80 feet, respectively, well within the 200 feet radius, and therefore in close proximity and obviously possessing standing in their own right.

Furthermore, the Court is not persuaded that the overly restrictive 200 foot radius is controlling in determining standing (***See: Sun-Brite Car Wash v Board of Zoning & Appeals***, 69 NY2d 406 [1987] {"If petitioners can show that their premises are located in close proximity to the subject property, then actual injury is not required for it is presumed that they will suffer an adverse impact different in nature or degree than the public at large"} and applying same, as pointed out by Petitioners' Counsel: ***Manupella v Troy City Zoning Board***, 272 AD2d 761 [3 Dept 2000] {where the Court recognized properties within 301 and 714 feet to be in close proximity}; ***Matter of McGrath v Town Board***, 254 AD2d 614, *leave denied*, 93 NY2d 803 {where the Court recognized property within 500 feet to be in close proximity}; and ***Round Dune, Inc v Krucklin***, *supra* {where the Court recognized properties within 500 feet to be close proximity}). The Court notes that Petitioner EMPOA members Elizabeth and Joseph Garbarino and Robyn and Brian Kossman, all of whom submit affidavits herein on behalf of Petitioner EMPOA, own property within approximately 329 and 383 feet, respectively, well within 500 feet of the subject property.

Still further, the Court notes that Brookhaven Town Code § 85-28, entitled "Appeal procedure", if this application were properly before Respondent ZBA, states the following, in relevant part:

> "C. The applicant shall mail notice of the hearing by either certified or registered mail, return receipt requested, to every property owner, as shown on the current Brookhaven assessment rolls and certified by the Department of the Assessor on a tax map excerpt radius map prepared by that Department within the area immediately adjacent and directly opposite thereto for a distance of 500 feet from the perimeter of the property, with the exception of applications seeking relief in connection with accessory structures, which radius notification shall remain at 200 feet...".

As this application addresses a principal structure, not an accessory structure, therefore Respondent BROOKHAVEN also recognized 500 feet as close proximity, and the four properties referenced herein above are clearly within the required radius to establish standing.

Even further still, if the application were instead a matter that should have been before the Town Board, as is discussed herein below, the Court notes that Brookhaven Town Code § 85-35, entitled "Notice required", states the following, in relevant part:

> "A. The Town Board shall fix the time and place of a public hearing thereon and cause notice to be given in accordance with the provisions of § 264 of the Town Law. The applicant shall provide the following notice requirements: a notice containing the following information must be sent by either certified or registered mail, return receipt requested, to every property owner immediately adjacent and directly opposite thereto for a distance of 500 feet from the perimeter of the subject property.".

Once more, it appears obvious that Respondent BROOKHAVEN recognized 500 feet as close proximity, and the four properties referenced herein above are clearly within the required radius to establish standing.

Avoiding further redundancy, it is clear in light of the above that Petitioner EMPOA has standing to maintain this action against Respondents.

Now, turning to review of the decision of Respondent ZBA, it is well settled law in the State of New York that a Court may not substitute its own judgment for that of the reviewing board (*See:* ***Janiak v Planning Board of the Town of Greenville***, 159 AD2d 574, 552 NYS2d 436 [2 Dpt], *appeal denied*, 76 NY2d 707, 560 NYS2d 989, 561 NE2d 889 [1990]; ***Mascony Transport and Ferry Service v Richmond***, 71 AD2d 896, 419 NYS2d 628 [2 Dpt 1979], *aff'd*, 49 NY2d 969, 428 NYS2d 948, 406 NE2d 803 [1980]). Therefore, if the decision rendered by the reviewing board is within the scope of the authority delegated to it, the Court may not interfere and annul it, unless said decision is arbitrary, capricious or unlawful (*See,* ***Castle Properties Co v Ackerson***, 163 AD2d 785, 558 NYS2d 334 [3 Dpt 1990]).

That brings forward the issue of whether the decision rendered by the reviewing board is within the scope of the authority delegated to it, and therefore whether the application itself was within the scope of the authority delegated to Respondent ZBA.

The Court notes Brookhaven Town Code § 85-29.1, entitled "Powers and duties" regarding the Board of Appeals (Respondent ZBA herein), states the following, in relevant part:

> "C. Use variances pursuant to §§ 267 and 267-b of New York State Town Law shall be within the sole jurisdiction of the Town Board as set forth in and subject to the provisions contained in Chapter IVA, § 85-31.2.".

Brookhaven Town Code § 85-31.2, entitled "Powers and duties" regarding the Town Board, states the following, in relevant part:

> "The Town Board shall have the powers and duties enumerated herein. An application requesting an interpretation, variance or special use permit shall be addressed to the Town Board, in accordance with the requirements set forth herein and in § 85-33."

Brookhaven Town Code § 85-33, entitled "Application requirements", states the following, in relevant part:.

> "A. An application, in the form approved by the Town Board, requesting a change of zone classification, special use permits or use variances (hereafter referred to as "the application")

shall be addressed to the Town Board, in addition to the following information, which shall be submitted with the application and shall be filed with the Town Clerk:

11) A copy of the notice to be sent to property owners as required under § 85-35 of this section.

The Court concludes that it is abundantly clear that the Brookhaven Town Code specifically and unequivocally keeps use variances within the sole and exclusive jurisdiction of the Brookhaven Town Board. That leaves the issue of whether the application under review herein was an area variance, as applied for by Respondent GILLARD and heard and decided by Respondent ZBA, or whether it was a use variance, as argued by Petitioners.

It is undisputed that the subject premises herein are located in an A-1 Residential zoning district. It is also undisputed that the Brookhaven Town Code states the following, in relevant part:

"§ 85-58. A Residence 1 District.
A. Permitted uses are as follows:
(1) All principal uses, accessory uses and uses authorized by special permit which are permitted in the A Residence District.

§ 85-57. A Residence District.
A. Principal uses are as follows:
(1) One-family dwelling, except that mobile homes shall not be a permitted principal use...
B. Accessory uses, when located on the same lot with a permitted principal use, are as follows:...
(2) Office of a physician, lawyer, architect, teacher or similar professional person residing on the premises and when such use is incidental to such residence; provided, however, that such use shall be within the main building and occupying not more than one-third of the first-floor area."

§ 85-1 Definitions; word usage...
B. For the purposes of this chapter, the following terms, phrases, words and their derivations shall have the meanings given herein:...
ACCESSORY BUILDING, STRUCTURE OR USE - A building, structure or use customarily incidental and subordinate to the principal building or use and located on the same lot with such principal building or use. An accessory use is permitted only on the same lot upon which a valid permitted principal use exists.

It is, therefore, abundantly clear to the Court that offices in an A-1 Residential zoning district are only permitted as an accessory use to a one-family dwelling, restricted to one-third of the first floor, and even then, only if the professional for whom the office is maintained resides in the dwelling, and only if the accessory use is incidental and subordinate to the principal use located on the same lot. It is also clear that Respondent GILLARD, by her own words, does not intend to continue the principal use of the premises, and would have it occupied for office use by persons not residing at the premises.

In ***Croissant v ZBA, Town of Woodstock***, 83 A.D.2d 673 [3 Dept 1981], the Court set forth the following language, on point:

> "An area variance permits deviation from strict compliance with the zoning ordinance's requirements for, as an example, the physical characteristics of premises, so long as the purposes for which the premises are intended to be used are permitted by the ordinance (***Overhill Bldg Co v Delaney***, 28 NY2d 449). However, a use variance often proposes a change in the character of the premises and involves a utilization not permitted by the ordinance (***Village of Bronxville v Francis***, 1 AD2d 236, *aff'd* 1 NY2d 839)."

Petitioners' Counsel adeptly cites ***Putcha v Beattie***, 129 AD2d 918 [3 Dept 1987], wherein the Court reviewed a somewhat similar situation, where a doctor continued to use an office in a residentially zoned premises after he had moved out, causing the office to no longer be a permitted accessory use. The Appellate Division stated that the use and expansion of the offices "...were not permitted principal uses in an RO district. Thus, the Board correctly determined that a use variance was required...".

This Court has determined that it is abundantly clear that the within application was for a use variance, in that Respondent GILLARD did not simply apply to expand the accessory use of her dwelling from one-third of the first floor to some larger percentage, but rather she applied to eliminate the permitted principal use of the premises as a residential dwelling, and completely convert use of the premises to a use that is only permitted within the existing zoning district as accessory and incidental to the principal use she seeks to eliminate, and then only if the premises is inhabited by the individual whose office are maintained thereat. If perhaps Respondent GILLARD sought to increase the size of her own offices to fifty percent of the first floor, while she continued to reside at the premises, that would have fallen within the definition of an area variance, but the application under review herein certainly does not qualify as an area variance.

Still further, Petitioners' Counsel points out that the only "findings" proffered by Respondent ZBA is "Granted, as presented". To borrow from the Practice Commentaries of Terry Rice at Town Law § 267-a: failure to state factual basis for a determination not only burdens the applicant in preparing a challenge to same, but also impedes the Court in its review (*See:* ***Pearson v Shoemaker***, 25 Misc2d 591 [SupCt, Rockland County 1960]); absent findings of fact, intelligent judicial review of the record and of the basis for the decision are not possible (*See:* ***Swan v Depew***, 167 AD2d 835 [4 Dept 1990]; ***Rendino's Truck and Auto Collision v ZBA, City of Syracuse***, 159 AD2d 949 [4 Dept 1990; ***Greene v Johnson***, 121 AD2d 632 [2 Dept 1986]). Clearly, "Granted, as presented" is inadequate.

That being determined, Respondent ZBA's Motion to dismiss is moot.

For all the reasons stated herein above and in the totality of the papers submitted herein, it is, therefore,

ORDERED, that the application of Petitioners for a Judgment, pursuant to CPLR Article 78, is hereby granted to the extent that the decision of Respondent ZBA is hereby annulled, as Respondent ZBA lacked jurisdiction over the subject matter of the application, and the Petition is therefore granted and the matter disposed; and it is further

ORDERED, that the application of Respondent ZBA for an Order dismissing the Petition herein is hereby denied in all respects, as moot in light of the above decision; and it is further

ORDERED, that Petitioners' Counsel is hereby directed to serve a copy of this Order, with Notice of Entry,

on all other parties, the Calendar Clerk of this Court and the Suffolk County Clerk, within 20 days of the date of entry of this Order by the Suffolk County Clerk.

Dated: **Riverhead, New York**
October 4, 2007

HON. JEFFREY ARLEN SPINNER, JSC

✓ FINAL DISPOSITION	NON-FINAL DISPOSITION
✓ SCAN	DO NOT SCAN

TO:

James F Gleason Jr, Esq
Attorneys for Petitioners
100 Park Avenue, Suite 1600
New York, New York 10017

Jaspan Schlesinger Hoffman LLP
Attorneys for Respondent ZBA
300 Garden City Plaza
Garden City, New York 11530-3324

Certilman Balin Adler & Hyman, LLP
Attorney for Respondent GILLARD
1393 Veterans Memorial Highway, Suite 301S
Hauppauge, New York 11788