

**Little Joseph Realty, Inc. v Town Board of Town of
Babylon**

2007 NY Slip Op 34397(U)

January 4, 2007

Supreme Court, Suffolk County

Docket Number: 01-15640

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 5/9/06
Mot. Seq. # 004 - MD CASEDISP
005 - MD
006 - MG

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LITTLE JOSEPH REALTY, INC.,	:	RUSKIN, MOSCOU, EVANS &
	:	FALTISCHEK, P.C.
	:	Attorneys for Plaintiff
	:	170 Old Country Road
Plaintiff,	:	Mineola, New York 11501
	:	
- against -	:	MATHEWS & MATHEWS
	:	Attorneys for Defendant Town
	:	191 New York Avenue
	:	Huntington, New York 11743
	:	
THE TOWN BOARD OF THE TOWN OF	:	FARRELL FRITZ, P.C.
BABYLON, THE TOWN OF BABYLON, and	:	Attorneys for Defendants Posillico
J.D. POSILICO, INC. and POSILICO BROS.	:	1320 Reckson Plaza
ASPHALT CO., INC.,	:	West Tower - 13 th Floor
	:	Uniondale, New York 11556
Defendants.	:	

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Upon the following papers numbered 1 to 54 read on these motions for summary judgment Notice of Motion/ Order to Show Cause and supporting papers 1 - 10; 11 - 23; 24 - 27; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 28 - 31; 32 - 33; 34 - 48; Replying Affidavits and supporting papers 49 - 50; 51 - 52; 53 - 54; Other Joint Exhibits Vols. I - IV _____; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion by plaintiff (Mot. Seq. #004) for an order pursuant to CPLR 3212 granting summary judgment in its favor and against defendants, the motion by defendants J.D. Posillico, Inc. and Posillico Bros. Asphalt Co., Inc. (Mot. Seq. #005) for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's causes of action set forth in its converted petition and supplemental verified complaint, and the motion by defendants Town Board of the Town of Babylon and the Town of Babylon (Mot. Seq. #006) for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint against them, are hereby consolidated for the purposes of this determination; and it is further

ORDERED that the motion by plaintiff is denied; and it is further

ORDERED that the motion by defendants J.D. Posillico, Inc. and Posillico Bros. Asphalt Co., Inc. is denied, as moot; and it is further

Little Joseph Realty, Inc. v Town Board of the Town of Babylon

Index No. 01-15640

Page No. 2

ORDERED that the motion by defendants Town Board of the Town of Babylon and the Town of Babylon is granted.

In this action for declaratory and injunctive relief, the plaintiff challenges as improper or illegal spot zoning the enactment of certain amendments to the Town of Babylon Zoning Code authorizing the operation of hot-mix asphalt plants in designated industrial areas as a special exception.

The plaintiff is the owner of property located at 1637 Broadhollow Road in Farmingdale, New York. Adjoining the plaintiff's property to the south is an eight-acre parcel on which defendants J.D. Posillico, Inc. and Posillico Bros. Asphalt Co., Inc. (collectively, "Posillico") have operated an asphalt plant since the 1970s. Both properties are located in the Town's G Industrial District, in which operation of an asphalt plant is not permitted as of right. Prior to 2001, Posillico operated the asphalt plant pursuant to a use variance, which expired on January 24, 2001.

In or about August 2000, the Town Board amended the Zoning Code by creating a Commercial Overlay District, intended to encourage the development of hotels and office buildings. The asphalt plant is located within the boundaries of the Commercial Overlay District. At or about the same time, the Town Board began to consider an amendment of the Zoning Code to permit asphalt plants in the G Industrial District as a special exception. On May 21, 2001, the Town Board adopted a resolution authorizing "certain asphalt manufacturing plants" in the G Industrial District as a special exception, providing (i) that the plant site contain at least eight acres of land, (ii) that the maximum height of its silo be 55 feet above the crown of any public roadway within a 200 foot radius of the site, (iii) that the site is a minimum of 1,800 feet from any residentially zoned property (exclusive of cemeteries and Metropolitan Transit Authority rights of way), 1,800 feet from the Town line, 1,000 feet from any State road, highway or parkway, and 1,000 feet from any State-designated tidal or freshwater wetland. This action followed.¹

By order dated September 25, 2003, this Court (Catterson, J.) denied Posillico's motion for summary judgment determining the questions as to whether the amendment "is a detriment to abutting properties, whether it benefits the safety and welfare of the people of the respondent Town, and whether it addresses a growing need and comports with the comprehensive plan for the respondent Town given the newly created Commercial Overlay District all remain issues to be determined by the fact finder."

The Town subsequently retained an outside consultant, Sector Planning, Ltd. ("Sector"), to take a "fresh look" at the Town's zoning regulations concerning asphalt plants. On June 21, 2005, based on Sector's findings and recommendations, the Town Board repealed the prior amendment and adopted a new amendment authorizing "Hot-mix Asphalt facilities" as a special exception in all of the Town's industrial districts, providing (i) that the site is a minimum of 2,000 feet from "sensitive institutional, residential and/or

¹ The plaintiff commenced this action as a hybrid article 78 proceeding and action for declaratory judgment by filing of a notice of petition and verified petition in June 2001. By order dated February 19, 2002, this Court (Floyd, J.) dismissed the article 78 claims and severed the two remaining causes of action for declaratory relief. The plaintiff subsequently discontinued one of these, leaving only a cause of action for judgment declaring that the amendment was unlawful, void, and unenforceable as illegal spot zoning.

public uses,” 1,500 feet from residentially zoned property, and 750 feet from residential uses in a non-residential zone, with all such restrictions subject to a reduction of 100 feet for every 10 feet of vegetative buffer planted along the site boundary, (ii) that the minimum lot size is two acres, (iii) that the maximum height of any building on the site is 35 feet and the maximum height of any machinery is 55 feet, and (iv) the emissions stack is a minimum height of 55 feet and a maximum height equal to 2.5 times the height of the tallest building within a 200-foot radius of the property line.

Following the adoption of the new amendment, and by stipulation of the parties, the plaintiff filed a supplemental complaint alleging three causes of action: the first, for judgment declaring that the subject amendments constitute illegal and improper spot zoning, are contrary to the Town’s own land use plan and, as such, are void and unenforceable, the second, for an injunction permanently enjoining the Town from granting a special exception for operation of an asphalt plant at the Posillico property based on the subject amendments, and the third, for an injunction requiring the closure of the Posillico plant until its operation is in accordance with applicable law. It appears that discovery is now complete and that a note of issue was filed on December 21, 2005.

The plaintiff now moves for summary judgment, claiming that notwithstanding the Town’s hiring of an outside consultant to “tidy up” the record, the new amendment is, like its predecessor, a blatant attempt to benefit a single, influential business and is not the result of comprehensive planning intended to benefit the community as a whole or to reflect the community’s changing needs. The plaintiff contends that Sector’s report does not actually show that the needs of the community require the special exception. The plaintiff also contends that the Town’s single-minded effort to legalize the Posillico plant is nowhere more evident than in its response to its consultant’s finding that allowing an asphalt plant in the same district as hotels, motels, and offices “is contradictory and undercuts an important function of zoning,” when it decided to carve out the Posillico property from the Commercial Overlay District rather than to honor the comprehensive plan by eliminating the Posillico property from the designated areas where the special exception use was to be permitted. In particular, the plaintiff notes that the new amendment remains at odds with the purposes underlying the creation of the Commercial Overlay District, whose boundaries the Town moved in order to exclude the Posillico plant when the new amendment was adopted.

Posillico also moves for summary judgment dismissing the verified petition and the supplemental complaint, and for a declaration that the new amendment does not constitute spot zoning and is consistent with the Town’s comprehensive plan. Posillico contends that the earlier amendment cannot constitute spot zoning because it was repealed. As for the new amendment, Posillico claims it did not rezone the premises but simply allows a particular use under certain conditions and, therefore, there can be no valid claim of spot zoning; in any event, because the law does not single out one property but rather applies to at least 42 properties in the Town, it cannot be considered spot zoning. Posillico further contends that the new amendment is consistent with the Town’s comprehensive plan because all of the potential sites for asphalt plants in the Town are in major industrial areas, and that the exclusion of the Posillico property from the Commercial Overlay District was appropriate because that property was not conducive to redevelopment for hotel, office or related business uses. Posillico also claims that it is not unfairly benefitted by the new amendment in that will need variances to meet the siting criteria set forth in the new amendment, absent which it is not even eligible for the special exception.

Little Joseph Realty, Inc. v Town Board of the Town of Babylon

Index No. 01-15640

Page No. 4

The Town likewise moves for summary judgment dismissing the complaint. Like Posillico, the Town contends that the repeal of the prior amendment renders moot any pending claims as to the validity of that amendment. As for the new amendment, the Town claims that it acted within its legislative authority by enacting a law regulating hot-mix asphalt plants on a town-wide basis, which was the product of an independent planning study that gave due consideration to the Town's comprehensive plan in strict observance of all legal requirements. Contrary to the plaintiff's claim, the law does not single out a small parcel of land for the benefit of its owner but rather affects some 39 properties which qualify as potential locations for hot-mix asphalt plants. The Town claims that the determination to reduce the size of the area where the special exception use was to be permitted was not inconsistent with the comprehensive plan strategy of promoting hotels, motels, and offices on the Route 110 corridor since the Posillico property does not front on the Route 110 corridor. The Town also asserts that the Town's general welfare and economic interests are furthered by the new amendment. As for the injunctive relief sought, the Town contends that there is no basis in law to compel it to take any action requiring the closure of the Posillico plant.

Initially, the Court notes that insofar as the amended complaint may be construed to be a challenge to the 2001 Local Law amending the zoning code related to asphalt plants such claims are dismissed. Plaintiff's counsel concedes that such claims were rendered moot by the adoption of Local Law No. 15 of 2005 repealing the 2001 Local Law and the subsequent enactment of Local Law No. 16 of 2005 but asserts that the manner in which the Town went about attempting to correct the patent spot zoning contained in the earlier amendment requires that the Court to view the new legislation with suspicion and negates the strong presumption of legality of the 2005 legislation.

Manifestly, zoning codes and amendments do enjoy a strong presumption of legality, and the burden rests on the party attacking them to overcome that presumption beyond a reasonable doubt (*see, Church v Town of Islip*, 8 NY2d 254, 203 NYS2d 866 [1960]; *Taylor v Head of Harbor*, 104 AD2d 642, 480 NYS2d 21 [2d Dept 1984] app den 64 NY2d 609, 489 NYS2d 1026). If the validity of a zoning determination is even fairly debatable, it must be sustained upon judicial review (*Save Our Forest Action Coalition, Inc. v City of Kingston*, 246 AD2d 217, 675 NYS2d 451 [1998]).

The power to zone is derived from the Legislature and must be exercised in the case of towns in accord with a "comprehensive plan". A comprehensive plan has its underlying purpose the control of land uses for the benefit of the whole community based upon consideration of its problems and applying the enactment or general policy to obtain a uniform result. The plan need not be contained in a single document; indeed, it need not be written at all. The court may satisfy itself that the municipality has a well-considered plan and that authorities are acting in the public interest to further it by examining all available and relevant evidence of the municipality's land use policies (*Rayle v Town of Cato Board*, 295 AD2d 978, 743 NYS2d 784 [2002] app den 747 NYS2d 851). An amendment which has been carefully studied, prepared and considered meets the general requirement for a well-considered plan and satisfies the statutory requirement. The Court will not pass on its wisdom (*Asian Americans for Equality v Koch*, 72 NY2d 121, 531 NYS2d 782 [1988]).

Spot zoning has been defined as the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners (*see, Rodgers v Tarrytown*, 302 NY 115 [1951]; *Miller v*

Kozakiewicz, 289 AD2d 494, 735 NYS2d 176 [2001]) In evaluating a claim of spot zoning the court may consider a number of factors including whether the rezoning is consistent with a comprehensive land use plan, whether it is compatible with surrounding uses, the likelihood of harm to surrounding properties, the availability and suitability of other parcels and the recommendations of professional planning staff (*Boyles v Town Board of the Town of Bethlehem*, 278 AD2d 688, 718 NYS2d 430 [2000]). No single factor is dispositive and the ultimate inquiry in determining whether the amendment constitutes spot zoning is whether the change is other than part of a well-considered and comprehensive plan calculated to serve the general welfare of the community (*Henderson Taxpayers Ass'n v Town of Henderson*, 283 AD2d 940, 723 NYS2d 786 [2001] app den 96 NY2d 719, 733 NYS2d 371; *Yellow Lantern Kampground v Town of Cortlandville*, 279 AD2d 6, 716 NYS2d 786 [2000]); *Save Our Forest Action Coalition, Inc. v City of Kingston*, supra).

Applying these principles to the matter at hand, the Court concludes that the Town's amendment of the Zoning Code to permit the operation of asphalt plants in its industrial zoning districts with a special exception use permit is not inconsistent with its comprehensive land use plan. The record reflects that the plan for hot-mix asphalt plant zoning was implemented following a well reasoned planning study by an independent planning specialist together with the input and approval of the Town's own planning and environmental experts. The primary motivation for the zoning amendment is set forth in the statement of the intent and purpose of the legislation, to the effect that hot-mix asphalt plants constitute a small but thriving industry on Long Island offering each community benefits such as jobs in the manufacturing sector, a local source of materials for other industries that produce for area growth and for the development and maintenance of the community's infrastructure (Town Code § 213-473[A][1]). The legislation also reflects that the local sourcing of hot-mix asphalt is advantageous because the product can deteriorate during transport over long distances and because distance hauling contributes to higher costs (§213-473[A][2]). The legislation further reflects that hot-mix asphalt facilities can entail adverse impacts on local air and water quality, traffic and neighborhood character which may be mitigated by use-specific controls (§ 213-473[A][3]). Thus, the stated purpose of the amendment is to support a local hot-mix asphalt by permitting facility location where compatible in all of the Town's industrial districts and to establish clear adequate and consistently-applied regulatory controls to limit the impact of any hot-mix asphalt facility on surrounding uses and the general public welfare (§ 213-473 [B][1][2]).

Contrary to plaintiff's contention, the 2005 amendments do not constitute illegal spot zoning. As noted, *infra*, the legislation requires that before any special exception use permit is issued by the Zoning Board of Appeals the property must meet criteria which impose restrictions for minimum set backs from "sensitive institutional, residential and/or public uses", from residentially zoned property, and from residential uses in a non-residential zone. The property must be a minimum of two acres in size, and the plant is restricted by maximum height limits with regard to any building or machinery on the site while the emissions stack must meet certain specified height requirements.

Given these restrictions on locating hot-mix asphalt plants, the Town's Commissioner of Department of Planning and Development, Peter Casserly, confirmed in his deposition testimony, that between 40 and 50 two-acre parcels met the siting requirement for hot-mix asphalt plants within the Town's industrial districts under the 2005 amendment. According to deposition testimony of George

Guarino, Senior Environmental Analyst with the Town's Department of Environmental Conservation, with the additional application of limiting environmental regulations there remain 39 qualifying parcels within the Town's industrial districts for the operation of a hot-mix asphalt plant. Evidence that other properties in the area benefit from the amendment refutes a "spot zoning" contention (*Kravetz v Plenge*, 84 AD2d 422, 446 NYS2d 807 [1982]; *Century Circuit, Inc. v Ott*, 65 Misc2d 250, 317 NYS2d 468 aff'd 37AD2d 1044, 327 NYS2d 829 [1970]). In any event, plaintiff does not dispute the fact that Posillico's plant, in its present configuration, does not meet the standards for a special exception under the amended ordinance and that its owners would be required to obtain certain area variances before being eligible to apply for a special exception use permit.

The Court also rejects plaintiff's contention that the Town's enactment of Local Law No. 13 of 2005 amending the Zoning Code to readjust the boundaries of the Commercial Overlay District so as to exclude defendants Posillico's plant and other industrialized properties from the Commercial Overlay District was inconsistent with the stated purpose of that district. As noted by the professional planning consultant in evaluating the rezoning proposal, the impetus for creating the Commercial Overlay District in August, 2000 was to encourage the establishment of hotel, motel, office and other commercial uses along State Route 110. The newly excluded parcels do not have frontage on that roadway and for most part are already developed with industrial uses and/or are otherwise not conducive to commercial development.

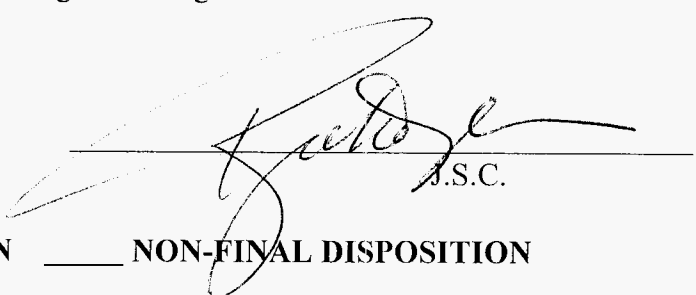
In sum, the evidence on the record demonstrates that the Town's enactment of the 2005 local laws amending its Zoning Code with respect to hot-mix asphalt plants and the adjustment of the boundaries of the Commercial Overlay District were made after an extensive review process, including the consideration of the impact on adjoining areas, the consistency with existing zoning plans, environmental concerns and the availability of other suitable sites. The Court further concludes that in enacting the amendment that sufficient forethought was given to the community's land use problems and that there was a reasonable relation between the rezoning determinations and the worthwhile goal of improving the economic health of the community (*Save Our Forest Action Coalition, Inc. v City of Kingston*, supra). In light of the Court's analysis establishing that the Town Board's action reflected a sufficient degree of comprehensiveness, plaintiff has failed to overcome the strong presumption of validity afforded this legislation and summary judgment dismissing plaintiff's first cause of action challenging its legality is therefore warranted (*see, Daniels v Van Voris*, 241 AD2d 796, 660 NYS2d 758 [1997]).

By its second and third causes of action plaintiff seeks a permanent injunction enjoining the Town from issuing Posillico a special exception use permit for its asphalt plant and a mandatory injunction requiring the Town to take action to restrain Posillico from operating its asphalt plant in violation of the Town's zoning code. Plaintiff's second cause of action is not only premature but also without legal merit as there has been no showing that Posillico has applied for a special exception use permit for this asphalt plant, and even if it had, the issuance of a special exception use permit for a hot-mix asphalt plant is within the sole province of the Town's Zoning Board of Appeals (Town Code § 213-475). The Zoning Board of Appeals is, of course, a separate entity from the Town Board and a necessary party to any action or proceeding challenging the award of a special exception use permit for a hot-mix asphalt plant. As for the third cause of action, plaintiff in its pleading and its supporting papers

has not set forth the authority for the requested injunction requiring the Town to enforce its zoning ordinance. Town Law § 268[2] which authorizes the proper town authorities to institute an action to enjoin zoning violations, provides that if they refuse or fail to do so after a written request by a resident taxpayer, any three taxpayers who are aggrieved by the zoning violation may institute an action or proceeding in like manner as town officials are authorized to do (*Marlowe v Elmwood, Inc.*, 12 AD3d 742, 784 NYS2d 206 [2004] app dism 4 NY3d 881, 798 NYS2d 726). Inasmuch as plaintiff has failed to plead and prove that the instant action was commenced by three resident taxpayers, plaintiff's third cause of action may not be sustained under Town Law § 268 [2] and is dismissed.

Accordingly, plaintiff's motion for summary judgment is denied. Defendant Town Board's motion for summary judgment is granted and the complaint is dismissed in its entirety. Defendants Posillico's motion for summary judgment is denied, as moot. The Court declares that Local Laws Nos. 13 and 16 of 2005 of the Town of Babylon amending its Zoning Code are valid.

Dated: JAN 04 2007



J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION