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

PRESENT:

HON. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

In the Matter of the Application of

ROBERT WAIDLER and **BARBARA WAIDLER,**

Petitioners,

For a Judgment pursuant to Article 78 of the CPLR,

- against -

THOMAS YOUNG, Chairman, **GWENDOLYN BROWN, THOMAS WEINSCHENK, JOHN FARRELL, MICHAEL KANE, BURTON KOZA, DENISE KRETZ, JENNIFER SPENCER** and **JOSEPH GUARINO,** constituting the Town of Babylon Board of Appeals, and **BRIAN HURLEY** and **HARBOUR CUSTOM HOMES, LTD,**

Respondents.

INDEX NO.: **2007-4210**

MOTION SEQ. NO.: 001 - CASEDISP
ORIG. MOTION DATE: 03/26/07

MOTION SEQ. NO.: 002 - MD
ORIG. MOTION DATE: 10/05/07

MOTION SEQ. NO.: 003 - MD
ORIG. MOTION DATE: 10/05/07

FINAL SUBMIT DATE: 11/28/07

UPON the following papers numbered 1 to 82 read on the Petition and the Motions herein:

- Petition (Pages 1-18 & Exhibits A-K);
- Respondent BABYLON's Motion (Pages 19-37 & Exhibits A-E);
- Respondents HURLEY & HARBOURs' Motion (Pages 38-53 & Exhibit A);
- Petitioners' Opposition (Pages 54-68);
- Respondent BABYLON's Reply (Pages 69-74 & Transcript);
- Respondents HURLEY & HARBOURs' Reply (Pages 75-82 & Exhibit A);

it is,

ORDERED, that the application of Petitioners is hereby denied; and both applications of Respondents are hereby denied in all respects.

Petitioners move this Court for a Judgment, pursuant to CPLR Article 78, annulling Respondent BABYLON's decision as granting Respondents HURLEY & HARBOURs' applications, or in the alternative, remanding the applications to Respondent BABYLON for a hearing and decision on the applications, and directing that Petitioners be awarded the costs and disbursements of this proceeding, including legal fees.

Respondent BABYLON moves this Court for an Order, pursuant to CPLR 3211, dismissing the Petition herein.

Respondents HURLEY & HARBOUR move this Court for an Order and Judgment, pursuant to CPLR 7804(f), dismissing the Verified Petition, with prejudice, awarding Respondents costs and disbursements.

Succinctly stated: Petitioners are the owners of property that adjoins the premises which is the subject of Respondents HURLEY & HARBOUR's application to Respondent BABYLON; said premises, located on the north side of Charleston Drive in the Hamlet of Amityville, Town of Babylon, County of Suffolk, State of New York, is designated on the Suffolk County Tax Map as District 0100, Section 181, Block 3, Lot p/o 63.1, being rectangular in shape, with a frontage on Charleston Drive of 120 feet, and a depth of 100 feet, creating a lot area of 12,000 feet, and improved with a single-family dwelling mid-parcel, with a shed and detached garage; said premises is located in the Residence C Zoning District, which pursuant to the Babylon Town Code is required to have a minimum lot area of 7,500 square feet, a minimum lot width of 75 feet, and a minimum front yard set back of 30 feet.

In September, 2003, the prior owner of the premises (Richard Rosenbusch, President of Respondent HARBOUR) filed applications with Respondent BABYLON to create two lots from the premises, each with a lot width of 60 feet instead of the Town Code requirement of 75 feet, and a total lot area of 6,000 square feet, instead of the Town Code requirement of 7,500 square feet, with additional variances for the front yard set back regarding the westerly lot; Respondent BABYLON held a public hearing on February 3, 2004, where a number of residents spoke in opposition, and the Town's Department of Environmental Control recommended disapproval; Respondent BABYLON rendered a decision dated February 5, 2004, denying the application, including extensive findings of fact setting forth environmental and planning/zoning reasons for the denial, as well as the impact of the undersized lots on the character of the community, and further finding that the benefit sought by applicant could have been achieved by other means, the variances sought were substantial, and the difficulty claimed was self-created; no judicial review thereof was sought.

Respondent HURLEY took title to the premises by deed dated September 30, 2004, who filed applications with Respondent BABYLON on March 3, 2006, seeking the identical relief requested in the September, 2003 application recited herein above, wherein he included Respondent HARBOUR as an interested party, although it was later amended to place the new construction on the westerly lot, rather than the easterly lot, and other revisions, including increasing proposed side yard set backs on one lot; Respondent BABYLON held a public hearing on October 5, 2006, and a number of residents again spoke in opposition thereto, the Planning Division recommended the same several covenants and conditions of approval be required as they recommended in 2003, and the Town's Department of Environmental Control again recommended disapproval; Respondent BABYLON rendered a decision approving the application on January 25, 2007, which was filed with the Town Clerk's Office on January 30, 2007, which did not include findings of fact in support of its decision; service of the within action was completed against all Respondent on March 14, 2007; Respondent BABYLON later 'updated' its decision with findings of fact by a decision dated June 28, 2007, received by the Town Clerk's Office on July 3, 2007, after this action had been commenced.

Respondents counter the Article 78 action with challenges to standing, and that must be resolved first. Said challenge is totally unsupported by well settled law in the State of New York. When it is undisputed that Petitioners' property and the property that is the subject of the application are adjacent to each other, proximity allegations are sufficient to establish standing *prima facie* (*See:* ***John John LLC v Planning Board of Town of Brookhaven***, 15 AD3d 486 [2 Dept 2005]; ***Williams v Hertzwig***, 251 AD2d 655 [1998]; ***Sun-Brite Car Wash v Board of Zoning and Appeals of Town of North Hempstead***, 69 NY2d 406 [1987]).

Interestingly, Respondents misapply the Court of Appeals' ruling in ***Sun-Brite v Town of North Hempstead***, *supra*, wherein the Court specifically found that the aggrieved party lacked the presumption of standing inferred by proximity specifically because "...petitioner's only substantiated objection is the threat of increased business competition – an interest not within the "zone of interest" protected by the zoning laws...", further stating that "...The fact that a person received, or would be entitled to receive, mandatory notice of an administrative hearing because it owns property adjacent or very close to the property in issue gives rise to a presumption of standing in a zoning case. But even in the absence of such notice it is reasonable to assume that, when the use is changed, a person with property located in the immediate vicinity of the subject property will be adversely affected in a way different from the community at large; loss of value of individual property may be presumed from depreciation of the character of the immediate neighborhood. Thus, an allegation of close proximity alone may give rise to an inference of damage or injury that enables a nearby owner to challenge a zoning board decision without proof of actual injury *(see, Matter of Prudco Realty Corp. v Palermo*, 93 AD2d 837, *affd on other grounds* 60 NY2d 656; *Matter of Marasco v Luney*, 99 AD2d 492, *lv denied* 63 NY2d 605; *see also*, 4 Anderson, American Law of Zoning § 27.18 [3d ed]; 3 Rathkopf, Zoning and Planning § 43.04)."

Citing ***The Society of the Plastics Industry Inc v County of Suffolk***, is also a clear misapplication. In that decision, the Court of Appeals was deciding the standing of a special interest group, a business organization representing member businesses, where the Court precisely reviewed associational or organizational standing, specifically regarding application of the State Environmental Quality Review Act (SEQRA), stating, even as to the one entity alleging to have corporate offices in Suffolk County, that "...Economic injury in not itself within SEQRA's zone of interests (*see, Matter of Mobil Oil Corp v Syracuse Indus Dev Agency, 76 NY2d 428...*". Once again, this is irrelevant to the objections of a non-commercial, residential owner of adjacent property, whose objections are well within the zone of interest protected by zoning laws.

It is patently evident that Petitioners herein are not objecting to a threat of increased business competition, outside the zone of interest protected by zoning laws. Rather, they specifically allege a threat of depreciation of the character of the immediate neighborhood, which is at the heart of the zone of interest protected by zoning laws. As well stated by the Court in ***Sun-Brite v Town of North Hempstead***, *supra*, "Zoning ordinances are a proper exercise of the police power because they are enacted to protect the health, safety and welfare of the community. In general, a person acquiring premises in a restricted zone may reasonably rely both on the promise the ordinance itself provides and on the fact that the municipality will enforce the ordinance, thereby protecting against diminution in the value of the property by nonpermitted uses. If the municipality fails to enforce its zoning laws, or acts arbitrarily or capriciously in varying the application of the ordinance, and a person is thereby aggrieved, it may seek relief in its own right. As in any other challenge to administrative action, a "petitioner need only show that the administrative action will in fact have a harmful effect on [it] and that the interest asserted is arguably within the zone of interest to be protected by the statute." *(Matter of Dairylea Coop. v Walkley*, 38 NY2d 6, 9; *see also, Matter of Dental Socy. v Carey*, 61 NY2d 330, 334.)". Therefore, Petitioners herein unambiguously possess standing due to their proximity as adjacent property owners, and the Motions of both sets of respondents must be denied.

Standing having been determined in Petitioners' favor, the Court must now address Petitioners' challenge to Respondent BABYLON's granting of Respondents HURLEY & HARBOUR's application. First, it must be stated, as this Court has repeatedly stated in prior decisions, 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 [2 Dept], *appeal denied*, 76 NY2d 707 [1990]; ***Mascony Transport and Ferry Service v Richmond***, 71 AD2d 896 [2 Dept 1979], *aff'd*, 49 NY2d 969 [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 [3 Dept 1990]).

That being said, the Court notes that a similar application (at first identical, and then modified) was denied in 2003 by Respondent BABYLON. The Appellate Division, Second Department recently confirmed, in ***Corona Realty Holdings, LLC v Town of North Hempstead***, 32 AD3d 393 [2006], that the determination of an administrative agency that neither adheres to its own prior precedent, nor indicates its reason for reaching a different result on essentially the same facts, is on its face arbitrary and capricious (*See:* ***Field Delivery Service***, 66 NY2d 516; ***Al Turi Landfill v NYS Department of Environmental Conservation***, 289 AD2d 231, *aff'd* 98 NY2d 758); and an agency's failure to provide a valid and rational explanation for the departure from its prior precedent mandates reversal, even though substantial evidence may exist in the record to otherwise support the determination (*See:* ***Al Turi Landfill v NYS Department of Environmental Conservation***, *supra*; ***Field Delivery Service***, *supra*).

The Appellate Division, Second Department ruled in ***Campo Grandchildren Trust v Colson***, 2007 NY Slip Op 03302, April 17, 2007, that the determination of a zoning board of appeals cannot be sustained if it lacks a rational basis and is arbitrary and capricious (*See:* ***Fuhst v Foley***, 45 NY2d 441; ***Greenfield v Board of Appeals of Village of Massapequa Park***, 21 AD3d 556; ***Crystal Pond Homes v Prior***, 305 AD2d 595); a determination of a zoning board of appeals that neither adheres to its own precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious (*See:* ***Knight v Amelkin***, 68 NY2d 975; ***Field Delivery Service***, *supra*; ***Corona Realty Holdings, LLC v Town of North Hempstead***, *supra*), mandating reversal, even if there may otherwise be evidence in the record sufficient to support the determination (*See:* ***Corona Realty Holdings, LLC v Town of North Hempstead***, *supra*).

The Court is perplexed by the filing of a decision approving the application herein, filed with the Town Clerk's Office on January 30, 2007, which did not include findings of fact in support of its decision; then, after service of the underlying Article 78 proceeding on March 14, 2007, the filing of an 'updated' decision, which then included findings of fact on July 3, 2007, almost four months after this action had been commenced and almost six months after the initial decision was filed. While this defies adequate explanation, and strains the tenets of lawful conduct, the Court has found no precedent for rejecting the filing of the 'updated' decision. Before moving on, though, it should be noted that, had the updated decision not been filed with the Town Clerk's Office, this Court would undoubtedly have rejected the January 30, 2007 decision for the reasons set forth herein above.

As this Court has set forth in prior decisions, compliance with the rulings set forth herein above, regarding inconsistent later decisions, is not onerous. It is well settled that the Courts in New York have accorded great deference to the explanations offered by boards for their contrary determinations under similar circumstances, as well as to changes in policy (*See:* ***Hawryluk v Zoning Board of Appeals of the Town of Huntington***, 173 AD2d 826 [2 Dept 1991]; ***Ciampa v Hudson***, 158 AD2d 925 [4 Dept 1990]; ***Pesek v Hitchock***, 156 AD2d 690 [2 Dept 1989]; ***Knight v Amelkin***, *supra*). The Appellate Division, Second Department, recently confirmed that the Courts will generally defer to the explanation for reaching a different result on similar facts, sustaining the determination because a rational explanation for reaching the

different result on similar facts was provided (*See:* ***Berk v McMahon***, 29 AD3d 902 [2 Dept 2006], *citing* ***Knight v Amelkin***, *supra*).

Therefore, in rendering this decision, this Court will defer to the explanation of Respondent BABYLON for reaching a result different from that reached in February 5, 2004, denying the prior, similar application, sustaining its determination because, within the confines of established caselaw, a rational explanation for reaching the different result was provided. Therefore, the Petition herein must be denied.

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

ORDERED, that the aforementioned applications of Respondents for Orders dismissing the within action are hereby denied in all respects; and it is further

ORDERED, that the aforementioned application of Petitioners is hereby denied, the Petition is hereby dismissed and the case disposed.

Dated: **Riverhead, New York**
January 28, 2008

HON. JEFFREY ARLEN SPINNER, JSC

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

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