

Matter of Home Depot, U.S.A. v Town Bd. of Town of Hempstead
2008 NY Slip Op 31046(U)
April 7, 2008
Supreme Court, Nassau County
Docket Number: 8690-07/
Judge: Edward W. McCarty
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. EDWARD W. MC CARTY, III
Justice

TRIAL/IAS, PART 2
NASSAU COUNTY

In the Matter of the Application of
HOME DEPOT, U.S.A. and ELIAS PROPERTIES
LEVITTOWN, LLC,

Petitioner(s)

INDEX No. 8690/07

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

-against-

TOWN BOARD OF THE TOWN OF HEMPSTEAD,

MOTION DATE: 1/10/08
MOTION SEQ.#001

Respondent(s)

The following papers read on this motion:

Notice of Motion/Order to Show Cause	X
Cross-Motion	
Answering Affidavit	X
Replying Affidavits	X

Application by petitioners for a judgment pursuant to CPLR Article 78: (a) determining that the Findings set forth in respondent's April 17, 2007 resolution (hereinafter, "the Resolution") conditionally approving petitioner Home Depot U.S.A.'s (hereinafter, "Home Depot") site plan application are unlawful, irrational, arbitrary and capricious, and unsupported by the evidence in the record and, therefore, may not serve as the basis for Conditions "a", "b", "c", "f", "h", "n", "o", "p" and "r" imposed by respondent as conditions of approval (hereinafter, "the Conditions"); (b) determining that the Conditions imposed by respondent in the Resolution conditionally approving Home Depot's site plan application are unlawful, irrational, arbitrary and capricious, improper and an abuse of discretion; (c) annulling the Conditions imposed by respondent in the Resolution conditionally approving

Home Depot's site plan application, and (d) directing that Home Depot's application for site plan approval be granted, as submitted, subject to compliance with all other conditions of approval, and that all necessary permits and approvals be issued, is decided as set forth herein.

Petitioner Elias Properties Levittown, LLC is the owner of commercial premises located on the southeast corner of Hempstead Turnpike and Gardiners Avenue in Levittown (hereinafter, "the Premises"). The Premises are partially occupied by an Office Depot store. The remainder of the Premises had housed a K-Mart store, but is currently vacant. The vacant portion of the Premises is being leased by petitioner Home Depot, which intends to open a retail store at the Premises.

Because the existing below-grade loading docks located on the east side of the Premises are insufficient to serve petitioner Home Depot's needs in transporting bulky items into the proposed store, on February 11, 2005, petitioner Home Depot submitted a Site Plan Approval Application to the Town of Hempstead seeking to relocate the loading docks to the west side of the Premises, opposite an existing curb cut on Gardiners Avenue.

Respondent failed to timely act upon petitioner Home Depot's application, necessitating petitioners' first Article 78 proceeding against respondent (*Matter of Home Depot, U.S.A., et.ano. v Town Board of the Town of Hempstead*, Supreme Court, Nassau County, Index #7377/06). Respondent moved to dismiss that proceeding. By order dated August 24, 2006, this Court granted petitioners' application for a judgment compelling respondent to render a decision on the pending site plan application and denied respondent's motion to dismiss. Judgment was signed on October 3, 2006 and entered October 4, 2006.

Respondent thereafter moved to reargue this Court's decision. By order dated November 22, 2006, this Court granted leave to reargue, but upon reargument, adhered to its prior decision granting petitioners' application and denying respondent's motion to dismiss

On April 17, 2007, respondent adopted a resolution approving Home Depot's site plan. However, said approval was made subject to a list of eighteen conditions. The conditions were based upon findings that were made "pursuant to the personal experience of [Hempstead Town] Supervisor Murray and [Hempstead Town] Councilman Hudes".

In a proceeding pursuant to CPLR Article 78 to review such a determination, judicial review is limited to ascertaining whether the decision is illegal, arbitrary and capricious, or an abuse of discretion. (See, *Matter of Sasso v Osgood*, 86 NY2d 374; *Matter of McKennett v Hines*, 289 AD2d 246.)

In applying the "arbitrary and capricious" standard, the Court's inquiry is whether the determination had a rational basis. Under this standard, a determination should not be disturbed unless the record shows that the respondent's decision was arbitrary, unreasonable, irrational or indicative of bad faith. (See, *Matter of Halperin v City of New Rochelle*, 24 AD3d 768,770.)

A condition for approval of a plan may be imposed upon a premises so long as the condition is rational and there is a reasonable relationship between the problem sought to be alleviated and the application concerning the premises. (See, *Matter of Turkewitz v Planning Board of City of New Rochelle*, 24 AD3d 790.)

In an analogous case very recently decided by the Appellate Division, Second Department, petitioner real estate developer submitted an application to the Planning Board of the Village of Rockville Centre (hereinafter, "the Village") for site plan approval to construct two adjacent multi-family residential buildings totaling 349 units on a 7.1 acre parcel occupied by an unused industrial building. The Village ultimately approved the site plan application, imposing "numerous modifications." The Appellate Division upheld the Supreme Court's decision that the Village's determination "to approve the site plan application by imposing numerous modifications upon the site plan was arbitrary and capricious". However, the Court held that the Village was authorized to impose the condition of a perimeter road for fire truck access, as such condition was not irrational. (See, *Chase Partners, LLC v Incorporated Village of Rockville Centre*, 43 AD3d 1053.)

Respondent imposed a total of eighteen conditions upon approval of Home Depot's site plan. Petitioners object to nine of those conditions. This Court shall proceed to address and review each of the conditions imposed by respondent herein which petitioners find objectionable:

Condition "a":

"No loading zone area shall be located on the Gardiners Avenue side of the property, and delivery facilities shall remain exclusively as currently established, or in any manner otherwise acceptable to the Building Inspector, on the east side of the building."

This condition appears to be based on respondent's findings 1, 2 and 3, which conclude that traffic in the northbound lanes of Gardiners Avenue approaching Hempstead Turnpike in Levittown is heavy and that it is a congested area, and the introduction of trucking into the area would exacerbate the situation. These findings are unsupported by any traffic studies, figures or statistics of any kind from respondent. These findings based on conclusory opinions also appear to ignore the fact that the intersection at issue is in the midst of a commercially zoned area. The lack of a substantial factual basis for condition "a" renders it arbitrary under the circumstances herein.

Condition "b":

"Trucks are prohibited from entering the site from Gardiners Avenue."

The same reasoning by which this Court found condition "a" arbitrary, applies to condition "b". No factual substantiation or empirical evidence is provided to justify this condition. Moreover, Gardiners Avenue is a County, not a Town road.

Condition "c":

"A 'headache bar' shall be installed pursuant to the requirements of the Building Inspector, sufficient to ensure no trucks may enter the site from Gardiners Avenue and the south."

This condition is wholly capricious and irrational given the fact that it has been established that the County will not approve the installation of a vehicle height restrictor i.e. “headache bar” to restrict trucks from entering the Gardiners Avenue access driveway.

Condition “f”:

“A 12-foot solid PVC fence shall be installed pursuant to the requirements of the Building Inspector, along all property lines abutting residential properties/streets”

While on its face this condition may appear reasonable, the applicable building zone ordinance permits only a six foot high fence, requiring a variance to meet condition “f”.

Condition “h”:

“The store shall remain closed for business between the hours of 12 a.m. and 6.a.m., and there shall be no outdoor deliveries to the site or other business activity at the site between the hours of 10 p.m. and 7:00 a.m.”

There is no authority cited for respondent’s restrictions of petitioner Home Depot’s hours of operation as part of a site plan review. Moreover, none of the other “big box” stores operating in the same business district are subject to such limitations, prompting the conclusion that such limitations are arbitrary herein.

Condition “n”:

“A recording closed circuit TV system shall be installed on the outside of the property, at such locations required by the Building Inspector.”

This condition is unsupported by any finding by respondent. There has been no evidence that such a system is necessary to maintain an adequate level of security in the subject area. Moreover, the condition itself is unacceptably vague in terms of petitioners’ obligations thereunder.

Condition "o":

"A sweeping system shall be provided for the parking field, not less than three times per week. A wet sweeping system must be utilized. Permissible hours of sweeping shall be Monday through Friday from 7:00 a.m. to 10:00 p.m., and Saturday and Sunday from 9:00 a.m. to 8:00 p.m."

While petitioner Home Depot has no objection to cleaning the parking lot, the time restrictions imposed by respondent leave Home Depot with no choice but to attempt to clean the parking lot while the store is open and while its customers' vehicles are filling the parking lot. Such temporal restrictions are arbitrary in that they do not appear to be reasonably related to respondent's supposed goal of keeping the parking lot clean. If respondent truly desires the lot to be thoroughly and safely cleaned, same should be allowed during non-business hours.

Condition "p":

"A landscape plan shall be submitted for the approval by the Town Horticulturist of the Department of Conservation and Waterways, and upon such approval shall be filed with the Building Inspector and the property shall thereafter be maintained by applicant in accordance therewith."

While petitioner's Notice of Petition seeks relief determining condition "p" unlawful, irrational, arbitrary and capricious, improper and an abuse of discretion, it does not refer to this condition as being objectionable in its petition or reply. Said condition appears reasonable and shall be upheld.

Condition "r":

'Within 90 days hereof or within such longer time hereafter authorized by the Building Inspector for good cause shown, applicant shall submit sealed copies of a new site plan to the Town Building Inspector, the Town Engineer and the Town Highway Commissioner, and if those official (sic) determine same to be in substantial and good faith compliance with the conditions hereof and all other applicable regulations, they shall mark their

written approvals thereon, and the site plan shall thereafter be filed with the Town Clerk and deemed approved by the Town Board in full satisfaction of the site plan approval requirements of Section 305 of Article XXXI of the Building Zone Ordinance."

Having found conditions "a", "b", "c", "f", "h" "n" and "o" arbitrary, capricious, unreasonable or irrational, said conditions are hereby stricken. In complying with condition "r", petitioner need only submit a new site plan compliant with conditions "d", "e", "g", "i", "j", "k", "l", "m", "p" and "q". The approval of such new site plan shall be completed promptly without undue delay.

Date 4/7/08

EDWARD W. McCARTY III
J.S.C.

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NASSAU COUNTY
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