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**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK**

**PRESENT: HON. DANIEL MARTIN**
**Acting Supreme Court Justice**

**TRIAL/IAS, PART 31**
**NASSAU COUNTY**

**TECH REALTY DEVELOPERS, INC.**

**Petitioner.**

**For a Judgment under Article 78 of the Civil Practice Law Rules to annul and set aside the determination of the Zoning Board of Appeals of the City of Long Beach, New York, dated April 28, 2008, and filed with the Buildings Department of the City of Long Beach, New York on April 28, 2008.**

**Sequence No.: *001***
**Index No.: 009597/08**
**XXX**

***- against -***

**THE CITY OF LONG BEACH, THE ZONING BOARD OF APPEALS OF THE CITY OF LONG BEACH, ROCCO MORELLI, as Chairman, and TRACEY EICHLER, MICHAEL LEONETTI and DAVID BYTHEWOOD, as members, and ALROSE KING DAVID, LLC.**

**Respondents.**

**The following named papers have been read on this motion:**

| | **Papers Numbered** |
|---|---|
| **Notice of Motion and Affidavits Annexed** | |
| **Order to Show Cause and Affidavits Annexed** | **X** |
| **Answering Affidavits** | **X** |
| **Replying Affidavits** | **X** |

Upon reading the papers submitted and due deliberation having been had herein, petitioner's application for a judgment upon review of the April 28, 2008 determination of the Zoning Board of Appeals of the City of Long Beach (hereinafter "ZBA") 1) annulling, reversing and vacating said determination on the grounds that same was arbitrary and capricious and/or not supported by substantial evidence; and 2) a permanent injunction which prohibits respondent Alrose King David, LLC (hereinafter "Alrose") from constructing certain alterations to the hotel located at 80 West Broadway, Long Beach, New York is denied.

The following facts are undisputed. Prior to March, 2005 the 23,180 square foot building located at 80 West Broadway of Long Beach, New York and which is on the corner thereat of

West Broadway and National Boulevard was operated as a 170 room nursing home. In August, 2007, the property was purchased by respondent Alrose who submitted a building permit application to the Long Beach Building Department for the reconstruction of a hotel including interior and exterior renovations. Same was granted by issuance of a permit on October 25, 2007.

In January, 2008 Alrose submitted an application and new plans for an amendment to the existing permit for an additional two stories and interior alterations. On February 1, 2008 the Building Department denied said application on the grounds that same was non-conforming with Appendix A of the City's Zoning Code for a residence "A" district to wit:

1) the total building area was 80% of the lot which is in excess of the 20% allowed for multiple dwellings by §9-105.14(d) of the code;
2) the plan had an inadequate front yard size and frontage on the side by Ocean Beach Park as required by §9-105.14(e);
3) the side yards were less than the one-half of the height of the principal building and the unobstructed space from front to rear lines was less than the 70% mandated by 9-105.14(f);
4) the sixty-one existing parking spaces combined with the nineteen additional proposed parking spaces is short of the ninety-eight required spots for Alrose's proposed use pursuant to §9-112(3); and
5) the nineteen proposed parking spots did not provide access to the public highways without having to move other vehicles in the lot in violation of §9-113.2(h).

Alrose appealed the denial to the ZBA which heard the application on March 27, 2008. On April 24, 2008 the ZBA granted petitioner's application with the following conditions:

1) necessary permits were to be obtained and construction commenced within nine months of either the filing of the resolution granting the application or sixty days from the conclusion of any Article 78 proceeding;
2) all work must be in conformity with the plans and specifications approved by the Commissioner of Buildings and Conservation;
3) twenty-five off-street parking spots must be provided prior to the issuance of a certificate of occupancy; and
4) in the event the conditions are not complied with, the variance is deemed revoked unless an extension is granted by the ZBA.

Petitioner herein seeks a judgment pursuant to CPLR Article 78 vacating the variance issued by the ZBA. Petitioner is the owner of real property located at 50 West Broadway, City of Long Beach, said property immediately east of and abutting the property that is the subject of the variance at issue herein. An Article 78 proceeding such as the instant one may seek an order declaring null and void a determination such as that made by the ZBA herein on the grounds that same was in violation of lawful procedure, affected by an error of law or was arbitrary, capricious or an abuse of discretion. CPLR §7803(3). See, also, Matter of Pell v. Board of Education, 34

N.Y.2d 222 (1974). The court will not find that respondent acted in an arbitrary and capricious manner unless it finds that respondent acted without any rational basis. Matter of Pell, supra.

In support of its position that the ZBA acted arbitrarily and capriciously in issuing the variance, petitioner first asserts that the determination was made on an incomplete record. Specifically, Alrose contends that the original October, 2007 plans submitted for the original building permit was not submitted with the application for the variance. Accordingly, claims petitioner, the ZBA did not have a proper view of the number of rooms and their arrangement, the number of parking spots and the usage of a restaurant and spa which were both part of the proposed hotel.

Petitioner also contends that the ZBA failed to deny the application based upon the non-conforming use of the property. Specifically, §9-105.14(a)(10) of the code prohibits as a use I na residential/business "A" district any building that is erected, altered, used or maintained in whole or part as a hotel on a lot containing less than 500 square feet of ground area for each quest room or suite in the hotel. Further, §9-105(c) of the code provides that no multiple dwelling may be erected or altered on a lot having an area of less than 40,000 square feet. The plans submitted to the ZBA called for 153 rooms in a building with approximately 23,000 square feet. Petitioner asserts that this purported non-conforming use aspect and the minimum area for multiple dwellings should have been addressed in the permit application and appeal.

Further, petitioner claims that the determination was arbitrary and capricious because the proposed off-street parking, was inadequate. First, the eighty spots proposed by Alrose was eighteen short of the determination made by the Building Department. That minimum number calculated by the building department was also inadequate, argues petitioner, because same failed to take into account the impact of the proposed spa and restaurant. Section 9-112(3) requires one parking spot for each of every two sleeping rooms or suite, one spot for every four employees and such additional spots as is deemed necessary by the Building Commissioner because of any supplementary parking generating activities including, "bars, ballrooms, night club facilities and the like." Petitioner's claim that the seventy-six spots relating to 153 rooms, ten spots for forty employees and an additional twelve spots calculated by the Commissioner is arbitrary. The application did not set forth how many seats were in the restaurant or how many customers could be serviced in the spa. Respondent points out that Alrose's traffic engineer admitted at the hearing that Alrose was negotiating with the City for the use of the Long Beach Long Island Railroad Station for parking. Petitioner also asserts that the ZBA acknowledged that the proposed parking was inadequate based upon its condition of requiring Alrose to add twenty-five spots.

Lastly, without specifying how, petitioner contends that the size and positioning of the eighty parking spaces proposed by petitioner was inadequately designed.

Petitioner also asserts that whether the application was for a use or area variance, is nothing in the record indicates that Alrose demonstrated the statutory factors necessary at the

hearing. Specifically, contends petitioner, Alrose's application was actually a use variance application and it failed to demonstrate a hardship for a use variance in that it payed $21,000,000 for property that had previously sold for $5,500,000.00 and therefore created its own hardship.

Lastly, petitioner contends that the ZBA decision was arbitrary and capricious because it imposed changes to the application instead of performing its duty which is to grant and deny applications.

First, as demonstrated by respondent Alrose, the issue here is not whether the use of the property as a hotel was a non-conforming use. The certificate of occupancy issued for the property in 1983 reflects that it was a hotel which is permitted in the district in which the subject lot is located. An area variance permits Permits a deviation from the Zoning Code's requirements for the physical characteristics of the subject premises. General City Law §81-b(1)(a); Boyadjian v. Board of Appeals of the Village of East Hills, 136 A.D.2d 548 (2nd Dep't 1988). A use variance permits the use of a premises which is prescribed by the code. Consolidated Edison of New York, Inc. v. Hoffman, 43 N.Y.2d 598 (1978). The restrictions in the Zoning Code which pertain to the size of the premises in relation to the number of rooms deals not with the use of the property as a hotel which is established in its certificate of occupancy and permitted in the zone in which it is located, but with the physical characteristics of that use.

Further, the court finds unavailing petitioner's position that the ZBA made a determination based upon an incomplete record because the original October 27, 2007 proposed plans were not submitted to the ZBA with the variance application. The fact remains that the application before the ZBA reflected all proposed changes by Alrose, and further, as part of the application submitted to the ZBA is a copy of the October 25, 2007 building permit.

Generally, zoning boards have broad discretions in considering applications for area variances and the court's role in reviewing such determinations is limited. Pecoraro v. Board of Appeals of the Town of Hempstead, 2 N.Y.3d 608 (2004). Such review by courts is limited to whether the action taken by the ZBA is illegal, arbitrary or an abuse of discretion. See, Inhof v. ZBA of Town of Islip, 13 A.D.3d 626 (2nd Dep't 2004). In determining whether the ZBA's determination is rational and not arbitrary and capricious, the court will only consider whether the record has sufficient evidence to support the rationality of the decision. See, Sasso v. Osgood, 86 N.Y.2d 374 (1995).

Pursuant to General City Law §81-b(4)(b) in making a determination an area variance application the board is required to consider the benefit to applicant against the detriment to the health, safety and welfare of the neighborhood or community by the granting of application and in so determining shall consider:

"(I) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance;

(ii) whether the benefit sought by the applicant can be achieved by some method feasible for the applicant to pursue, other than an area variance;

(iii) whether the requested area variance is substantial;

(iv) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood; and

(v) whether the alleged difficulty was self created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance."

In its findings the ZBA determined that in employing the balancing test set forth above that the benefit to Alrose outweighs any detriments to the health, safety and welfare of the community. The board further determined that the continued use of the hotel will not change the character of the neighborhood and that the relief sought in the application is the least intrusive method of obtaining Alrose's goals. The board recognized that Alrose was decreasing the number of rooms while increasing the number of parking spaces and will therefore be more in conformity with off-street parking requirements. The use of valet parking for twenty-five spots as required by the board as opposed to the nineteen as proposed by Alrose is a small proportion of the overall number of parking spots.

Where, as here, the ZBA takes into consideration the factors set forth above and weighs the competing interests and evidence in arriving at its determination the court should not overturn that determination if it is reasonable. See, Kessler v. Town of Shelter Island Planning Board, 40 A.D.2d 1005 (2nd Dep't 1972).

Nothing in petitioner's application leads the court to conclude that the ZBA in reaching its conclusion did so in an arbitrary manner or as the result of illegality. Thus, the court hereby denies the relief sought in the petition and the petition is hereby dismissed.

So Ordered.

A.J.S.C.

**Dated:** December 24, 2008