

**Hejna v Planning Bd. of the Vil. of Amityville**

2011 NY Slip Op 31532(U)

June 6, 2011

Sup Ct, Suffolk County

Docket Number: 2009-00214

Judge: Jeffrey Arlen Spinner

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

PRESENT:

HON. JEFFREY ARLEN SPINNER  
Justice of the Supreme Court

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ANJELIKA HEJNA, LOUIS MACCARONE,  
MICHAEL BANEK, DONNA BANEK,  
GERALDINE DEMPSEY, MARILYN DENZLER,  
ROBIN DUNN, EDWARD MCNICHOLAS,  
NANCY MCNICHOLAS, ALAN RAU, JOHN  
SPELLMAN, PEARL SPELLMAN, VINCENT  
WILD, LISA WILD, and LYNN XYSTRIS,

**COPY**

INDEX NO.: 2009-00214

Petitioners,

MTN SEQ NO: 001 - CASEDISP  
ORIG MTN DATE: 01/30/09

- against -

**PLANNING BOARD OF THE VILLAGE OF  
AMITYVILLE, JOHN J LAURIA**, as Building  
Inspector of the Village of Amityville and **JAMM  
HOLDING, INC, d/b/a RICHMOND AUTO BODY;**

FINAL MTN DATE: 04/06/11

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Respondents.

UPON the following papers numbered 1-8 read on this Motion:

- Petition (Paper 1);
  - Respondent JAMM's Answer (Paper 2);
  - Petitioners' Support & Memorandum of Law (Papers 3-4);
  - Respondent JAMM's Memorandum of Law (Paper 5);
  - Petitioner's Reply (Paper 6);
  - Respondent JAMM's Supplemental Affirmation & Memorandum of Law (7-8);
- it is,

**ORDERED**, that the application of Petitioners is hereby denied.

Petitioners move this Court for an Order, pursuant to CPLR Article 78:

1. Vacating and annulling the Determination of Respondent, PLANNING BOARD filed with the Village clerk on December 10, 2009, which granted respondent, JAMM HOLDING, INC d/b/a/ RICHMOND AUTO BODY, approval of a Site Plan Application in connection with the construction of a 7,500 sq ft addition to be used as an automobile-truck body shop in the B-2 Business District at 91 Merrick Road, Amityville, New York; and
2. Vacating and annulling the Determination which granted the application of Respondent, RICHMOND AUTO BODY which sanctioned the conduct of the automobile body shop business, utilizing a cemetery right-of-way for ingress and egress over the land at 71 Merrick

*(RR)*

- Road, Amityville, New York; and
3. Vacating and annulling the Determination of the PLANNING BOARD which granted RICHMOND AUTO BODY Site Plan Approval to utilize lands in the BB Residence District for the purpose of automobile parking and automobile-truck storage used in connection with the RICHMOND AUTO BODY collision repair business; and
  4. Vacating and annulling such Determination which granted RICHMOND AUTO BODY Architectural Review approval to construct the 7,500 sq ft addition; and
  5. Vacating and annulling such PLANNING BOARD Determination which established a reduced fifty-five (55') foot buffer along the most southerly end of Respondent's premises with only a fifteen (15') foot buffer on the east end of the existing buffer; and
  6. For an injunction pendente-lite enjoining the Respondent, JOHN LAURIA, as Building Inspector of the Village of Amityville from issuing a Building Permit for the construction of a 7,500 sq ft building addition in accordance with plans submitted by RICHMOND AUTO BODY under the subject Planning Board of Application, pending a determination of this Article 78 Proceeding; and
  7. For an injunction pendente-lite enjoining the Respondent, RICHMOND AUTO BODY from (a) constructing a 7,500 sq ft addition to be built in accordance with plans submitted to the BOARD OF APPEALS, and (b) utilizing the Residence District portion of the premises for parking and storing motor vehicles, both pending a determination of the subject proceeding.

The parcel that is the subject of the underlying application before Respondent PLANNING BOARD lies on the south side of Merrick Road, in the Village of Amityville, consisting of an area of 45,646 sq ft, with a street frontage of 139.22 feet and a depth of 335 feet. The northerly 200 feet of the parcel is zoned B-2 Retail Business District, and the southerly 135 feet is zoned BB Residential District. All portions of the parcel which abut neighboring BB Residential District zoned property are improved by residential premises, numbering six in close proximity. Access is provided by two curb cuts on Merrick Road. Access is also provided from a right of way running along the westerly side of the property and extending from Merrick Road to a small cemetery located South of the premises.

Petitioners allege, and it is uncontroverted by Respondents, that since 1976 uses at the premises have been the subject of multiple Board of Appeals applications regarding either physical changes or mere ownership changes, with the Board of Appeals consistently imposing conditions and stipulations, due to the proximity of the residential premises, regulating use, fencing, licensing, appearance, environmental effects, pollution containment, building construction, aesthetics, hour of operation, outside storage, number of vehicles parked, plantings and screening, number of vehicles serviced, operations in the interior and exterior of the premises, ventilation and air filtration, fire inspection, use expirations, etc.

The Premises has been used as an automotive business since at least 1950 pursuant to Special Permits issued by the Zoning Board of Appeals. The Premises was acquired by JAMM HOLDINGS INC d/b/a Richmond Auto Body in 1998. In that year JAMM applied for and obtained a special permit from the Zoning Board of Appeals to upgrade the automotive body shop, citing that the site had become old and in a state of disrepair, and the Planning Board approved a site plan on April 1,

1998.

On July 6, 2005 the PLANNING BOARD held a meeting regarding the application of JAMM HOLDING, INC for approval of proposed construction to expand the presently existing one story building pursuant to Section 183-85, and 26-6(A)(1)(g). Many of the neighboring property owners voiced their objections to the proposed construction. Nonetheless, on August 12, 2005 the PLANNING BOARD approved the application of JAMM HOLDING, INC to construct an addition containing five vehicle paint spraying booths and seven work bays in the B-2 Retain Business District without conditioning such approval upon a special exception or use variance to be granted by the Board of Appeals or a use modification by the Board of Trustees. As a result, Angelika Hejna and Louis Maccarone brought an Article 78 Proceeding against the PLANING BOARD, Building Inspector of the Village of Amityville and JAMM HOLDING, INC. On September 11, 2006 the undersigned held that the decision of the PLANNING BOARD was beyond the scope of its authority due to the fact that it failed to condition its approval on the granting of a special exception by the Board of Appeals of the Village of Amityville and modifications by the Board of Trustees of the Village of Amityville.

On March 15, 2007 the Board of Appeals, Village of Amityville issued their findings and determinations denying JAMM HOLDINGS, INC's February 23, 2007 application for Use Variances and Special Exceptions in connection with a proposed 7,770 sq ft extension and a Special Exception for parking within the BB-Residence District. The Board stated that use variances, not special exceptions, would be necessary to permit the building extension. Furthermore, they noted that JAMM HOLDING, INC would need, at the very least, consent from 71 Merrick Road Realty Corp permitting further use of the right way, due to the fact that there was no clear right to use the right of way.

On June 21, 2007, the Board of Appeals granted a variance and Special Exception relief authorizing JAMM HOLDING, INC to utilize the premises for an expanded body shop operation with the 7,770 sq ft addition and to utilize the Residence District portion of the premises for the parking and storage of vehicles and wrecks used in connection with the collision repair business, resolving the concerns and objections expressed in their prior findings and determinations.

On September 3, 2008, the PLANNING BOARD certified that they held a meeting to consider the application of JAMM HOLDINGS INC for approval for proposed construction to expand the presently existing one-story building. The Certification was signed by the Diane C. Sheridan, Village Administrator/Clerk on November 20th, 2008. The application was approved subject to the following:

**Stipulations:**

- Buffer zone on east side to be increased to 15' and planted with two offset rows of Leyland Cypress trees 8' high and planted 8' on center on a 3' high earthen berm.
- Roof venting system to be fitted with filtering equipment to remove all particulate emissions and odors and to be located at the northerly end of the extension.
- Existing spray booth to be replaced with new booth meeting all Suffolk County, State and Federal standards.

- Storage trailer, outside lift and temporary tent structure to be removed. No overhead doors shall be permitted on the south side of the building.
- All walls in the shop area to be insulated and meet a Sound Transmission Rate of 58 or a decibel rating, acceptable to the village, to be measured at the westerly and northerly borders of the buffer areas.
- All roof top units including filtering, heating and air condition equipment to be installed or fitted with noise reduction blankets and/or enclosures.

**Covenant and Restrictions:**

- Overhead doors shall be restricted to a maximum height of 12 feet.
- No overhead doors shall be permitted on the south side of the building.
- Existing wooded area in rear yard to be supplemented with a row of Leyland Cypresses to be planted on the northerly side of said buffer areas. Cypresses to be 8' high and planted 8' on center. Both planted buffer areas to be serviced by underground sprinkler system. Trees in buffer area to be maintained by the owner and any and all diseased or dead shrubs or trees to be replaced as necessary. No trees to be removed without permission of the Village.
- All lighting to be contained on site.
- Truck repairs on premises to be limited to vans, pick-ups and small trucks with repair of large trucks prohibited.
- No further expansion into the residentially zoned property shall be permitted.
- All work on any and all vehicles shall be performed inside the building and outdoor repairs of any type shall be prohibited.
- The owner shall be prohibited from any further expansion of the proposed facility.
- All painting, on the premise shall be conducted in the spray booth. No other spray booths shall be permitted.
- No outdoor storage of any vehicle parts shall be permitted.
- All equipment, approved pursuant to this plan, to be maintained in proper working order by the owner.
- This permit is transferable upon change of ownership of the subject premises, provided that the planning board reserves the right to revoke such permit after notice and hearing, for failure of the transferee to comply with one or more of said stipulations, covenants, or other applicable provisions of the Building Code.

**Zoning Board of Appeals Stipulations:**

- Compliance with all Federal, State, County and local environmental regulations;
- The Applicant shall secure all necessary permits from the Building Department prior to construction;
- Conditions outline above, including the Covenants and Restrictions and Stipulations, can only be modified upon application and approval of the Planning Board following proper notice and a public hearing;
- All recyclable materials (metal, plastics, junk) must be stored on the Business B-2 portion of the property.

As a result of the PLANNING BOARD's September 2008 decision, the Petitioners brought an Article 78 proceeding. The Petitioners claim that the building extension, parking/storage area, and increase in body shop operations will substantially affect the tranquility and enjoyment of their

property, significantly impact their quality of life and reduce their property values.

It should be noted that 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 Planning Board of the Town of Greenville*, 150 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]). It is, therefore, indisputable that the standard of review for determination of Respondent PLANNING BOARD is whether the decision rendered is arbitrary, capricious and/or unlawful.

Petitioner HEJNA asserts standing to bring the underlying litigation as the legal owner of two parcels of residential real property directly abutting the premises that is the subject of the application before Respondent PLANNING BOARD. Petitioner MACCARONE is an equitable owner and resides a parcel adjacent to the premises that is the subject of the application and therefore has standing to bring the underlying litigation. However, the parcels owned by the other Petitioners name in this litigation are more than two hundred feet from the premises that is the subject of this action and therefore lack standing to commence the Article 78 proceeding.

Petitioners allege that JAMM HOLDING, INC failed to provide notices are required by law. JAMM HOLDING, INC complied with all public notice requirements. In fact, the Petitioners were present and participated at both hearings regarding site plan approval, therefore waiving any claimed defect in the claim.

Petitioners also allege that the PLANNING BOARD failed to properly minimize the impact of site development upon adjacent properties. They claim that when the PLANNING BOARD is evaluating the site plan, they must consider how any proposal "contemplates the use of a particular parcel in conjunction or interrelation with one or other parcels." AVC §24-12. In this instance the PLANNING BOARD did contemplate the use of the parcel and implemented Stipulations, and Covenants and Restrictions to mitigate the impact of site development upon the adjacent properties.

Petitioners argue that the PLANNING BOARD's site plan approval based upon sole access being provided by the two curb cuts was arbitrary and capricious. Petitioners HEJNA and MACCARONE have standing to raise issues related to the "cemetery right of way" due to the fact that they are the legal and equitable owners of parcels within two hundred feet of the parcel subject to the application. The other Petitioners are not within the two hundred feet radius and therefore lack standing to raise this issue. Pursuant to New York State Village Law §725-a, a board of trustees may empower a planning board to hear and decide applications for site plan review. AVC §24-11 empowers the Village Planning Board to hear and decide site plan applications so that reasonable supervision and control can be exerted over the layout and design of certain sites in order to provide for community health, safety and welfare. Petitioners argue that the PLANNING BOARD's approval of the site plan was premised on providing principal access through the cemetery right of way. However, the site plan does not turn on the use of the right of way. There are two curb cuts on Merrick Road. If

the use of the right of way ended tomorrow, the only change would be the opening of a gate. Furthermore, Petitioners failed to join all the necessary parties required to assert any title claim concerning the easement and failed to join all necessary/indispensable parties having an interest in the property, and as a result are prevented from litigating any issues regarding the right of way.

Petitioners also argue that the approval by the PLANNING BOARD of a 50 ft buffer along the southerly boundary and a 15 ft buffer along the easterly boundary within the BB residence district was arbitrary, capricious and irrational. Petitioners state that the reduction of the buffer constitutes a sever modification to the buffer previously mandated by the PLANNING BOARD and the Board of Appeals in their 1998 decision. However, the Board of Appeals approved the reduction of the buffer, thereby amending the village zoning code as to this particular parcel. Furthermore, AVC requires only a 5 ft buffer and JAMM HOLDING, INC is providing a 50 ft and 15 ft buffer. Therefore, the decision by the PLANNING BOARD was not arbitrary, capricious and irrational.

Petitioners argue that the PLANNING BOARD was prohibited from granting site plan approval without first having a storm water pollution prevention plan in place. AVC §24-19(C) states that a plan is required for "land development activities where clearing, grading, excavating, soil disturbance or placement of fill result in a land disturbance equal to or greater than one-half acre." Petitioners claim that the total area of ground disturbance exceeds one-half acre and therefore the Site Plan cannot be approved without a Storm Water Pollution Prevention plan in conformance with the requirements of AVC Chapter 150. However, on June 8, 2009 the Board of Trustees approved Local Law No. 14 which amended AVC. The main impact of the amendment is that it shifts the timing of the submission of the Site Plan and review by the Code Enforcement Officer until after site plan approval. Therefore, the Petitioner's argument is without merit.

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

**ORDERED**, that the above referenced application of Petitioners is hereby denied in all respects; and it is further

**ORDERED**, that Counsel for Respondents JAMM HOLDING, INC, d/b/a RICHMOND AUTO BODY herein is hereby directed to serve a copy of this order, with Notice of Entry, upon Counsel for all the remaining parties within twenty (20) days of the date this order is entered by the Suffolk County Clerk.

**Dated: Riverhead, New York  
June 6, 2011**



**HON. JEFFREY ARLEN SPINNER, JSC**

X FINAL DISPOSITION	NON-FINAL DISPOSITION
X SCAN	DO NOT SCAN

TO:

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