STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

EL RACHEED ELDOMA,

Petitioner,

-against-

DECISION and ORDER
INDEX NO. 5477-11
RJI NO. 01-11-104609

CITY OF ALBANY, NEW YORK
CITY OF ALBANY, BOARD OF ZONING APPEALS

Respondents.

Supreme Court Albany County All Purpose Term, September 12, 2011
Assigned to Justice Joseph C. Teresi

APPEARANCES:
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TERESI, J.:

Petitioner owns a parcel of property located in a C-1 Neighborhood Commercial District at 1192 Broadway, Albany, New York (hereinafter "the premises"). On June 8, 2011, he submitted an application to the City of Albany Board of Zoning Appeals (hereinafter "BZA"). The application sought, in part, an interpretation of the City of Albany Zoning Ordinance (Code of the City of Albany Ch. 375) that his proposed use of the premises constitutes a "retail outlet,"

for which no special use permit is required, rather than a "grocer[y]," which requires a special use permit. Alternatively, Petitioner's application sought a special use permit to use the premises as a "grocer[y.]" The BZA, by decision dated July 27, 2011 (hereinafter "Decision"), denied Petitioner's proposed interpretation; it also refused to consider his special use permit application.

Petitioner commenced this CPLR Article 78 Proceeding challenging the BZA's interpretation Decision. Alternatively, the petition also seeks an order directing the BZA to consider his special use permit application. Respondents answered the petition and seek its dismissal. Because Petitioner failed to establish his entitlement to any of the relief he seeks, the petition is dismissed.

While the BZA's "fact-based interpretation of a zoning ordinance that determines its application to a particular use or property is entitled to great deference... deference is not required when reviewing a pure legal interpretation of terms in an ordinance." (Erin Estates, Inc. v. McCracken, 84 AD3d 1487, 1489 [3d Dept. 2011] quoting both Matter of Shannon v. Village of Rouses Point Zoning Bd. of Appeals, 72 AD3d 1175 [3d Dept. 2010] and Matter of West Beekmantown Neighborhood Assn., Inc. v. Zoning Bd. of Appeals of Town of Beekmantown, 53 AD3d 954 [3d Dept. 2008]; Mack v. Board of Appeals, Town of Homer, 25 AD3d 977 [3d Dept. 2006]). Additionally, "in an appropriate case, th[e] Court [must] parse various sections of a statute or regulation, and identify certain sections as requiring deference to agency experts, while other sections present questions of pure legal interpretation." (Matter of New York Botanical Garden v. Board of Stds. & Appeals of City of N.Y., 91 NY2d 413, 420 [1998]).

Here, Petitioner's challenge to the BZA's interpretation poses a mixed question of pure legal interpretation and a fact-based portion that requires deference.

Considering first the BZA's pure legal interpretation, the City of Albany Zoning Ordinance (hereinafter "Zoning Ordinance") states that a "[r]etail outlet[], not to exceed 5,000 square feet" is a principal permitted use in a C-1 Zone. (Zoning Ordinance §375-71[A][11]). It further restricts, to "[s]pecial permit uses... [g]roceries, not to exceed 5,000 square feet." (Zoning Ordinance §375-71[c][9]).

While the Zoning Ordinance does not define either "retail outlet" or "groceries," it explicitly defines "retail sales" and "grocery store." (Zoning Ordinance §375-7). Reading the statute as a whole to avoid rendering any of its language superfluous, the term "retail outlet" is reasonably defined by the "retail sales" definition. Similarly, "groceries" are reasonably construed as constituting "grocery store[s]." (Erin Estates, Inc. v. McCracken, supra; Matter of Blalock v Olney, 17 AD3d 842 [3d Dept. 2005]). Reading all of the ordinance's parts together in this manner provides the terms "retail outlet" and "groceries" with their necessary definitions, which the Zoning Ordinance otherwise lacks.

As such, for purposes of interpreting Zoning Ordinance §375-71(A)(11), a "retail outlet" is an "[e]stablishment[] engaged in selling goods or merchandise to the general public for personal or household consumption and rendering services incidental to the sale of such goods." (Zoning Ordinance §375-7). Additionally, "groceries" under Zoning Ordinance §375-71(C)(9) are "retail outlet[s] selling foodstuffs and daily essential items, which may include but not be limited to canned goods, vegetables, meats, dairy products, condiments and paper goods." (Zoning Ordinance §375-7). With Zoning Ordinance §375-71's definitional parameters set, because "groceries" are defined as a type of "retail outlet," there is no ambiguity that the Zoning Ordinance clearly and unequivocally specifies that "groceries" are a sub-type of the larger "retail

outlet" designation. Thus, while a "retail outlet" is generally principally permitted in the subject C-1 Zone, its "grocer[y]" sub type requires a "special use permit." This construction is logically required to prevent the Zoning Ordinance's designation of "groceries" as a special permit use from being rendered meaningless.

Although not entitled to deference, the BZA rationally and correctly construed the Zoning Ordinance in accord with the above.

Turning to the BZA's interpretation of the ordinance in light of the Petitioner's June 8, 2011 application, this fact-based inquiry is entitled to great deference, is rationally based and reasonable. (Erin Estates, Inc. v. McCracken, supra). Petitioner's June 8, 2011 application sought to use the premises to sell: "coffee, kitchen ware, phones phone card, household item, ju[i]ces, soda, tobacco product, beauty supply, over counter medicine, sandwiches African American goods and merchandi[se], stationary, fr[ui]t, cat & dog food, pic[nic] item paper product, detergent & soap, other." The BZA reasonably determined that Petitioner's inclusion of the items: coffee, juices, soda, sandwiches and fruit constituted "foodstuffs" under the definition of a "grocer[y]." Similarly, Petitioner's intention to sell "paper product" also fits squarely within a "grocer[y's]" "paper goods" category. While Petitioner's sale of additional retail items are not included within the Zoning Ordinance's definition of a grocery because they do not relate to its examples, falling instead into the broader "retail outlet" definition of "merchandise [for sale] to the general public for personal or household consumption," the BZA's fact based balancing between the two definitions requires deference. Because the BZA's interpretation Decision was not irrational or unreasonable, it will not be disturbed.

Considering next Petitioner's objection to the BZA's refusal to consider his special use

permit application, this challenge is similarly unavailing.

It is well recognized that "the determination to rehear an application is within the discretion of a zoning board, and a zoning board may refuse to rehear an application in the absence of new facts or a change of circumstances." (Matter of Moore v Town of Islip Zoning Bd. of Appeals, 28 AD3d 772 [2d Dept. 2006]; Matter of Hayes v Gibbs, 89 AD2d 656 [3d Dept. 1982]; Matter of Lee v Zoning Bd. of Appeals of Town of Putnam Val., 1 AD3d 600 [2d Dept. 2003]; Matter of Falco v Town of Islip Zoning Bd. of Appeals, 283 AD2d 576 [2d Dept. 2001]; Matter of Crandell v Wigle, 148 AD2d 943 [4th Dept. 1989]; see also Freddolino v. Village of Warwick Zoning Bd. of Appeals, 192 AD2d 839 [3d Dept. 1993]). Moreover, "in the absence of proof that the board acted in an arbitrary or capricious fashion in making that determination... the petition [must be] dismissed." (Matter of Hayes v Gibbs, supra at 656).

On this record, Petitioner failed to establish that the BZA's refusal to hear his June 8, 2011 special use permit application was arbitrary or capricious. As alleged and admitted in the pleadings, the BZA denied Petitioner's special use permit "because a previous hearing [on Petitioner's application for a special use permit] had been held and issued a negative determination." It is further uncontested that such prior "negative determination" was issued on February 23, 2011, upon an application to the BZA dated January 5, 2011. Petitioner alleges that his new special use permit application, dated June 8, 2011, differed from his prior application, dated January 5, 2011, because it "contain[ed] the following changes: fewer customers, a discussion of cooperation with the police in preventing loitering on the streets in front of the retail outlet, as well as a list of goods and items [Petitioner] intends to sell." Such fundamentally minor changes, however, are neither substantive nor related to the basis for the BZA's prior

February 23, 2011 denial. As such, Petitioner failed to establish that the BZA's refusal to consider his June 8, 2011 special use permit application was arbitrary or capricious.

Accordingly, the petition is dismissed.

This Decision and Order is being returned to the attorneys for the Respondents. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: September 16, 2011
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Petition, dated August 12, 2011; Petition, dated August 12, 2011; Affidavit of El Racheed Eldoma, dated August 12, 2011, with attached Exhibits A-G.
2. Verified Answer, dated August __, 2011; Affirmation of Jeffery Jamison, dated September 1, 2011, with attached Exhibits A-C.
3. Reply of Anne Reynolds Copps, dated September 7, 2011.