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| <b>Matter of Harbor Park Realty, LLC. v Modelewski</b>                                                                                                                                                                           |
| 2011 NY Slip Op 33196(U)                                                                                                                                                                                                         |
| November 23, 2011                                                                                                                                                                                                                |
| Sup Ct, Suffolk County                                                                                                                                                                                                           |
| Docket Number: 24135-10                                                                                                                                                                                                          |
| Judge: Peter Fox Cohalan                                                                                                                                                                                                         |
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## MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 24

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 In the Matter of the Application of  
 Harbor Park Realty, LLC.,

By: Cohalan, J.S.C.

Dated: 2011

Petitioner,

Index No. 24135-10

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

Mot. Seq. # 001 - CDISPSUBJ

- against -

Christopher Modelewski as Chairman, Scott M.  
 Frayler as Vice Chairman, Carol Gaughran, as  
 member, Robert F. Slingo, as member, Jeffrey  
 Naness, as member, James Rogers, as member  
 Constituting the ZONING BOARD OF APPEAL  
 OF THE TOWN OF HUNTINGTON & JOHN  
 NOTARO, R.A., NOTARO GRUPP ASSOCS,  
 1033 FORT SALONGA, LLC

Return Date: July 30, 2010  
 Calendar Date: June 15, 2011

Respondents.

-----X  
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This is an Article 78 special proceeding brought by the petitioner, Harbor Park Realty, LLC, seeking to reverse, annul and set aside a determination and decision by the respondent, Zoning Board of Appeals (hereinafter ZBA) of the Town of Huntington (hereinafter Town), New York, dated March 11, 2010, and filed on June 4, 2010 which granted an application to build a commercial store by the additional respondents, John Notaro, RA, Notaro Grupp Associates and 1033 Fort Salonga, LLC., (hereinafter Notaro) for certain variances pertaining to a vacant parcel of land.

The petitioner is the owner of a commercial parcel of real estate, i.e. a shopping center called Norwood Plaza, located at 1015-1019 Fort Salonga Road, in Huntington, Suffolk County on Long Island, New York. The additional Notaro respondents are the "anchor" tenants at the Norwood Plaza shopping center operating under the name, Bottle Bargains, and are engaged in the retail sales of wine and spirits. The Notaro respondents claim that they are the petitioner's main tenant at the Norwood Plaza shopping center and that they purchased an adjoining parcel of property at 1033 Fort Salonga Road in close proximity to the Norwood Plaza site owned by the petitioner to build a one story retail store for their commercial business. Notaro applied for and the ZBA granted a special use permit for a depth extension into the residential parcel, a variance to erect a retaining wall, a parking variance and a variance from the steep slope ordinance in order to erect a 10,666 square feet one story retail store with a basement and mezzanine. The ZBA conducted a hearing on the Notaro application on March 11, 2010 and in a decision, dated March 11, 2010, and filed on June 4, 2010, granted the Notaro application with certain conditions attached, inter alia, limiting deliveries, hours of operation and use of the building's basement for storage only.

The petitioner thereafter instituted this action appealing from the ZBA's grant of the Notaro application as arbitrary, capricious, against the weight of the substantial evidence presented and legally without merit. The petitioner argues that the proposed variances are unreasonable in allowing a retaining wall which encroaches within an area zoned R-40 for residential zoning and that the building could have been configured differently so that no variances would have been required. The subject vacant parcel of land has a lot width and street frontage of approximately 135 feet with the total depth of approximately 251 feet. The front portion of the lot is zoned C-6 for general business zoning while approximately 115 feet of the rear yard is zoned R-40 residential. Notaro sought a special permit to use a portion of the rear property zoned residential for commercial purposes as well as variances for a retaining wall requiring height, location and steep slope variances. The ZBA and Notaro argue in opposition to the petition that the depth extension granted Notaro is a similar business depth extension to that which was granted to the petitioner's property as well as 3 other properties in the area.

For the following reasons, the petitioner's Article 78 special proceeding seeking to vacate and annul the ZBA's decision is denied and the proceeding dismissed .

It is well settled law “that in a proceeding seeking judicial review of administrative action the court may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether there is a rational basis for the decision or whether it is arbitrary or capricious.” **Flacke v. Onondaga Landfill Systems, Inc.**, 69 NY2d 355, 363, 514 NYS2d 689,693 (1987).

The proper standard for a reviewing court is whether the challenged administrative ruling lacked a rational basis for the action taken and was arbitrary and capricious. As the Court, in **Matter of Halperin v. City of New Rochelle**, 24 AD3d 768, 809 NYS2 98 (2<sup>nd</sup> Dept. 2005), stated:

“In applying the ‘arbitrary and capricious’ standard, a court inquires whether the determination under review had a rational basis. Under this standard, a determination should not be disturbed unless the record shows that the agency’s action was ‘arbitrary, unreasonable, irrational or indicative of bad faith’ (**Matter of Cowan v. Kern**, 41 NY2d 591, 599; see **Matter of Pell v. Board of Educ.**, 34 NY2d 222, 231 [“Arbitrary action is without sound basis in reason and is generally taken without regard to the facts”]).

The Court further stated:

“The Court of Appeals has long recognized the ‘settled rule’ that ‘in reviewing board actions as to variances or special exceptions the courts...restrict themselves to ascertaining whether there has been illegality, arbitrariness, or abuse of discretion’ (**Matter of Lemir Realty Corp. v. Larkin**, 11 NY2d 20, 24 [collecting cases]; see **People ex rel. Hudson-Harlem Val. Tit. & Mtgw. Co. v. Walker**, 282 NY 400, 405 [determination of zoning board of appeals ‘may not be set aside unless it appears to be arbitrary or contrary to law’][collecting cases]). The Court of Appeals has continued to articulate the CPLR 7803 (3) standard of review in zoning cases, emphasizing the deference that must be afforded to local officials in making judgments concerning land use in their community (see **Matter of Pecoraro v. Board of Appeals of Town of Hempstead**, 2 NY3d 608, 613 [‘courts may set aside a zoning board determination only where the record reveals that the board acted illegally or arbitrarily, or abused its discretion, or that it merely succumbed to generalized community pressure’] **Matter of Ifrah v. Utschig**, 98 NY2d 304, 308 [‘Local zoning boards have broad discretion in considering applications for variances and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary or an abuse of discretion’]; **Matter of Cowan v. Kern**, *supra* at 599 [‘Where there is a rational basis for the local decision, that decision should be sustained’]).”

Thus the ZBA's determination must be upheld if it is rational, and supported by substantial evidence. The consideration of "substantial evidence" is limited to determining "whether the record contains sufficient evidence to support the rationality of the [Respondent's] determination." Sasso v. Osgood, 86 NY2d 374, 633 NYS2d 259 (1995). Here, in the case at bar, the ZBA in weighing the competing interests between the requested variances and the petitioner's opposition to those requests found on the evidence rational reasons to grant the application which this Court will not disturb.

Further, the ZBA found that no adverse impact would affect the area or impact in a negative way on the physical or environmental conditions in the neighborhood. The ZBA stated that Notaro provided "expert real estate and traffic testimony" and that the "requested variance relief was not substantial in light of the existing conditions on the property and with the imposition of the ZBA conditions noted herein." In reviewing the Notaro application, the ZBA noted that the Town Code §198-110-C(1) permitted an extension of a business zone into a residentially zoned portion of the same property if the ZBA could find such extension necessary for the reasonable use of the property. In fact, the ZBA recognized that the petitioner as an owner of the adjoining Norwood Plaza shopping center enjoyed the same benefit of a business depth extension as was granted to Notaro. The ZBA also recognized the aesthetic effect of the two tiered retaining wall rather than a single wall and the parking issues were carefully examined and discussed as to the lack of the additional four (4) parking spaces which were attributed to the basement area of 2000 feet and which the ZBA addressed by imposing a covenant that the basement would be storage only. These are the very issues charged by the Town Code to the ZBA to weigh and make a considered judgment on and it is not the province of this Court to reach a contrary result or substitute its judgment for that of the ZBA. The depth extension, parking issues (48 required but only 44 available), steep slope and retaining wall are minimal variances and within the ZBA's power and judgment to grant or deny.

The Court should not intervene on such a judgment, nor does it find the grant of such variances of such significance as to warrant a finding of arbitrariness. Further, the petitioner's arguments directed at the lot and size variance, parking issues and the steep slope variance appear really concerned not with claims of arbitrariness or capricious conduct by the ZBA (especially in light of the steep slope issues and depth extension at the other commercial establishments in the area) but rather its own economic interest because a valued and "anchor" tenant is leaving to occupy the adjoining property. The competition and loss of business cannot be ignored by this Court in weighing the reasonableness of the petitioner's objections and claims of arbitrary and capricious conduct on the part of the ZBA. The fact that the petitioner disagrees with the ZBA's decision does not make that decision arbitrary, capricious or against the weight of the substantial evidence presented. During the ZBA hearing, the petitioner attempted to claim ownership to the small 20 foot strip designated as lot #45.002 which would have resulted in parking issues for the Notaro application. However, by the end of the hearing the Notaro applicants noted that they owned both lots designated as the main lot #45.001 and the small strip designated lot #45.002.

The petitioner also raises the question of the ZBA's authority because of a lot line issue involving a small portion of 20 feet of the property (lot # 45.002) between Norwood Plaza and the Notaro parcel which appears to have been subdivided or been added to the Notaro parcel by taking from Norwood Plaza. The ZBA recognized that the authority to draw

lot lines and subdivisions lay with the Town Planning Board and not the ZBA and that the ZBA decision granting the variance requested was subject to certain express conditions, #6 of which stated "subject to any and all lot line changes as determined by the Planning Board." The petitioner's argument became moot when Notaro submitted a lot line change application to the Town Planning Board merging the small 20 feet parcel into the larger parcel, which application was granted in a resolution, dated January 5, 2011. The petitioner's citation in its memorandum of law on this point to **Matter of SCI Funeral Services of New York, Inc. v. Planning Board of Babylon**, 277 AD2d 319, 715 NYS2d 744 (2<sup>nd</sup> Dept. 2000) is inapposite to the facts in this case.

The ZBA's decision, dated March 11, 2010, was not arbitrary, capricious, or against the weight of the evidence. "The judicial responsibility is to review Zoning decisions but not, absent proof of arbitrary and unreasonable action, to make them". **Matter of Cowan v Kern**, *supra*, 599; **Matter of Zaniewski v ZBA Town of Riverhead**, 64 AD3d 720, 722, 883 NYS2d 279, 281 (2<sup>nd</sup> Dept 2009).

A review of the record herein establishes more than sufficient support to substantiate the ZBA's decision to grant the Notaro application for the requested variances. The ZBA noted that the steep slope issues were common within all the properties on this commercial avenue. The petitioner's claims that the ZBA failed to perform a detailed analysis of the substantial building construction and the requested variances as well as the opposition presented is belied by the record and the analysis conducted by the ZBA of the area as well as the layout, traffic and commercial enterprises that make up the area. **Matter of Halperin v. City of New Rochelle**, *supra*. Further, the ZBA discussed and asked questions of the petitioner's witnesses concerning the loss of a major "anchor" tenant with the establishment by that former tenant of a building on an adjacent parcel and the motivation behind the petitioner's opposition as to whether it involved a real land use issue or just the loss of a large commercial tenant from its shopping center.

Finally, the ZBA must also take into account the precedential nature of the request. In **Matter of Campo Grandchildren Trust v. Colson, et. Al.**, 39 AD3d 746, 834 NYS2d 295 (2<sup>nd</sup> Dept 2007), the Court held that

" A determination of a zoning board of appeals that 'neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious' " (citations omitted).

This is a valid concern of the ZBA. It is not this Court's duty to second guess or substitute its judgment for a well reasoned analysis by the ZBA as to the granting of the Notaro application for a number of zoning variances especially where the ZBA discussed the variances provided to other commercial establishments in the area and the right to condition the variances on subsequent approval by the Town Planning Board of the lot line adjustment. The Court finds that the ZBA engaged in the required balancing test and properly granted the Notaro application for the variances requested with the 6 conditions imposed. There is nothing within the ZBA's fact finding process or its decision to

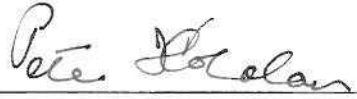
suggest or find that its granting of the application for a variance was arbitrary, capricious, an abuse of discretion or lacked support in the record presented before it. **Cellco Partnership v. Bellows**, 262 AD2d 849, 692 NYS2d 203 (3<sup>rd</sup> Dept. 1999).

Based upon the entire record before it, and balancing all the factors set forth, the ZBA could and did rationally conclude that the Notaro application was in keeping with the area and its own precedential decisions in this area and thus its determination granting the requested relief was not arbitrary, capricious, an abuse of discretion or unsupported by a rational basis. **Picarelli v. Karl**, 51 AD3d 1028, 858 NYS2d 389 (2<sup>nd</sup> Dept. 2008). Accordingly, the petition is denied and the proceeding dismissed. **Matter of Ifrah v. Utschig**, *supra*.

### Settle Judgment

The foregoing constitutes the decision of this Court.

Date: November 23, 2011

  
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J.S.C.  
PETER FOX COHALAN