

**Matter of 1011 RT. 109 Corp. v Zoning Bd. of Appeals of Town of Babylon**

2012 NY Slip Op 30784(U)

March 21, 2012

Supreme Court, Suffolk County

Docket Number: 43170/2010

Judge: Paul J. Baisley

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MEMORANDUM

SUPREME COURT - SUFFOLK COUNTY

PRESENT:

HON. PAUL J. BAISLEY, JR., J.S.C.

I.A.S. PART 36

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In the Matter of the Application of  
1011 RT. 109 CORP. and LEONARDO  
LOCRICCHIO,

By: Baisley, J.S.C.

Dated: March 21, 2012

Petitioners,

INDEX NO.: 43170/2010  
MOT. NO.: 001 MD CDISPSUBJ

For a Judgment pursuant to Article 78 of the CPLR

**PETITIONERS' ATTORNEY:**  
CHRISTOPHER THOMPSON, ESQ.  
33 Davison Lane East  
West Islip, New York 11795

-against-

THE ZONING BOARD OF APPEALS OF THE  
TOWN OF BABYLON, 7-ELEVEN, INC. and 1000  
WELLWOOD CORP.,

**RESPONDENTS' ATTORNEYS:**  
PAUL J. MARGIOTTA, ESQ.  
Town Attorney, Town of Babylon  
200 East Sunrise Highway  
Lindenhurst, New York 11757

Respondents,

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AMATO LAW GROUP, PLLC  
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Garden City, New York 11530

In this proceeding, petitioners seek a judgment pursuant to CPLR Article 78 annulling and reversing a determination by respondent Zoning Board of Appeals (the "Board") of the Town of Babylon (the "Town") granting, with condition, an application by respondent 7-Eleven, Inc. for an area variance and the lifting of certain covenants and restrictions.

Petitioners<sup>1</sup> are neighboring landowners of a 18,385-square-foot irregularly shaped parcel of property located at 1000 Wellwood Avenue, West Babylon, Town of Babylon, New York. The parcel spans from the southeast corner of Wellwood Avenue and 11th Street to the northeast corner of Wellwood Avenue and Babylon-Farmingdale Road (Route 109). The parcel is zoned "E" Business. It is owned by respondent 1000 Wellwood Corp. and is currently improved with a

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<sup>1</sup> Petitioner 1011 Rt. 109 Corp. has its principal place of business, a Dunkin' Donuts, directly across the street from the subject property on the west side of Wellwood Avenue and the north side of Babylon-Farmingdale Road (Route 109). Petitioner Leonardo LoCricchio (LoCricchio) resides at 123 11th Street, West Babylon, New York. His westerly boundary and a portion of his southerly boundary are adjacent to the northeast boundary of the subject property.

building housing a four-bay motor vehicle repair shop. A substantial portion of the rear of the building faces the southwest corner of the residential property of petitioner LoCricchio. Respondent 7-Eleven, Inc. (7-Eleven), tenant of 1000 Wellwood Corp., seeks to develop the property. Its plans include demolishing the existing building and constructing an approximately 2,950-square-foot convenience store building situated at the southeast corner of the property. Its plans also include the addition of 17 parking stalls, two curb cuts, site landscaping improvements, and a trash enclosure consisting of two dumpsters with a landscaped buffer located in the northwest portion of the property.

The property is subject to declarations of covenants and restrictions. One, filed on April 6, 1961, requires that any structure erected on the property comply with the requirements of the Town's "E" Business District. Another, filed February 13, 1964 concerning the northern portion of the property requires that it remain in its natural state, clean and neat and free of refuse, that permission be obtained from the Board for construction of any structure thereon, and provides that the covenants and restrictions can only be annulled, amended or changed by the Board.

Respondent 7-Eleven obtained site plan approval for its proposal from the Planning Board of the Town of Babylon upon certain conditions, including approval by the Zoning Board of Appeals of associated variances and the removal of the aforementioned covenants and restrictions. 7-Eleven subsequently applied to the Board requesting area variance relief from the Town Code § 213-137 rear yard setback requirement of 50 feet in the "E" Business District to allow for a three-foot rear yard setback distance and a "lifting," or removal, of the covenants and restrictions imposed on the property so as to locate the landscaping, parking stalls, curbing, and trash enclosure within the northwest restricted area of the property.

A public hearing was held on July 8, 2010. At the end of the hearing, the Board left the record open for 30 days for the neighbors to respond and for two weeks thereafter for the applicants to respond. In its response to opposition submitted by the petitioners, 7-Eleven submitted a memorandum with exhibits that included an amended site plan depicting revisions to the proposed trash enclosure. In a decision dated October 21, 2010, the Board approved the requested variances "based upon the plans as submitted and considered by the Board with CONDITION that there be no deliveries between the hours of midnight and 5:00 a.m. Said condition to be noted on the certificate of occupancy." The decision was filed with the Town Clerk's Office on October 26, 2010 and then revised due to a scrivener's error and re-filed on November 1, 2010. The Board filed its findings of fact with the Town Clerk's Office on January 25, 2011.

Petitioners commenced the instant Article 78 proceeding challenging the Board's determination as unlawful, arbitrary and capricious, and not supported by the substantial evidence in the record. Petitioners argue that the Board's approval of the application was procedurally defective. They argue that the Board failed to require a variance application for the proposed trash enclosure in the northerly restricted area of the property. They also argue that the Board improperly approved an amended variance application reflecting post-hearing submissions based on the Board's suggestions without holding another public hearing to allow members of the community to comment on or raise objections to the new submissions. Petitioners assert that the Board should have denied the application following the public hearing rather than requiring the applicants to make certain changes and clarifications to their application based on issues raised at the public hearing. They also argue that the abutting residential neighborhood has developed with an expectation of privacy that will be

eliminated by the construction of a 7-Eleven convenience store that operates 24 hours a day and attracts high traffic, as compared to the small auto body shop that only operated 9 a.m. to 5 p.m., Monday through Friday. Petitioners further argue that the natural buffer created years ago to shield the residential community from the commercial nature of the subject property will be destroyed and a garbage dumpster with its surrounding structure will be added to the entrance of their community. Finally, petitioners assert that the condition of no deliveries between midnight and 5 a.m. is completely unenforceable inasmuch as the Board lacks policing power. Petitioners request that the matter be remanded to the Board to conduct a new public hearing.

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 Ifrah v Utschig*, 98 NY2d 304, 746 NYS2d 667 [2002]; see *Matter of DiPaolo v Zoning Bd. of Appeals of Town/Vil. of Harrison*, 62 AD3d 792, 879 NYS2d 507 [2d Dept 2009]). Thus, a determination of a zoning board should be sustained upon judicial review if it has a rational basis and is supported by substantial evidence (*Matter of Pecoraro v Board of Appeals of the Town of Hempstead*, 2 NY3d 608, 781 NYS2d 234 [2004]; *Matter of Ifrah v Utschig*, supra; *Matter of Sasso v Osgood*, 86 NY2d 374, 633 NYS2d 259 [1995]). A determination is rational “if it has some objective factual basis, as opposed to resting entirely on subjective considerations such as general community opposition” (*Matter of Caspian Realty, Inc. v Zoning Bd. of Appeals of Town of Greenburgh*, 68 AD3d 62, 67, 886 NYS2d 442, 446 [2d Dept 2009], quoting *Matter of Halperin v City of New Rochelle*, 24 AD3d 768, 772, 809 NYS2d 98, 105 [2d Dept 2005]). The consideration of “substantial evidence” is limited to determining whether the record contains sufficient evidence to support the rationality of the zoning board’s determination (*Matter of Sasso v Osgood*, supra; see *Matter of DiPaolo v Zoning Bd. of Appeals of Town/Vil. of Harrison*, supra). This Court may not substitute its discretion for that of the zoning board unless its determination is arbitrary or contrary to law (*Matter of Smith v Board of Appeals of the Town of Islip*, 202 AD2d 674, 609 NYS2d 912 [2d Dept 1994]). Nor may the court weigh the evidence or reject the choice made by the zoning board where the evidence is conflicting and room for choice exists (*Matter of Calvi v Zoning Bd. of Appeals of City of Yonkers*, 238 AD2d 417, 656 NYS2d 313 [2d Dept 1997]; see *Matter of Toys R Us v Silva*, 89 NY2d 411, 654 NYS2d 100 [1996]; *Stork Rest. v Boland*, 282 NY 256 [1940]).

In its findings of fact, the Board explained that the property is currently improved with a structure with non-complying setbacks that was originally a gasoline service station that became a public garage. The Board also explained that the condition of no deliveries between midnight and 5 a.m. that it imposed in granting approval of the application was meant to alleviate concerns raised at the hearing regarding excessive noise. The Board noted that revised plans dated September 7, 2010 modified the trash enclosure to include a more preferable design of a landscaped buffer rather than a masonry wall around the dumpsters, and moved the location of the dumpsters further away from the neighboring parcels to the east. It also noted that a variance is not required for dumpsters in the “E” Business District.

With respect to the removal of the covenants and restrictions, the Board indicated that there was no evidence as to why the covenants and restrictions were ever imposed on the property. In addition, the Board noted that the hearing testimony revealed that the proposal of 7-Eleven to develop the land on the north side of the property for parking and the trash enclosure would provide for an uninterrupted landscaped buffer from the eastern side of the property and around the north side

with the proposed trash enclosure furthest away from the abutting residential property. It also noted that the Planning Division had no objections to the plan and found that the landscaping would mitigate any adverse impacts of the commercial development with adjoining or nearby residences. Moreover, the Board noted that the restricted area is 40 feet deep and that the buffer will be reduced to nine feet at its narrowest point. Based on the evidence, the Board found that the proposed development would actually enhance the area and present a drastic improvement in conditions of the property, and granted the request to remove the covenants and restrictions.

The Board next considered the request for an area variance diminishing the rear yard setback from 50 feet to three feet for the lot line that the subject property shares with the adjoining commercial property to the south. In determining whether to grant an area variance, a zoning board is required by Town Law § 267-b (3) to engage in a balancing test “weighing the benefit to the applicant against the detriment to the health, safety and welfare of the neighborhood or community if the variance is granted” (*Matter of Ifrah v Utschig, supra*). The zoning board is required to consider whether (1) 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, (2) the benefit sought by the applicant can be achieved by some method, other than an area variance, feasible for the applicant to pursue, (3) the required area variance is substantial, (4) the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district, and (5) the need for the variance was self-created (Town Law § 267-b [3] [b]; *Matter of Sasso v Osgood, supra*; *Matter of Wallach v Wright*, 91 AD3d 881, 936 NYS2d 685 [2d Dept 2012]).

Noting that the intersection where the subject property is located has a Dunkin’ Donuts on the northwest corner, a gas station with a convenience store on the southwest corner, and a car wash on the southeast corner, and that instead of a public garage, the subject property will be improved with a new building with a retail use and extensive landscaping, the Board found that the proposal represents a desirable change in the character of the neighborhood. In addition, the Board found that due to the parcel’s unique shape, it would be virtually impossible to develop the property without variance relief. The Board determined that the variance relief was not substantial inasmuch as the granting of the variance would allow the new building to be located further away from the adjoining residential property (of petitioner LoCricchio) and closer to and in line with the adjacent commercial building to the east. It noted that the area variance relates to the property line that the subject property shares with the adjoining commercial property to the south, not the adjoining residential property to the north (belonging to petitioner LoCricchio). Based on the hearing testimony from 7-Eleven and a review of photographs of the present condition of the property, the Board found that there was currently a substantial lack of landscaping, that there were vehicles parked in the northern restricted portion, and that the current building is dilapidated so that the entire property has become an eyesore. Noting that auto repair/public garage uses by their nature tend to pose an environmental threat to the community as opposed to retail uses and that the area variance would locate the new building further away from the abutting residential property, the Board determined that the requested area variance would not have an adverse effect or impact on the physical or environmental conditions of the neighborhood or district. Finally, the Board found that the difficulty was not self-created given the unique configuration of the property with its non-complying setbacks, indicating that the current use is non-complying without relief from the Board. Upon consideration of Town Law § 267-b (3) (c) which requires that the Board consider the minimum variance that it deems necessary and adequate while preserving and protecting the character of the neighborhood and the health, safety and welfare of the community, the Board granted the requested area variance.

The Court finds that determination of the Board to grant the requested variances was neither arbitrary nor capricious, had a rational basis, and was supported by substantial evidence (*see Matter of Simonsen v Zoning Bd. of Appeals of Town of Huntington*, 301 AD2d 654, 754 NYS2d 325 [2d Dept 2003]). The proposed convenience store is a permitted use in the “E” Business District pursuant to the Town Code (*see* Town Code § 213-129 [A] [shops and stores for the sale of retail or consumer merchandise and services]). The ZBA’s granting of the request to remove the covenants and restrictions was within its authority and, on the record presented, rational, and not arbitrary and capricious (*cf. Matter of Mallins v Foley*, 74 AD3d 1070, 903 NYS2d 492 [2d Dept 2010]). Petitioners fail to specify the particular section of the Town Code pursuant to which the applicants would be required to obtain a variance from its requirements for the installation of garbage dumpsters in an “E” Business District. They merely rely on the language of the first covenant and restriction requiring that the property owner apply to the Board for permission to erect any structure on the premises. With respect to requirements for public hearings on variances, petitioners rely on the Standards for the Review of Variances pursuant to the Adirondack Park Agency Act (9 NYCRR § 576), which are inapplicable to this matter, rather than on Town Code § 213-15. Moreover, petitioners fail to demonstrate that they were denied due process of law based on the Board’s failure to hold an additional public hearing after 7-Eleven revised its site plans with respect to the location and enclosure of the garbage dumpsters (*see Matter of Basha Kill Area Assn. v Planning Bd. of Town of Mamakating*, 46 AD3d 1309, 849 NYS2d 112 [3d Dept 2007], *lv denied* 10 NY3d 712, 861 NYS2d 272 [2008]).

Furthermore, a zoning board may, where appropriate, impose reasonable conditions and restrictions that are directly related to and incidental to the proposed use of the property, and are aimed at minimizing possible adverse impacts to an area by the granting of a variance or special permit (*see* Town Law § 267-b [4]; *Matter of St. Onge v Donovan*, 71 NY2d 507, 527 NYS2d 721 [1988]). Such conditions may relate to landscaping, screening, period of use of access roads, outdoor lighting and noises, and emission of odors, dust, refuse matter, and other factors incidental to the comfort, peace, enjoyment, health or safety of the surrounding area (*see id.*). The condition imposed by the Board limiting delivery hours is proper inasmuch as it relates directly to the use of the property and is intended to protect the neighboring residential properties from the possible adverse effects of the operation of the convenience store, such as the anticipated increase in traffic congestion, parking problems, and noise (*see Matter of Zupa v Zoning Bd. of Appeals of Town of Southold*, 31 AD3d 570, 817 NYS2d 672 [2d Dept 2006]; *Matter of Milt-Nik Land Corp. v City of Yonkers*, 24 AD3d 446, 806 NYS2d 217 [2d Dept 2005]). Petitioners’ assertion that the Board will be unable to enforce the condition that it has imposed is unfounded (*see generally Taylor Tree, Inc. v Planning Bd. of Town of Montgomery*, 272 AD2d 336, 707 NYS2d 193 [2d Dept 2000]).

Accordingly, the petition is denied and the proceeding is dismissed.

Settle judgment.

**PAUL J. BAISLEY, JR.**

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J.S.C.