

**Matter of Idelson v Zoning Bd. of Appeals of the  
Town of Oyster Bay**

2013 NY Slip Op 33150(U)

December 5, 2013

Sup Ct, Suffolk County

Docket Number: 13-10291

Judge: Hector D. LaSalle

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This opinion is uncorrected and not selected for official publication.

MEMORANDUM

COPY

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 48

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 In the Matter of the Application of :  
 DR. KEVIN IDELSON and BARBARA IDELSON, :  
 :  
 Petitioners, :  
 :  
 For a Judgment Pursuant to Article 78 of the :  
 Civil Practice Law and Rules :  
 :  
 - against - :  
 :  
 ZONING BOARD OF APPEALS OF THE TOWN :  
 OF OYSTER BAY, :  
 :  
 Respondent. :  
 -----X

By: LaSalle, J.S.C.  
 Dated: December 5, 2013  
 Index No. 13-10291  
 Mot. Seq. # 001- MotD; CDISPSUBJ  
 Return Date: 5-9-13  
 Adjourned: 9-17-13

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Petitioners seek a judgment annulling and vacating the determination of the Zoning Board of Appeals of the Town of Oyster Bay ("ZBA"), dated February 21, 2013, which denied the petitioners' application for a special permit to operate a home business at their residence, and directing the approval of the application in its entirety.

Petitioners, Dr. Kevin Idelson and Barbara Idelson, own and reside at the premises located at 94 Balsar Court, Syosset, Town of Oyster Bay, New York ("the subject property"). Dr. Idelson is licensed to practice dentistry in the State of New York, has been practicing dentistry since 1988 and currently has an office at 425 Northern Boulevard in Great Neck, New York. The subject property is located within the R1-2A Zoning District (2 acre residential).

On or about October 17, 2012, the petitioners applied to the ZBA for a special permit to operate a "home business" at their residence, for the purposes of a part-time dental office, to be accessory to his primary office in Great Neck. Within the R1-2A, a home business is allowed by special permit from the ZBA, provided the applicant demonstrates compliance with the standards set forth in Town of Oyster Bay Zoning Code Section 5.5.14.3 *et. seq.* No area variance relief was necessary because the application complied with all required setbacks and met the parking requirement for a home business.

A public hearing was held before the ZBA on December 13, 2012, to consider the petitioners' application for a special permit. The petitioners were represented by their architect, Gary Gallagher, of

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GHG Architects. Mr. Gallagher testified that the proposal met all eleven of the special permit criteria for a home business set forth in the Town Code. First he testified that Dr. Idelson is a dentist and resides at the subject property with his wife. Dr. Idelson and his wife are the only employees who will be working in the office. All activities will be conducted inside the dwelling. Mrs. Idelson will be both hygienist and receptionist. The plans were designed so that the square footage of the home business would be limited to 500 square feet. Two additional parking spaces are provided for on the proposed site plan. Mr. Gallagher pointed out, on the site plan, the location of the two parking spots. Petitioners sought a shingle sign to identify the office, which would not exceed two square feet, in conformance with the Town Code. He further testified that the creation of the home business would not interfere with maintaining the character of the dwelling as a residence. The existing dwelling is a one-story ranch and will remain that way. There will be no production of materials associated with the application and it will not create any hazardous conditions or generate any objectionable noise, odors, fumes, lighting, glare or other adverse impacts. The application complies with the Town Code and no variances are required.

Dr. Idelson testified that he would be working at home maybe two days a week, to see a patient every hour or hour and a half. He would see about 15 patients, two days a week. He would be seeing his first patients at 8:50 a.m. and his last about 5:30 at night. These would be patients of his who live in this area. He also testified that his office generates very little medical waste. Dr. Idelson has submitted an affidavit stating that the next part of his testimony is incorrect in the record. He indicates he stated that medical waste pickup is regulated and he would comply with the law as he does at his Great Neck Office. He avers that he did not testify, as the transcript purports, that he would be bringing medical waste from his office to his residence.

After Mr. Gallagher completed his presentation, a series of more than 10 neighboring property owners testified and stated generalized objections to the application, including traffic, parking, danger from x-rays, increased "strangers" in the area, and that it would change the nature of the neighborhood. No expert testimony was offered in opposition

The petitioners and Mr. Gallagher have submitted affidavits attesting to the fact that one of the neighbors testified that there was an existing home dental use in the surrounding area. The other dentist, Dr. Nancy Ciminera of 10 Sagamore Drive, Syosset was specifically identified by name. The neighbor further testified that since there was already an existing home dental business in the community, there was no need for another. The respondent has completely failed in its attempt to deny that this testimony occurred. It is first noted that the certified record or Return submitted to the court is a shambles. It consists of a stack of unbound documents, unindexed, with a certification by the Town Clerk. More importantly, the Return submitted to the court did not contain the transcript of the public hearing in this matter. Fortunately, petitioners did submit a copy of the transcript, which reveals that the transcript is not properly certified. Respondent's counsel argues that these statements were not made by anyone who was sworn in, and at the podium. Counsel, however, has no personal knowledge of the meeting, since he was not present at the hearing. Thus, his purported factual assertions are without basis. In light of the foregoing facts, the court accepts the petitioners' allegations as to the existing home business dental use as true for the purposes of this decision.

On February 21, 2013, the ZBA rendered a decision denying the petitioners' application and filed

its findings on March 13, 2013.

Petitioners' application seeks a special permit to operate a home business at their residence. Unlike a use variance, a special exception allows a property owner to put his property to a use expressly permitted by the ordinance subject only to conditions attached to it to minimize the impact on the surrounding area. The significance of this distinction is that the inclusion of the permitted use in the ordinance is tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood (*see Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead*, 98 NY2d 190, 195, 746 NYS2d 662 [2002]; *Matter of North Shore Steak House v Board of Appeals of Inc. Vil. of Thomaston*, 30 NY2d 238, 243, 331 NYS2d 645 [1972]; *Matter of G & P Investing Co. v Foley*, 61 AD3d 684, 684, 877 NYS2d 143 [2d Dept 2009]; *see also Matter of Navaretta v Town of Oyster Bay*, 72 AD3d 823, 825, 898 NYS2d 237 [2d Dept 2010]). The burden of proof is lighter than that on an owner seeking a variance, and an owner seeking a special exception permit is only required to show compliance with any legislatively imposed conditions on an otherwise permitted use (*Kabro Associates, LLC v Town of Islip Zoning Board of Appeals*, 95 AD3d 1118, 944 NYS2d 277 [2d Dept 2102]; *see also Matter of North Shore Steak House v Board of Appeals of Inc. Vil. of Thomaston, supra*). While the reviewing board retains some discretion to evaluate each application for a special use permit, to determine whether the applicable criteria have been met and to make commonsense judgments in deciding whether a particular application should be granted, such determination must be supported by substantial evidence (*see Matter of Twin County Recycling Corp. v Yevoli*, 90 NY2d 1000, 665 NYS2d 627 [1997]). Although scientific or expert testimony is not required in every case to support a determination, the board may not base its decision solely on generalized community objections. Moreover, expert opinion regarding traffic patterns, when presented, may not be disregarded in favor of generalized community opposition (*Market Square Properties, LTD v Town of Guilderland Zoning Board of Appeals*, 66 NY 2d 893, 498 NYS2d 772 [1985]; *see also Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead, supra*; *Matter of Twin County Recycling Corp. v Yevoli, supra*). Generalized or unsubstantiated complaints from neighbors, unsupported by empirical or expert evidence are generally insufficient for a zoning board to base its decision (*Caspian Realty, Inc. v Zoning Board of Appeals of Town of Greenburgh*, 68 AD3d 62, 886 NYS 2d 442 [2d Dept 2009]; *Market Square Properties, LTD v Town of Guilderland Zoning Board of Appeals, supra*).

The eleven criteria for a special use permit for a home business under the Town Code are as follows:

5.5.14.3.1 The home business shall be operated by a person residing on the premises who is a certified physician, psychologist . . . dentist . . .

5.5.14.3.2 No more than one nonresident employee shall be allowed.

5.5.14.3.3 All activity shall be conducted fully within the dwelling. Additionally, there shall be no display of a home business visible outside the dwelling other than permitted signage and there shall be no outside storage of materials or equipment associated with the home business.

5.5.14.3.4 The maximum area in use as a home business shall not exceed 500 square feet

or 30% of the gross floor area of the dwelling unit, whichever is less.

5.5.14.3.5 The maximum number of visits by patients, students, clients or other visitors shall be two per hour.

5.5.14.3.6 At least two additional off-street parking spaces shall be provided in addition to those required for residence use. The off-street parking shall be buffered from neighboring properties and streets with fences and/or landscaping.

5.5.14.3.7 The home business shall not involve merchandising, storage of materials or equipment or the exchanging of commodities by sale to persons who come to the premises or by shipment from the premises.

5.5.14.3.8 A maximum of one sign not more than two square feet in area shall be permitted.

5.5.14.3.9 The creation of the home business shall not interfere with maintaining the character of the dwelling as a residence. The exterior of the dwelling shall not be modified to accommodate the home business in a manner inconsistent with the residential character of the neighborhood.

5.5.14.3.10 No production of materials other than written materials, computer-generated materials or a type and quantity of materials that might typically be created as part of a residential hobby shall be permitted; in no case shall any manufacturing, assembly or food preparation be permitted.

5.5.14.3.11 The nature and intensity of the home business shall not create hazardous or detrimental conditions or generate objectionable noise, odors, fumes, lighting, glare or other adverse impacts.

Petitioners established, in the record, that they met all of the criteria for their proposed home business use. The respondent found that the application does not comply with Section 5.5.14.3.5 “in that the applicant could not specify the exact days and number of patients it would regularly be seeing.” The record establishes that Dr. Idelson would be seeing less than two patients an hour, two days a week for a total of about 15 patients. This section only requires that the applicant establish that the “maximum number of visits by patients, students, clients or other visitors shall be two per hour.” Thus, this criteria was satisfied. Next (citing the wrong section of the Code) the ZBA found that the application “does not provide any buffer from the off-street parking other than a chain link fence that currently exists.” However, photographs in the record, confirmed by an overhead photograph submitted by the petitioners, show that there is an existing heavy vegetative buffer between the roadway and the area where the parking for the home business will be located. The site plan also indicates that no trees shall be removed.

The ZBA next addresses in its findings the general requirements for special use permits. A review of these findings reveals that they are simply either incorrect or unsupported by the record. The ZBA started by repeating its unsupported claims that the applicant placed no limit on the number of patients who would

be seen each day and that there was no screening of the off-street parking. The ZBA also finds that “the applicant has failed entirely to submit any evidence with respect to traffic flow to and from the site.” Again, this is simply incorrect. The record establishes that Dr. Idelson will be seeing 15 or 16 patients over a period of two days and will be seeing one patient every hour or hour and a half. This means that this use will generate less than one additional vehicle coming into the area, per hour, two days a week. Based on this, the ZBA concludes “that it is impossible to assume that this home business will not increase the vehicular and pedestrian safety hazard.” Not only is this finding untenable based upon the de minimis nature of the amount of traffic this use will generate, but any logical extrapolation of this finding leads to the conclusion that any proposed home use would lead to a similar finding. The ZBA also found that “there is no adequate information to deduce whether the use will overburden or interfere with the enjoyment of neighboring parks, recreational facilities or other public facilities.” Again, based upon the de minimis nature of the traffic generated by the proposed use, there is no rational basis upon which to find that these 15 or 16 patients heading to and from a dental appointment would have any effect at all on parks or other public facilities. A final example is the ZBA’s finding that “this additional use will set an unwanted precedent in this neighborhood and in turn cause an adverse effect on the safety, health, welfare comfort, convenience and order of the Town.” Not only does this pronouncement lack support in the record, it flies in the face of the fact that the inclusion of the permitted use in the ordinance is tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood (*see Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead, supra; Matter of North Shore Steak House v Board of Appeals of Inc. Vil. of Thomaston, supra*). The ZBA likewise ignored the lighter burden of proof imposed on an applicant for a special exception (*see Kabro Associates, LLC v Town of Islip Zoning Board of Appeals, supra*).

Based on the foregoing, this court finds the decision of the respondent Zoning Board of Appeals herein to be arbitrary and capricious and unsupported by substantial evidence in the record. The respondent also ignored or failed to apply the applicable law in reaching its decision. The respondents finding appears to be only a pretext for respondents’ unwarranted and improper capitulation to the generalized community opposition to the application

Turning to the issue of the respondents’ prior precedent with regard to this application, the Court finds that the issue of the prior application and approval of an application of a Dr. Nancy Ciminera of 10 Sagamore Drive, Syosset for a home dental use was raised at the public hearing. Even if the issue of this application had not been raised, the respondent is bound to deal with its prior precedent. 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, and such determination must be annulled pursuant to article 78 proceeding even if there may otherwise be evidence in record sufficient to support determination (*Bout v Zoning Bd. Of Appeals of Town of Oyster Bay*, 71 AD3d 1014, 897 NYS2d 205 [2d Dept 2010]; *Waidler v Young*, 63 AD2d 953, 882 NYS2d 153 [2d Dept 2009]; *see, also Matter of Charles A. Field Delivery Serv. [Roberts]*, 66 NY2d 516, 498 NYS2d 111 [1985]). However, where a zoning board provides a rational explanation for reaching a different result on similar facts in an allegedly similar application, the determination will not be viewed as either arbitrary or capricious (*Hurley v Zoning Bd. Of Appeals of Village of Amityville*, 69 AD3d 940, 893 NYS2d 277 [2d Dept 2010]; *Berk v McMahon*, 29 AD3d 902, 814 NYS2d 753 [2d Dept 2006]). Here the evidence establishes that the respondent approved a home office use for Dr. Ciminera in November of 2007. This property is three tenths

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of a mile away from the subject property and thus is considered to be part of the same neighborhood. Respondents' counsel attempts to differentiate the applications based on the fact that Dr. Ciminera's property is zoned differently. The evidence establishes that Dr. Ciminera's parcel is in a one acre residential zoning district while the petitioners' parcel is in two-acre residential district. Thus, the ZBA granted the prior home business application on a parcel substantially smaller than the petitioners', and which required an area variance. More telling is an examination of the findings of fact from the prior application. Therein, the applicant was only submitted to a review of the eleven criteria for a special use permit for a home business and was not subjected to review, as the petitioners were, under the more general special exception standards. Thus, the court finds that the decision of respondent was arbitrary and capricious in that it failed to adhere to its prior precedent and provided no reason for reaching a different result on essentially the same facts.

Accordingly, the determination by respondent dated February 21, 2013 is vacated and annulled and the matter is remitted to the respondent Zoning Board of Appeals for the issuance of a special permit for a home business, subject to any conditions or restrictions as may be appropriate.

Submit Judgment.

This constitutes the Order and decision of the Court.

**Dated: December 5, 2013**  
**Riverhead, NY**

  
**HON. HECTOR D. LASALLE, J.S.C.**

FINAL DISPOSITION

NON-FINAL DISPOSITION