

**Serota Smithtown LLC v Town of Smithtown Bd. of
Zoning Appeals**

2014 NY Slip Op 30781(U)

March 25, 2014

Supreme Court, Suffolk County

Docket Number: 12-38197

Judge: Daniel Martin

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MEMORANDUM

COPY

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 3

In the Matter of

By: Martin, A.J.S.C.
Dated: March 25, 2014

SEROTA SMITHTOWN LLC and CINOS
SMITHTOWN LLC.

Index No. 12-38197
Mot. Seq. #002 - MG; CDISPSUBJ

Petitioner.

Return Date: 1-24-13
Adjourned: 6-4-13

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

- against -

THE TOWN OF SMITHTOWN BOARD OF
ZONING APPEALS, ROBERT LIPINSKI,
KATHLEEN LIPINSKI, JOHN DETLING,
NORA DETLING, GLENN ANDERSON,
ANNEMARIE ANDERSON, JOHN KIKEL &
TATIANA KIKEL.

Respondents.

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In this article 78 proceeding, the petitioners seek judgment annulling and vacating the determination of the Board of Zoning Appeals of the Town of Smithtown (“BZA”), dated November 14, 2012, which denied the petitioners’ application for a special exception to permit a 2,100 square foot counter-service Sonic restaurant in a Wholesale and Service Industry (“WSI”) district. Petitioners also sought a variance of a special exception standard to permit a counter-service to have outdoor dining; a variance to allow outdoor dining in a WSI district; a variance to permit 22 loudspeakers at locations other than the drive-thru window; a variance to reduce the landscape area between the front property line and parking from 8% to 7% (existing); and six variances with regard to signage on the property. The BZA denied these variances, as moot, and made no findings with regard thereto. Petitioners now seek judgment annulling and vacating the determination of the BZA with regard to these requested variances as arbitrary and capricious, and not supported by substantial evidence. Petitioners further seek a judgment directing the BZA to grant their application for a special exception, as well as their application for area variances.

Petitioners also sought an interpretation of the Code of the Town of Smithtown to determine if curb service is permitted as an accessory use to a counter service restaurant. The BZA determined that curb service is permitted as an accessory use to a counter-service restaurant. Petitioners do not challenge that determination.

Petitioners herein filed the above-mentioned application on May 24, 2012. A public hearing on the application was held on June 26, 2012. Petitioners presented several expert witnesses in support of the application. Real estate valuation expert John Breslin testified and submitted photographs of the subject premises and surrounding area as part of his report. He concluded that the proposed restaurant would not adversely impact nearby residential real estate values due to the fact that the proposed use is common in this mature commercial corridor on Middle Country Road given the location across the street from Smithhaven Mall and numerous stores and restaurants. Mr. Breslin’s evidence included the large number of nearby restaurants including Ragazzi Italian Kitchen, which is located on the same parcel, as well as two newly approved restaurants that will be built across the street on the Mall property. Mr. Breslin also based his opinion on the existence of an adequately dense vegetated buffer and the topography between the site and the residences located south of the property, as well as the Sound Analysis Report submitted by the applicants.

Petitioners presented expert testimony and evidence from Michael Marinis, a licensed professional engineer who worked with the petitioners on their site plan. Mr. Marinis presented a photometric analysis which measured and analyzed the lighting proposed for the restaurant, and, using empirical data, concluded that the lighting is in compliance with the Town Code and that the lighting will not adversely impact the residential neighborhood to the south. He further testified that the site met all of the frontage requirements pursuant to the Code; that the proposed building was well within the gross floor area allowed as of right pursuant to the Code; and that an approximately 60-foot buffer was proposed for the southern portion of the site. He also testified as to the manner in which traffic would circulate through the site.

Petitioners also presented expert testimony and evidence from Charles Olivo, a professional traffic engineer, who analyzed the traffic and parking on the site plan, and issued a report on those

issues, as well as area traffic patterns and ingress/egress from the site. He testified that his traffic and parking studies were in accordance with the recommended guidelines and practices of the Institute of Transportation Engineers, and that he had analyzed the potential traffic impact and concluded that there would be no discernable impact from the proposed restaurant. He further testified that the site can contain up to 34 queuing vehicles on-site given both the size of the lot and the specific site plan which includes long internal driveways and an internal drive-thru and bypass lane. An additional 46 vehicles can be parked on the site (22 vehicles in drive-in stalls and 24 additional parking spaces). He further testified that the queuing traffic would not block the parking stalls. He concluded that, based upon the dimensions and design of the proposed site, the restaurant could accommodate 80 vehicles on-site and that the site met the number of parking spaces required by the Code.

As a final witness, petitioners presented expert testimony and evidence from Paul Boyce, a professional engineer. Mr. Boyce conducted a series of acoustical tests at both the proposed Smithtown and existing North Babylon sites. Based upon his work he concluded that the drive-in menu-board speakers at the Smithtown site became statistically inaudible at 48 feet. The menu-board speakers at the site are all more than 100 feet from the nearest residence and thus would be inaudible from those residences.

A number of Smithtown residents testified against the application. They also submitted newspaper clipping, photographs, documents taken from websites and YouTube videos taken at the opening of the North Babylon Sonic restaurant or within a few days thereafter. Testimony included, among other things, concerns with traffic, noise “drunken teenagers,” smells, loud radios and safety. One witness spoke of interviews with residents adjacent to the North Babylon site and their complaints about light and noise from that site. Letters in opposition were also received by the respondent BZA.

Prior to the respondent BZA’s decision on the petitioners’ application, it received the review and recommended SEQRA resolution from the Town’s Department of Environment and Waterways, which included the following:

E. Although concerns have been expressed regarding potential impacts associated with noise, fugitive light, odors, off-site parking, and off-site queuing of automobiles on the basis of such impacts having occurred at an existing Sonic restaurant in North Babylon, such impacts are not considered to be likely at this site, for the following reasons:

a. The proposed Sonic restaurant is to be located on 1.8 acres of partially developed 4.9 acre site. In contrast, the North Babylon Sonic site is approximately 0.8 acres in size. The substantially greater size of the proposed site facilitates substantial increases in setbacks, buffer depth and space for onsite queuing and parking;

b. Comments have identified the existing North Babylon Sonic restaurant’s drive-in canopy area as a major source of light and noise impact. Said canopy is located along the property line to the existing

residences (an orientation which maximizes the exposure to nearby residences) and is separated from the nearest residences by approximately 100 feet of lawn area. In contrast, the proposed Sonic restaurant's drive-in canopy area is located at least 105.6 feet from the property line, is oriented perpendicular to the existing residences (thereby minimizing exposure to adjacent residences), and will be separated from the nearest residences by an approximately 60 foot naturally vegetated buffer to be supplemented by two rows of evergreen trees. All of these factors associated with the proposed Sonic restaurant will be expected to mitigate the adverse light and noise impacts which have been associated with the North Babylon facility;

c. Comments have identified the existing North Babylon Sonic restaurant as an occasional source of food odors. The occurrence and intensity of such odors are largely a function of wind direction, which on Long Island is primarily from the south during the warmer months when windows are most likely to be open. The existing North Babylon Sonic restaurant is located to the south of the existing residences, whereas the proposed Sonic restaurant is north of the existing residences. In addition, the proposed vegetated buffer at the proposed Sonic restaurant is likely to inhibit the southward movement of air and its associated odors. Accordingly, the proposed Sonic restaurant would not be expected to result in odor-related impacts comparable to those experienced at the North Babylon location;

d. Comments have identified off-site parking problems with the existing North Babylon Sonic restaurant. Inspection of North Babylon Sonic restaurant reveals the presence of ten non-drive-in parking spaces on site. In contrast, the proposed Sonic restaurant site plan proposes the construction of 24 non-drive-in parking spaces on the 1.8 acre leased site. Further, the applicants' representatives have indicated that a surplus 83 parking spaces exist on the remainder of the overall 4.9 acre site. These factors are expected to mitigate the potential off-site parking impacts which have been associated with the North Babylon facility; and

e. Comments have identified off-site queuing problems with the existing North Babylon Sonic restaurant. Inspection of North Babylon Sonic restaurant reveals the presence of short driveways between Deer Park Avenue and the Sonic drive-in canopy areas. In contrast, the proposed Sonic site plan proposes the construction of two longer driveways with combined on-site queuing capacity of approximately 25 vehicles for the drive-in stalls and an additional nine vehicles for the drive-thru window. Further, the applicant's representatives have indicated that additional parking and/or queuing spaces exist on the remainder of the overall 4.9 acre site. These factors are expected

to mitigate the potential off-site queuing impacts which have been associated with the North Babylon facility.

F. Although concerns were identified regarding the potential difficulty of making southbound turns from the subject parcel onto Alexander Avenue, an adverse impact is not anticipated as the applicant has indicated a willingness to restrict the outbound driveway to right (northbound) turns.

At the BZA's November 13, 2012 meeting, the Board voted to issue a SEQRA negative declaration with regard to the petitioners' application. The respondent BZA then voted to deny the special exception application by a 3 to 2 vote. The respondent BZA also denied the other requested variances, as moot, and made no findings regarding them. The respondent BZA further determined that curb service is permitted as an accessory use to a counter-service restaurant. The respondent BZA issued findings with regard to the denial of the special exception pursuant to Sections 322-94 and 322-81 C(6) of the Town Code.

Petitioners now argue that the respondent BZA's determination must be annulled and vacated because it is arbitrary and capricious and not supported by substantial evidence.

Petitioners' application was for a special exception to permit a 2,100 square foot counter-service restaurant in a WSI district. 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*).

A review of the findings upon which the respondent BZA based its determination, the record, and the applicable law establishes that said determination is arbitrary and capricious because it is not supported by substantial evidence in the record. In reviewing the respondent BZA's findings, it is important to again note the conclusion reached by Town's Department of Environment: "Although concerns have been expressed regarding potential impacts associated with noise, fugitive light, odors, off-site parking, and off-site queuing of automobiles on the basis of such impacts having occurred at an existing Sonic restaurant in North Babylon, such impacts are not considered to be likely at this site..."

With regard to the 13 general standards set forth in §322-946 of the Smithtown Code, the relevant portions of the respondent BZA's findings are quoted below.

"Subsection (2)-requires that the plot area be adequate, but in no case less than the minimum area and frontage required in the district or more than the maximum floor area ratio. The lot meets the requirements in the ordinance but is not adequate to store all of the queued vehicles that can reasonably be expected. The applicant submitted a traffic study that concludes the site has space to store 34 vehicles waiting to use the drive-thru window and/or curb service stalls. However this overstates the space by 270% because it includes space necessary for general vehicular circulation for customers for the other restaurant on the site and for customers ordering inside the building." This conclusion of the BZA contradicted the traffic study and expert testimony which concluded that the queuing automobiles would not block ingress or egress to the parking spaces on the site. Furthermore, the findings fail to set forth any facts upon which this conclusion is based or how they calculated the supposed overstatement of available space.

The BZA continued in its findings, "[t]he assertions made by the residents at the hearing supported by testimony, photographs, videos, and newspaper articles, demonstrated that the only other Sonic restaurant on Long Island, located in North Babylon, has created significant traffic problems and noise. Board member Edward Benz visited the North Babylon Sonic and observed a long queue on more than one occasion. That eatery it is located 19 miles from the site. News reports showed that it created phenomenal traffic congestion for the first few weeks after it opened; vehicles were queued around the block and for over two miles. The congestion subsided after a few weeks." It is noted that Board member Benz mentioned that he had driven by once, the findings however, say that he had observed long queue on more than one occasion. He also did not give a time or date of his single visit. Therefore, his statement is of no probative value

The BZA found that "[m]oreover, the North Babylon Sonic attracts customers from great distances; only 3% are from the same zip code; 41% are from beyond Suffolk County." This finding, which is based on a chart taken from the internet by an opponent of the application, has no probative value since there is no source given for the statistics and, thus, no way to confirm their reliability. "We find the place remains an attraction and a gathering place for teenagers and college-age adults on Friday

and Saturday nights, generally until about midnight; the noise is obviously louder than it is for traditional counter-service restaurants, the evidence presented at the public hearing shows that nearby residents are disturbed by the noise.” Throughout its decision, the respondent Board ignores the multiple differences between the North Babylon Sonic site and the applicants’ site.

As already noted by the Town’s Department of Environment, the existing North Babylon Sonic restaurant’s drive-in canopy area has been identified as a major source of light and noise impact. Said canopy is located along the property line to the existing residences (an orientation which maximizes the exposure to nearby residences) and is separated from the nearest residences by approximately 100 feet of lawn area. In contrast, the proposed Sonic restaurant’s drive-in canopy area is located at least 105.6 feet from the property line, is oriented perpendicular to the existing residences (thereby minimizing exposure to adjacent residences), and will be separated from the nearest residences by an approximately 60 foot naturally vegetated buffer to be supplemented by two rows of evergreen trees.” The record also shows that music is played from speakers outside of the North Babylon Sonic. No such music will be playing at the Smithtown site. The North Babylon Sonic has an outdoor dining area. The petitioners herein requested an outdoor dining area on the north side but stated that they retract the request if it would interfere with the approval of the application. Without the music and the outdoor dining and with a vegetated buffer, the sound levels of the two sites are not directly comparable. In addition, the petitioners’ sound expert established that the sound from Sonic’s outdoor speakers would be inaudible from 48 feet away and the nearest residence is more than 100 feet away.

Next, we find that if the present application were approved, the traffic at the subject site would not be as bad for the first few weeks because the novelty has subsided. Further, it is common knowledge that the population density is lesser in this part of Long Island than the North Babylon location. Also, potential customers living in Nassau County and New York City would likely use the North Babylon site because it is about 20 to 30 minutes closer to those areas.

The evidence on the record shows that noise is a significant concern because customers eat and congregate outside instead of inside. The noise consists of loud shouting, laughter, engine revving and idling and car radios playing. According to testimony the neighbors adjacent to the North Babylon Sonic are bothered by the noise, and that it is significantly above the din of typical highway and business related noise.

Therefore we find that substantially the same noise will be generated by the proposal because the noise is inherent in the nature of the use. It is irrational to conclude that the customers would be quieter in the Nesconset location. Accordingly, we find the plot area is insufficient, inappropriate, and inadequate for the use intended.

As set forth above, there are significant differences (more will be noted below) between the two sites. Thus the sites are not comparable and the respondent BZA has proffered no evidence or empirical

data to support this finding. In addition to this, a zoning board cannot deny a special exception because of characteristics which are inherent to the operation of such business (*see Holbrook Associates Development Co. v McGowan*, 261 AD2d 620, 690 NYS2d 686 [2d Dept 1999])[Zoning Board improperly denied a special exception on the ground that the use was characterized by late hour noise, outdoor congregation, conversation, vehicular movement, rubbish and odors, which amounted to an objection to the nature of the use itself, and the denial also appeared to be impermissibly based, in part on generalized objections by members of the adjoining residential neighbor hood]; *Green v LoGrande*, 96 AD2d 524, 464 NYS2d 831 [2d Dept 1983][A restaurant and bar is a permitted use and since such a business is characterized by late hour patronage and traffic, this reason for denying the permit is meritless. It is tantamount to finding the use is undesirable, which runs contrary to the zoning plan permitting such use]; *see also Matter of North Shore Steak House v Board of Appeals of Inc. Vil. of Thomaston, supra*).

The BZA continued “[s]ubsection (3)-requires that the use not prevent the orderly and reasonable use of adjacent properties in adjacent use districts. Based on the North Babylon site the proposed site will not comply with this standard. The applicant proposes a buffer of 57 feet, however the buffer is only the existing woods. The woods are deciduous, and are not sufficient for six months per year to block out noise or glare. It is reasonable to adjust the site plan to provide a buffer sufficient for the application to be in compliance with the standards. There is sufficient slack in the layout to allow the structures and activities to be moved 15 feet further from the residences in the rear. This is sufficient for a small berm and a dense hedge of evergreens. The applicant stated that they would plant a row of evergreens at the curb, in part, to address this concern. While helping somewhat to alleviate the noise and light, it would not be enough.”

First it is noted that the 57 foot buffer complies with the Town Code’s buffer requirement. The Ragazzi restaurant next door, which has outdoor dining, is only required to have a 10 foot buffer. In addition to this, one of petitioners’ experts’ presented a photometric analysis which measured and analyzed the lighting proposed for the restaurant, and, using empirical data, concluded that the lighting is in compliance with the Town Code and that the lighting will not adversely impact the residential neighbor hood to the south. Thus, there is no factual basis for respondent BZA to find that the lighting is a basis for denying the application

The BZA stated “[m]oreover, for the reasons previously stated, the traffic hazards that would likely come about unreasonably impact the residential neighborhood immediately to the south. Much of the foreseeable traffic problems impacting the residential neighborhood would be lessened if there were no curb cut on Alexander Avenue but such condition would likely cause a different concern, such as queuing to get onto the site from Middle Country Road.” This again ignores the expert evidence with regard to traffic in the record without reference to any evidence or empirical data to support its finding.

“Subsection (4)- requires the site to be in a location that is particularly suitable relative to fire protection, water supply, sewage disposal, access, topography, and nearby land uses. To meet this standard requires a rational basis. Clearly, determining suitability should be made by comparing the special exception use to the uses permitted as of right.”

The BZA goes on to find that the application meets all of the standards until it gets to nearby land uses, where it states: “[t]he location is not suitable with respect to nearby land uses unless measures are taken to mitigate the impacts on the residential uses to the rear. As explained above, the Sonic type of counter-service restaurant generates more noise and glare than do typical counter-service restaurants.” However, the respondent BZA does not point to any evidence or empirical data in the record to support this finding. And as referenced above, the petitioners’ experts have established that the light from the site will not have an adverse impact on the residences to the south of the site. The respondent Board could also, as suggested in their findings, increase the buffer or require more planting in the buffer.

Subsection (7)-requires that special exception uses have to have access facilities that are adequate for the estimated public streets and sidewalks so to assure public safety and avoid traffic congestion. There was no testimony regarding traffic from public sidewalks, however, clearly the amount of traffic from sidewalks will be minimal, especially because the use is more auto-oriented than other counter service restaurants. No walkways from public sidewalks are depicted on the plans, but the site is large enough to be designed to allow pedestrians to safely access the building.

The access facilities are not adequate for the estimated traffic from public streets. Access facilities consist of curb-cuts, driveways, and sidewalks. As explained above, particularly for several weeks after opening. Vehicles queuing for the North Babylon location need to use the shoulder of the highway, however, there is no shoulder near the subject site.

While the applicant asserts that access to the site is adequate because there is an additional traffic aisle on the site to accommodate more queued vehicles than can fit in the queue lane, we find that this space is not available because it is necessary for access to the stalls for the existing restaurant. If vehicles back up on Middle Country Road, they will be in the travel lane, and this will pose a traffic hazard.

Once again, the petitioners’ traffic expert established that this finding is incorrect and that the queuing cars will not block access. The respondent BZA points to no evidence in the record to support this finding. In fact, as already noted, the report from the Town’s Department of Environment found that the North Babylon Sonic restaurant has ten non-drive-in parking spaces on site. In contrast, the proposed Sonic restaurant site plan proposes the construction of 24 non-drive-in parking spaces on the 1.8 acre leased site. Further, the applicants’ representatives have indicated that a surplus 83 parking spaces exist on the remainder of the overall 4.9 acre site. The respondent BZA once again ignored both the petitioners’ evidence and the Town’s experts and produced findings with no evidentiary support.

The BZA further stated “[t]he applicant submitted a traffic study that concludes that there will be a negligible increase in delays at the adjacent intersection. However, the traffic study did not study the spike of traffic for the several weeks the restaurant opens. This spike is unique to Sonic as demonstrated by the evidence of the record.” Again, the respondent makes this finding without any substantive

evidence to support it. While the record would support a finding that there is a spike in traffic when the first Sonic restaurant comes into a new area for the first time (Northern New Jersey, North Babylon, Long Island), there is no evidence in the record that this will happen with any subsequent opening in the area. Nor is there any evidence that such a “spike” is unique to Sonic.

The BZA goes on to find that the application meets all of the standards for curb cuts pursuant to §322-946 of the Smithtown Code.

Subsection (8)-requires that special exception uses provide adequate parking. The Zoning Board found the parking did meet the parking standards of the ordinance but also made two other findings:

“The site has parking for the existing restaurant, however, both restaurants are likely to be busy at the same times. Therefore, the use of shared parking is not applicable here.” Again the record shows that there are 83 additional parking spots on the overall site surplus to the requirements of both restaurants. This finding is also without any factual basis in the record.

“Moreover, the standard requires that the layout of stalls and driveways be conducive to safer operation. The application is not in compliance with this standard because one of the driveways will likely be a shortcut between the adjacent shopping center and Alexander Avenue. Alexander Avenue is a residential street, but is a main route to the Smithhaven Mall and Costco shopping center. Currently, motorists on Alexander Avenue to Costco or Ragazzi must first turn onto Middle Country Road. The proposed driveway will be a shorter, straight route, and it avoids two traffic signals. The other aisles have dimensions tight enough to calm traffic.” Once again, the respondent BZA has pointed to no proof to support that this speculation is correct, and even if this were the case, there is no evidence in the record to support a find that the layout is not conducive to safer operation of the site. In fact, the petitioners’ traffic expert opined that the layout was conducive to the best traffic flow on the overall site.

The BZA continued “[s]ubsection (9)--requires that special exception uses have buffer yards and screening to protect the adjacent properties and land uses. We find that the application does not meet this standard. As described above, a Sonic type of counter-service restaurant is different from other counter service restaurants. It is primarily an auto oriented outside restaurant. Based on the evidence submitted of the Sonic restaurant in North Babylon, the canopy, lighting, engine idling and congregating is far more impacting than is the typical counter service restaurant. The noise, glare, and visual character would impact the adjacent residents to the south. Sonic proposes a 57-foot buffer zone, however, it is sparse deciduous wooded area. For six months of the year it would not screen the glare. Based on site inspection, it is likely that even in the Summer the glare of the canopy and parking lot would be visible from the homes. In addition, it is well known that woods are ineffective in reducing noise levels, even with the evergreen additions proposed by the applicant.” The record contains no evidence to support this “well known” fact. Furthermore, there is no evidence in the record to support the other “findings” contained in this paragraph.

To determine whether the standard is met it is necessary and appropriate to compare the special exception to uses permitted by right. A conventional restaurant with only a ten-foot buffer is permitted by the

zoning ordinance. The noise and glare from the Sonic are much worse than the noise and glare from a typical restaurant. Furthermore, a typical use is required to plant a row of evergreen trees, and that is much more effective than the equivalent deciduous buffer. But because the intense nature of the noise we would expect from this type of industry, we find that the proposed special exception would impact the adjacent residents more than uses permitted by right.

Again, this finding is not supported by any facts in the record.

Pursuant to Subsection (13) the BZA found the proposal to be consistent with the Town's Comprehensive plan.

The BZA also made findings pursuant to Section 322-81 C(6) of the Town Code. Subsection (b) requires, for this type of special exception use, landscape buffers at least 25 feet deep along the front and rear property lines. The BZA found that the application complies with this standard as well as the standards with regard to curb cuts and drive thru windows. However, the BZA found, under subsection (d):

The second part requires that a queuing line be provided is sufficient to prevent queued cars from interfering with ant traffic on any highway or parking area. For reasons described above we find that the proposal does not meet this part. The queuing lane is 160 feet long, and is long enough for eight vehicles if they queue more tightly than normal. Part of the queue has a bypass lane, but this does not add to the capacity of the lane. Eight is enough for a typical counter-service restaurant, but several photos of the existing Sonic in North Babylon show at least 10 vehicles queued on the street before even getting into the site. Further, videos submitted from YouTube show dozens of vehicles cued in the street. In addition, there was a customer who said he had to wait 10 to 15 minutes to get into the site, and this was four months after the business opened.

The applicant states that there is capacity on site to queue another 17 vehicles, however, these would block access to four parking stalls, and would block normal circulation for the proposed counter service restaurant and the existing restaurant.

Once again, this finding contradicts the traffic study and petitioners' experts without any evidence or empirical data to support such findings.

In sum, the record herein reveals that the respondent improperly bowed to community pressure in making its determination. The complaints of the neighbors, as well as the findings of the respondent BZA, were uncorroborated by any empirical data or expert testimony, and, therefore, were insufficient to counter the expert testimony presented by the petitioners, as well as that of the Town's own

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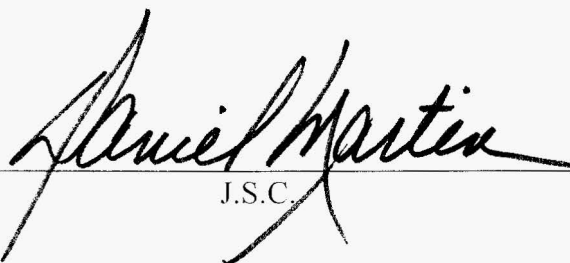
environmental department. Thus, the respondent BZA's determination is not supported by substantial evidence (*see Greenfield v Board of Appeals of the Village of Massapequa Park*, 21 AD3d 556, 800 NYS2s 728 [2d Dept 2005]; *Matter of Twin County Recycling Corp. v Yevoli, supra*).

By order dated October 10, 2013, this court allowed intervention by the individual respondents herein. The individual respondents have raised the affirmative defense that this action is barred by the 30 day statute of limitations set forth in Town Law 267-c. The petitioners, in fact, filed their Article 78 proceeding on December 21, 2012, approximately 35 days after the challenged BZA decision was filed with the Town Clerk. However, on October 26, 2012, as a result of problems caused by Hurricane Sandy, Governor Cuomo issued Executive Order 47, which, among other things, suspended the statute of limitations. This suspension continued until it was lifted, pursuant to another Executive Order of the Governor, on December 25, 2012. Thus, this proceeding was timely filed, and the individual petitioners' affirmative defense must be dismissed.

Accordingly, the determination by respondent dated November 26, 2012 is vacated and annulled and the matter is remitted to the BZA for reconsideration of the petitioners' application for variances and the making of specific factual findings in proper form, including a discussion of all five elements set forth in Town Law § 267-b[3][b] with regard thereto, and, thereafter, for the issuance of the special exception permit, subject to any conditions or restrictions as may be appropriate.

Submit judgment

3/25/14


J.S.C.