Colin Realty Co. LLC v Town of N. Hempstead

2012 NY Slip Op 30483(U)

February 14, 2012

Sup Ct, Nassau County

Docket Number: 009407-11

Judge: Steven M. Jaeger

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

COLIN REALTY CO. LLC,

Petitioner,

-against-

TOWN OF NORTH HEMPSTEAD, TOWN OF NORTH HEMPSTEAD BOARD OF ZONING AND APPEALS and DAVID L. MAMMINA, DONAL MCCARTHY, PAUL ALOE, LESLIE FRANCIS, ANA KAPLAN, as Members thereof, and MANHASSET PIZZA LLC, and FRADLER REALTY CORPORATION,

Respondents.

TRIAL/IAS, PART 41
NASSAU COUNTY
INDEX NO.: 009407-11
XXX
MOTION SUBMISSION
DATE: 9-16-11

MOTION SEQUENCE
NO. 1

The following papers read on this motion:

Notice of Petition, Verified Petition, and Exhibits	X
Verified Answer (Defts. Manhasset Pizza and Fradler Realty)	X
Verified Answer and Return (Defts. Town of North Hempstead and Town of North Hempstead Board of Zoning and Appeals)	X
Affidavits of Service	X
Memorandum of Law (Defts. Manhasset Pizza and Fradler Realty)	X
Memorandum of Law (Petitioner)	X
Reply Memorandum of Law (Petitioner)	X
Respondents' Memorandum of Law	X

Hybrid declaratory judgment action and proceeding pursuant to CPLR Article 78 by the petitioner-plaintiff Colin Realty Co., LLC for an order, *inter alia*, setting aside and annulling a determination of the respondent North Hempstead Board of Zoning and Appeals, dated May 25, 2011, which granted an application

by the respondents Fradler Realty Corporation and Manhasset Pizza, LLC for, *inter alia*, a conditional use permit and related variances.

In February of 2011, the respondent Manhasset Pizza, LLC ["Manhasset Pizza"], applied to the North Hempstead Board of Zoning and Appeals [the "Board"], for: (1) a conditional use permit; and (2) related, off-street parking and loading variances, so as to convert a non-conforming, commercial building into a proposed 45-seat dine-in restaurant – which would also have no off-street parking (Town Code §§ 70-126A;70-103[A][1], [B], [F]; 70-208[C]-[G] *see also*, § 70-225[B]). Significantly, the subject storefront in question has been vacant since 2007, but had previously been operated as a retail gift shop (Hearing Transcript ["H"] at 90, 108, 138).

Currently, the Code-prescribed standards for the proposed restaurant use require a minimum of 24, off street parking spaces, together with one loading zone (*see,* Town Code § 70-103[A][1])(H 94-95). The subject building – which fronts onto the west side of Plandome Road and is located in a Business "A" zone – has been owned since 1938 by Fradler Realty Corporation ["Fradler"], but possesses no Code-compliant, off-street parking, thereby necessitating the granting of variances from the above-noted parking requirements.

The petitioner-plaintiff, Colin Realty Co., LLC ["Colin"], also owns multi-tenanted retail property fronting on the west side of Plandome Road, which property is located directly immediately adjacent and to the north of the Fradler property (Pet., ¶¶ 10, 18). Colin's property possesses appurtenant parking for some 31 vehicles in a rear-located directly abutting parking lot to the west (H 102-103). Although the main store entrances of both the Colin and Fradler parcels both front on Plandome Road, each property also has (or had) an active, rear entrance by which customers parking directly behind the store complexes can access the properties (Pet., Exh., "C"; Return, Exhs., "14"-"16").

The Colin-owned stores and rear lot are directly bordered and abutted to the west by an uninterrupted (unbordered) portion of a public parking lot – "Lot No. 5" – and to the south, by a much smaller, "paved area" in a corner location directly behind the proposed restaurant. The three parking lot areas (public lot "5", the Colin lot and the smaller "paved area"), exist as a single, continuously paved surface, with no visible property lines and/or permanent physical barriers which would prevent a vehicle from traveling from one area of the lot to another (H 103-104). Notably, there is a second, physically separate municipal lot (Lot "4") across a smaller street (Locust Street) to the west, in close proximity to the subject lot complex, which – together with Lot 5 – provides some 100 municipal parking

spaces (Dec., at 5, ¶ 7). By virtue of its corner location, however, the "paved area" of the rear parking lot complex, together with the rear entrance of the proposed restaurant, is "land locked," *i.e.*, the only way to gain access thereto (by car), is to proceed from the street, through the main public lot and then to the right through the portion of the lot owned by Colin (Pet. Exh., "D"; Return Exhs., "7", "14"). In the past, the land locked portion of the lot has been utilized by Fradler for, customer access, deliveries and garbage pick-up.

After conducting a hearing on Manhasset Pizza's application, at which both Manhattan Pizza and Colin produced traffic experts, the Board granted the conditional use permit and the parking/loading variances.

Among other findings, the Board's 13-page decision notes that Manhattan Pizza's traffic expert conducted an empirical parking analysis, utilizing on-site observational techniques which revealed that there existed ample, parking to support the proposed use; namely, that some 32 open spaces were available, even during peak hours – primarily in nearby municipal lots (Dec., at 5, ¶ 12, 10-11; H97; Lutz Report at 2-4 ["Table 1A"]).

Based upon this evidence, and additional findings relating to the impact of the proposed restaurant proposal, the Board determined, *inter alia*, that: (1) the issuance of the parking variances would not generate an adverse impact upon the

subject neighborhood; and (2) that the underlying restaurant use would be in harmony with the surrounding Plandome area, which the Board described as a "vibrant downtown area where, within a 300-foot radius of the subject property, there were "12 other food uses, including restaurants and/o delicatessens of similar size or layout" (Dec., at 8-11). The Board also observed that the presence of a conditionally permitted restaurant use – as opposed to a vacant storefront – would not only be consistent with the character of the surrounding location, but at the same time, contribute to the growth and development of the community (Decision at 9).

Although the Board acknowledged that the parking variance was mathematically significant (technically 100%, since no off-street parking existed), the Board found that the "substantiality of a variance cannot be viewed solely by a comparison of the percentage [of] deviation" from the Code, but should be tempered by an assessment of the larger, overall actual impact upon the community which the deviation would create (Dec., at 10). With this in mind, the Board concluded that the granting of the variances would not generate deleterious or adverse affects upon the surrounding location (Dec., at 10).

Lastly, while there was evidence that the small, "paved area" lot formerly utilized by Fradler had become land locked, in the sense that the lot could not be

reached without first traversing or driving across Colin's portion of the lot, the Board concluded that Colin possessed viable options in the event of illegal parking or "trespassing" (Dec., at 8-9).

Thereafter, by verified petition/complaint dated June 2011, Colin commenced the within, hybrid action and proceeding for declaratory relief setting aside and annulling the Board's May 25 determination. Issue has been joined and the matter is now before the Court for review and resolution of Colin's claims and the Respondents' opposing objections.

The petition should be denied and the proceeding/action dismissed on the merits.

It is settled that "[l]ocal zoning boards are vested with broad discretion in considering applications for area variances, and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary and capricious, or an abuse of discretion" (*Wallach v. Wright*, ___ AD3d___, 2012 WL 234033 [2nd Dept. 2012]; *JSB Enterprises, LLC v. Wright,* 81 AD3d 955, 956 *see, Gebbie v. Mammina*, 13 NY3d 728, 729 [2009]; *Pecoraro v. Board of Appeals of Town of Hempstead,* 2 NY3d 608, 612-613 [2004]; *Matter of Ifrah v Utschig,* 98 NY2d 304, 307 [2002]). Further, "[u]nlike a variance, which gives permission to an owner to use property in a manner inconsistent with a local

zoning ordinance, a special exception involves a use permitted by the zoning ordinance * * * [and] [a]ccordingly, an applicant's burden of proof is much lighter than the burden on one seeking a variance" (*Franklin Square Donut System, LLC v. Wright*, 63 AD3d 927, 929 *see, Retail Property Trust v. Board of Zoning Appeals of Town of Hempstead*, 98 NY2d 190, 196 [2002]; *Capriola v. Wright*, 73 AD3d 1043, 1045). "While a property owner is not entitled to a special use permit merely for the asking, once it is shown that the contemplated use is in conformance with the conditions imposed, the special use permit must be granted unless there are reasonable grounds for its denial, supported by substantial evidence" (*Plaza Associates, L.P. v. Town Bd. of Town of Babylon*, 250 AD2d 690, 693 *see, Retail Property Trust v. Board of Zoning Appeals of Town of Hempstead*, *supra*; *Capriola v. Wright*, *supra*, 73 AD3d 1043, 1045).

With these principles in mind, the Court agrees that the challenged determination is rationally based on the extensive evidentiary record developed before the Board and comports with the relevant statutory criteria (*e.g.*, Town Code §§ 70-126[A]; 70-225[B]; Town Law § 267-b[3][b]).

More specifically, and with respect to the conditional use permit component of the challenged determination (Dec., 10-13), the evidence supports the Board's findings, *inter alia,* that the subject location is a commercially active, downtown-

type location characterized by a variety of proximately located restaurant uses and retail establishments; that the proposed restaurant use is of a scope, character, and design appropriate to, and in harmony with, these surrounding uses; and that the petitioner's restaurant will neither materially hinder, impair or discourage the appropriate use and development of the adjacent uses (*see generally, Matter of Lerner v Town Bd. of Town of Oyster Bay,* 244 AD2d 336, 337; *Green v Lo Grande,* 96 AD2d 524, 525 *see also, Framike Realty Corp. v. Hinck,* 220 AD2d 501, 502; *Matter of C.B.H. Props. v Rose,* 205 AD2d 686, 687; *Matter of Burke v Denison*, 203 AD2d 642, 643-644). Indeed, "[t]he classification of a particular use as permitted in a zoning district 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' * * *" (*Twin County Recycling Corp. v. Yevoli, supra,* 90 NY2d 1000, 1001-1002 [1997]; *Matter of North Shore Steak House v. Board of Appeals of Inc. Vil. of Thomaston*, 30 NY2d 238, 243–244 [1972]; *Matter of Capriola v Wright,* supra, 73 AD3d 1043; *Eleven, Inc. v. Board of Trustees of the Inc. Village of Mineola*, 289 AD2d 250).

Colin further contends that the Board's decision is "wrong" because, *inter alia*, in its view, the proposed restaurant will "overwhelm" limited parking in the downtown area (Pet. Main Brief, 7-10). Although there was conflicting evidence

and opposing expert testimony relating to what impact the use would have upon, *inter alia*, parking, access to the proposed restaurant, loading and/or congestion in the surrounding area, the empirical evidence presented by the petitioner's traffic expert was to the effect that even during peak times, there would be ample parking spaces within the surrounding location (*Matter of Oyster Bay Dev. Corp. v Town Bd. of Town of Oyster Bay*, 88 AD2d 978 *see*, *Matter of Lerner v Town Bd. of Town of Oyster Bay, supra,* 244 AD2d 336, 337, *Matter of Gordon & Jack v Peterson*, 230 AD2d 856, 857; *Matter of C & A Carbone v Holbrook*, 188 AD2d 599, 600 *see also*, *Green v. Lo Grande, supra,* 96 AD2d 524). Where, as here, there are grounds in the record supporting the challenged determination, "deference must be given" to the commonsense judgments of the board," which is composed of community members who "generally, possess the familiarity with local conditions necessary to make the often sensitive planning decisions which affect the development of their community'" (*Pecoraro v. Board of Appeals of Town of Hempstead, supra,* 2 NY3d at 613, *quoting from, Matter of Cowan v. Kern*, 41 NY2d 591, 590 [1977]; *Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead*, *supra*, at 196; *Conley v Town of Brookhaven Zoning Bd. of Appeals*, 40 NY2d 309, 314 [1976]).

The record further supports the related conclusion that the Board rationally engaged in the statutorily mandated balancing test by, *inter alia*, "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" (*Wallach v. Wright, supra, quoting from, Matter of Ifrah v. Utschig, supra*).

At bar, there was ample evidence before the Board upon which the granting of the variances could be lawfully predicated. While the off-street parking variances were substantial, the mathematical scope of a requested variance is not alone determinative (*see, Matter of Cacsire v City of White Plains Zoning Bd. of Appeals*, 87 AD3d 1135, 1137; *Matter of Filipowski v Zoning Bd. of Appeals of Vil. of Greenwood Lake*, 38 AD3d 545), particularly, where as at bar, there was evidence on which the Board could rely, that the overall impact of granting the request would not adversely, or otherwise result in an undue detriment to the health, safety, and welfare of the neighborhood or community as a whole (*Matter of Cacsire v City of White Plains Zoning Bd. of Appeals, supra,* 87 AD3d 1135). The record indicates in this respect that many of the buildings in the general area were constructed prior to the enactment of the Code's off-street parking requirement and would also require variances in differing degrees.

Contrary to Colin's contentions, the Board heard and weighed all the relevant evidence before it, including Colin's claims relating to the issue of customer access to the proposed restaurant from the adjacent, rear-located parking lots. Significantly, in "applying the balancing test set forth in Town Law § 267-b(3)(b), [a] Zoning Board is 'not required to justify its determination with supporting evidence with respect to each of the five [statutory] factors, so long as its ultimate determination balancing the relevant considerations was rational'" (*Matter of Genser v. Board of Zoning & Appeals of Town of N. Hempstead*, 65 AD3d 1144, 1147, *quoting from, Matter of Merlotto v. Town of Patterson Zoning Bd. of Appeals*, 43 AD3d 926, 929 *see also, Steiert Enterprises, Inc. v. City of Glen Cove,* 90 AD3d 764, 767).

Although Colin may disagree with the Board's conclusions (*see*, *Town of Hempstead v. The Town of Hempstead*, 2011 NY Slip Op 32538(U), [Supreme Court, Nassau County, 2011]), where, as here, a rational basis exists for a challenged decision, reviewing courts must refrain from substituting their own judgment for that of a zoning board, even if the court would have decided the matter differently and/or if "a contrary determination is supported by the record' (*Matter of Metro Enviro Transfer, LLC v Village of Croton-on-Hudson*, 5 NY3d

236, 241 [2005]; *Matter of Retail Prop. Trust v. Board of Zoning Appeals of Town of Hempstead*, *supra*, 98 NY2d at 196).

Similarly, and upon the facts presented, the Board properly reviewed the parking variances in conformity with the criteria applicable to "area" variances, as opposed the criteria applicable to "use" variances (*Matter of Marro v Zoning Bd. of Appeals of City of Long Beach*, 287 AD2d 506; *Matter of Il Classico Rest. v Colin*, 254 AD2d 418, 419 *see generally*, *Matter of Overhill Bldg. Co. v Delany*, 28 NY2d 449, 454 [1971]; *Grogan v. Wright*, 52 AD3d 601, 602; *Matter of Riley v Village of Pittsford Zoning Bd. of Appeals*, 46 AD3d 1359, 1361; *Matter of Center Sq. Assn., Inc. v City of Albany Bd. of Zoning Appeals*, 19 AD3d 968, 971; *Merrick Gables Ass'n v. Fields*, 143 AD2d 117, 121 *see*, Rice, *Practice Commentaries*, McKinney's Cons. Laws of N.Y., Book 61, Town Law § 267–b, at 294-295)[the "classification of a parking variance under any circumstances as a use variance is contrary to the established distinction between such forms of relief"] *cf.*, *Matter of Off Shore Rest. Corp. v Linden*, 30 NY2d 160, 168 [1972]). The Court notes that the foregoing parking "use" variance theory has been developed as an argument point for the first time in Colin's reply brief, and was not – insofar as the record indicates – specifically raised either before the Board or currently in Colin's complaint/petition (*Compare*, Main brief at 3-7, *with,* Reply

Brief, at 6-9)(Town Resp's Ans., ¶ 22 [3rd Aff. Def])(*see, Leon Petroleum, LLC v. Board of Trustees of Inc. Village of Mineola,* 309 AD2d 804, 806).

Also unpersuasive is the assertion that the Board unlawfully granted the special permit because the proposed restaurant allegedly constituted an unconditionally prohibited and/or nonconforming use in the subject zone, for which a "use" variance was required (Town Code §§ 7-208[F], 208[C]-[F]; 7-103[A][1]; Town Law § 267-b *see, Board of Com'rs of Great Neck Park Dist. v. Board of Zoning and Appeals of Town of North Hempstead*, 188 AD2d 464; *City of New York v. Bilynn Realty Corp.*, 118 AD2d 511, 513 *cf., Matter of Traveler Real Estate v Cain,* 160 AD2d 1214, 1215; *Matter of Angel Plants v Schoenfeld,* 154 AD2d 459, 460; *Biener v. Incorporated Village of Thomaston*, 98 AD2d 785)(Pet's Main Brief, at 1-2; 3-7).

Preliminarily, the record indicates that both the Board and the parties generally proceeded upon the assumption that the application involved a non--conforming "building" (based on the variances required) – as distinguished from a conceptually distinct, non-conforming "use" (H-131)(Dec., at 4)(*see generally*, 1 N.Y. Zoning Law & Practice, § 10:02; 4 Rathkopf's The Law of Zoning and Planning, § 72:5 [4th ed. 2011 update]; 8A McQuillin, The Law of Municipal Corporations, § 25.180.50 [3rd ed 2011 update]; *Dawson v. Zoning Bd. of Appeals*

of Town of Southold, 12 AD3d 444, 445; *Amzalak v. Incorporated Village of Valley Stream*, 220 NYS2d 113, 115 [Supreme Court Nassau County 1961] *see also*, *Matter of Biener v Incorporated Vil. of Thomaston*, 85 AD2d 730, 732-733).

In any event, the Court agrees that the proposed restaurant was not a non-conforming and/or prohibited use within the meaning of the Town Code or otherwise, *i.e.*, a use, *inter alia*, unconditionally excluded from the district which, if permitted, will generally "result in a use of the land in a manner inconsistent with the basic character of the zone" (*e.g.*, *Matter of Consolidated Edison Co. of N.Y. v Hoffman,* 43 NY2d 598; *Matter of C & A Carbone v Holbrook*, *supra*, 188 AD2d 599, 600 *cf., Matter of Traveler Real Estate v Cain,* 160 AD2d 1214, 1215; *Matter of Angel Plants v Schoenfeld,* 154 AD2d 459, 460; *Biener v. Incorporated Village of Thomaston*, *supra,* 98 AD2d 785). Rather, restaurants are conditionally permitted in the zone, and therefore deemed presumptively consistent with the basic character of the surrounding community (*Twin County Recycling Corp. v. Yevoli*, *supra*, 90 NY2d 1000, 1001-1002). Additionally, conditionally permitted uses are authorized by zoning authorities based upon significantly different standards and burdens of proof from those applicable to use variances (*Retail Property Trust v. Board of Zoning Appeals of Town of Hempstead*, *supra*, 98 NY2d at 195-196; *Capriola v. Wright*, *supra*, 73 AD3d 1043 *cf., Matter of Elm St.*

NY2d at 195-196; *Capriola v. Wright*, *supra*, 73 AD3d 1043 *cf., Matter of Elm St. Assoc. v Sniado*, 159 AD2d 570, 571).

Colin's reliance upon the Second Department's holding in *Board of Com'rs of Great Neck Park Dist. v. Board of Zoning and Appeals of Town of North Hempstead*, 188 AD2d 464), is misplaced since there, the issue was whether an already unconditionally non-conforming use (a retail store), then located in a residential zone, could be altered so to permit the applicant to engage in yet another non-conforming and prohibited use in the same residential zone (a Chinese take out restaurant) – an alteration which the Court ruled could not be authorized absent the issuance of a use variance (*see*, *Board of Zoning and Appeals of Town of North Hempstead*, *supra*).

Lastly, the Board did not err in declining to consider and/or credit a petition objecting to the application submitted by certain surrounding property owners after the hearing proceedings were closed (Pet., Exh., "E" *see also*, Exh., "D")(*see*, *Matter of Hampshire Mgt. Co. v Nadel*, 241 AD2d 496). In any event, the two sentences set forth in the petition are conclusory and non evidentiary in nature and merely voice generalized community objections (Pet., Exh., "E")(*see, Metro Enviro Transfer, LLC v. Village of Croton-on-Hudson*, 5 NY3d at 240; *Pecoraro v. Board of Appeals of Town of Hempstead, supra,* 2 NY3d at 613; *Goldsmith v.*

Bishop, 264 AD2d 775, 776; *Matter of C & A Carbone v Holbrook, supra*, 188 AD2d 599, 600).

The Court has considered Colin's remaining contentions and concludes that they are lacking in merit.

Accordingly, it is,

ORDERED that the petition is denied and proceeding/action is dismissed on the merits, and it is further,

ORDERED and **DECLARED** that the respondent North Hempstead Board of Zoning and Appeals lawfully rendered the challenged determination by which it granted the subject application.

The foregoing constitutes the Order and Decision of the Court.

Dated: February 14, 2012

STEVEN M. JAEGER, A.J.S.C.

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