

Matter of 7-Eleven, Inc. v Town of Babylon
2017 NY Slip Op 31467(U)
July 7, 2017
Supreme Court, Suffolk County
Docket Number: 09290/2016
Judge: William G. Ford
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

COPY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE SUPREME COURT

Motion Submit Date: 06/0/17
Motion Seq #: 001 Mot D; CASE DISP

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In the Matter of the Application of

7-ELEVEN, INC. & LOUHAL PROPERTIES,
INC.,

Petitioners,

PETITIONERS' COUNSEL:
Amato Law Group, PLLC
666 Old Country Road, 9th Floor
Garden City, NY 11530

For a Judgment Pursuant to CPLR Article 78

-against-

THE TOWN OF BABYLON, THE TOWN OF
BABYLON PLANNING BOARD, & ANN
MARIE JONES, in her capacity as the
Commissioner of the TOWN OF BABYLON
DEPARTMENT OF PLANNING &
DEVELOPMENT,

Respondents.

RESPONDENTS' COUNSEL:
Joseph Wilson, Esq.
Babylon Town Attorney
200 E. Sunrise Highway
Lindenhurst, NY 11757

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Upon the following papers read on the Verified Petition pursuant to CPLR Article 78; Notice of Petition and Verified Petition, Memorandum of Law in Support and supporting papers dated September 26, 2016; Verified Answer dated October 13, 2016; Memorandum of Law in Opposition dated October 13, 2016; Certified Administrative Return dated October 12, 2016; Replying memorandum in further support and supporting papers dated November 2, 2016; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the this special proceeding commenced by petitioner's Verified Petition pursuant to CPLR Article 78, seeking a determination vacating, annulling or otherwise setting aside a determination by respondents the Town of Babylon, the Town of Babylon Planning Department and Ann Marie Jones, Chairwoman of the Town of Babylon Planning Department is granted solely to the extent thoroughly discussed below.

Petitioner 7-Eleven Incorporated and Louhal Properties, Inc. (hereinafter referred to as "petitioners" or "7-Eleven") brought this proceeding against respondents the Town of Babylon,

the Town of Babylon Planning Department and Ann Marie Jones, Chairwoman of the Town of Babylon Planning Department (“Town Respondents”) arising out of the denial of both a building permit application and application for site plan review concerning a parcel of commercial real property situated within the Town at 550 Straight Path, Wyandanch, Suffolk County, New York owned by petitioners.

Petitioners submitted an application before the Town of Babylon Planning Department (“Planning Dept.”) seeking site plan review on or about July 17, 2012, pursuant to Babylon Town Code § 186-6(A)(5), and for a building permit and certificate of occupancy under Babylon Town Code § 186-1(b) & 186-3 respectively. In its present condition, the property is improved by a defunct automobile repair shop with garage and canopies for an abandoned gasoline service station. The property is situated with 6th Avenue on its west and 7th Street on its north, both areas comprised of adjacent residential neighborhoods. Petitioners sought to tear down the existing use and improve it with a 24 hour 7-Eleven convenience store, a use they contend is a permissive commercial use as of right pursuant to Babylon Town Code § 213-129A.

In connection with petitioners’ application, the Town respondents replied with comments throughout the process, from various levels of Town government charged with providing input on the proposed land use. The Planning Dept.’s Building Division issued an initial memorandum dated July 19, 2012, followed by comments from several other entities concerning traffic safety, engineering, fire marshal, environmental control, highways and planning departments. The comments were dated from July 19, 2012 through October 26, 2012, and were acknowledged received by petitioners between October 25 & 26, 2012.

To address the initial comments and concerns raised by respondents, petitioners provided architectural drawings and a revised site plan on or about February 25, 2013 and forwarded correspondence prepared by High Point Engineering, an expert engineering firm retained by petitioners in support of their applications, dated February 21, 2013. The Town respondents having received this submission issued further comment dated November 21, 2013 and transmitted those written comments to petitioners by fax on December 5, 2013. Petitioners thereafter incorporated that critique into their proposal going forward.

Planning Dept.’s Traffic Division (“Traffic Division”) then issued further comment on October 3, 2012 objecting to it for several reasons: insufficient customer truck parking on site; an inadequate delivery truck loading zone; inadequate setbacks for trash enclosure, mechanical equipment and all of the same being too close in proximity to residential dwellings located on 7th Street. Further, a question was raised as to the propriety or appropriateness of 7-Eleven siting an additional convenience store at the subject site since another location was already operating half a mile away on Straight Path. The Traffic Division also raised a concern that access to the site, both ingress and egress for truck traffic as designed would cause increased traffic overflow and parking onto the nearby residential streets, 6th Ave and 7th St.

In an effort to address the Traffic Division’s comments and concerns, petitioner again revised the site plan and provided additional correspondence from their engineer in or around February 2013. Specifically addressing issues concerning truck parking and traffic, petitioners revised the site plan to include 3 customer truck parking spaces and a dedicated delivery truck loading zone. Further, petitioners represented that they would restrict

all deliveries to be box truck only. Petitioners also made further modifications to the trash enclosure and loading zone to attenuate sound and improve visual screening.

In or around November 2013, the Traffic Division responded by memorandum to petitioners' revised site plan noting that all prior concerns and objections were met. Particularly, in its memo the Traffic Division focused on the dedicated customer truck parking stalls as meeting the concern that potential truck traffic would spillover to 7th St and 6th Ave, as well as address the requirement of serving the recurring needs of a truck driving customer base.

A public hearing was held in connection with petitioners' applications before the Babylon Planning Board. Counsel and an engineer appeared on petitioners' behalf. At the hearing, further requests for revision of the site plan were made centering on changing the flow of traffic onto 7th St; acceptance of a deed covenant and restriction by petitioners to prohibit tractor trailer truck deliveries; acceptance of a deed covenant and restriction by petitioners to restrict delivery hours; acceptance of deed covenant and restriction by petitioners to prohibit truck parking on residential streets; acceptance of a deed covenant and restriction by petitioners to limit the hours of operation of the convenience store, and provision of security protocol to the Town. Petitioners agreed to all of the covenants and restrictions with the exclusion of limiting the convenience store to anything but a 24 hour operation. The public hearing was left open pending the submission of a traffic study into the record. The resulting traffic study found that the majority of vehicle traffic was relegated to Straight Path with no major impact to pedestrian or bus stop safety.

Respondents received a fair degree of concern, comment and opposition from the public on petitioners' application. Taking the form of various letters and a citizen's petition with signatures, residents in or around the area of the site voiced opposition and concern regarding increased vehicle traffic near the residential neighborhood, and a decrease in residential property values; increase in crime and decreased public safety.

Also received into the public record was correspondence dated January 27, 2014 from Michael McArdle, the franchisee/proprietor of the other 7-Eleven store location on Straight Path. By his unsworn letter, McArdle made a few points, which later would loom large in the disposition of petitioners' applications. He stated concerns, shared by some nearby residents as to the propriety of siting an additional 24 hour convenience store, half a mile away from his location, which he believed would lead to oversaturation and increased competition. McArdle noted that his store provided surplus food as donations to surrounding charitable organizations and believed that might decrease in the future. Lastly, McArdle questioned the enforceability of petitioners' suggested prohibition of tractor trailer truck deliveries, stating that in his experience certain vendors or suppliers would make delivery by tractor trailer anywhere from 11:00 p.m. through 6:00 a.m.

In light of the public's testimony, the public record was held open and extended, over petitioners' objection, from February 4, 2014 to March 31, 2014. In the interim, the Traffic Division sent by fax a new memo on February 24, 2014, citing additional overriding concerns on truck parking and traffic. As a result, the Traffic Division stated that until its concerns on whether petitioners would provide adequate parking for customer trucks to prevent increased truck traffic on adjacent residential roadways, it advised absent further site plan revision, no further action or review on the application would take place.

Thereafter, petitioners made additional site plan changes and presented them to the Traffic Division and certain residents at an informal meeting held on April 17, 2014. At that time, petitioner reiterated their commitment to accepting only box truck deliveries, as well as modifying customer truck parking stalls to accommodate tractor trailer trucks for parking and in the loading zone. Petitioners filed the newly revised site plan with respondents in May 2014 to address the Traffic Division's outstanding concerns which specifically closed off the access points located at 7th St and 6th Ave; installed fencing along 7th St to reduce vehicle headlights in the residential community; relocated the trash enclosure and loading zone to improve delivery truck maneuverability; redesigned the truck parking stall to accommodate tractor trailer truck; relocated mechanical equipment to roof further away from adjacent residential neighborhood; increased landscaping to improve visual screening; added additional parking space; and eliminated the pedestrian walkway at 6th Ave sidewalk.

Subsequently, the Traffic Division authored an additional memo dated July 23, 2014. That communication found further fault with petitioners dedicated customer truck parking stall as inadequate to sufficiently accommodate the most common tractor trailer truck model, in its view.

Petitioners filed their final site plan on May 7, 2015, accompanied by engineered drawings, a traffic study dated April 15, 2015, a planning study dated April 6, 2015, an appraisal dated April 20, 2015 and accordingly they requested final closing of the hearing on their applications. Also submitted in support of petitioners' final site plan was an affidavit from Kenneth Barnes, regional senior director for 7-Eleven, Inc.

The Barnes affidavit was submitted in direct opposition to McArdle's testimony. Barnes testified that he had 35 years experience working for 7-Eleven in various capacities, but in his most recent position, he had authority to oversee all 7-Eleven deliveries *inter alia* on Long Island. Further, Barnes testified that he had direct, personal and firsthand knowledge of 7-Eleven's policies and practices regarding the use of suppliers and vendor deliveries. He stated under oath that 7-Eleven had both the capacity and authority to enter into or agree to deed covenants and restrictions to limit all deliveries to by box truck only at the subject location. Further, Barnes swore the 7-Eleven could restrict truck delivery hours to between 12:00 a.m. to 5:00 a.m. for newspapers and fresh produce. Concerning enforceability of the tractor trailer delivery prohibition, Barnes relayed that 7-Eleven suppliers and vendors operate on an "honor system."

Additionally, petitioners submitted an affidavit by their engineer Chris Tartaglia, P.E., purporting to be a comparative analysis of 7 similarly situated "as-of-right" commercial land uses previously approved by respondents in the previous two years. In sum and substance, the Tartaglia affidavit proposed that petitioners' proposed use was superior to other commercial uses approved by the Town respondents in the previous 2 years. Moreover, by the affidavit, petitioners also argued that none of the 7 prior approved site plans was required by Town Code to provide onsite customer truck parking. Further, petitioners claim by their engineer's analysis that 4 of the 7 prior approvals required parking area variances, and only one had a designated truck loading zone, which petitioners noted they did not require.

After receiving petitioners' final submissions, respondents held a board meeting on September 21, 2015, and adjourned the applications to October 19, 2015. Following that meeting, the parties engaged additional communication, back and forth. The Traffic

Division then issued additional commentary and critique on February 8, 2016, essentially crediting McArdle's testimony over Barnes' regarding questionable enforceability of a tractor trailer truck delivery ban, and also continuing to raise concerns regarding truck traffic, parking and increased vehicle traffic in the adjacent residential community. Petitioners responded in writing on February 29, 2016. The Traffic Division in a memo dated April 4, 2016, stated its position that petitioners acceptance of the deed covenants and restrictions was insufficient and its onsite truck parking inadequate. Thus respondents stated that petitioners were required to submit another revised site plan for continued consideration of this application.

Petitioners sent a demand letter to respondents on June 21, 2016 calling for an up or down determination on their applications, scheduling of a public hearing on July 18, 2016 in lieu of litigation. Respondents denied petitioners' application on August 22, 2016, making several specific findings. Relying on its inherent authority for site plan review and to safeguard the health, welfare and safety of the public at large, respondents cited that petitioners proposed use was bordered by and contiguous on two sides to residential neighborhoods and had the potential for adverse impact to the same due to vehicle traffic and parking; the use and site had insufficient onsite parking and increased vehicle traffic at points of ingress and egress further jeopardizing the residential community; petitioners' use would have deleterious effects generally speaking to the residential community's health, welfare and safety; and lastly, concerns regarding increased vehicle traffic and public safety or crime would create undue risk of harm to the residential character of the neighborhood.

Petitioner in response commenced this proceeding arguing that respondents' determination denying its applications should be vacated, annulled or otherwise set aside as arbitrary or capricious, abuse of discretion or error of law for respondents' failure to ground their decision in logic, credible, scientific or expert evidence, or reliance upon Town code or ordinance, beyond conclusory, baseless public opposition and reaction.

As relevant to the matter at hand, Town Law provides the following in pertinent part:

The town board may, as part of a zoning ordinance or local law adopted pursuant to this article or other enabling law, authorize the planning board or such other administrative body that it shall so designate, to review and approve, approve with modifications or disapprove site plans prepared to specifications set forth in the ordinance or local law and/or in regulations of such authorized board. Site plans shall show the arrangement, layout and design of the proposed use of the land on said plan. The ordinance or local law shall specify the land uses that require site plan approval and the elements to be included on plans submitted for approval. The required site plan elements which are included in the zoning ordinance or local law may include, where appropriate, those related to parking, means of access, screening, signs, landscaping, architectural features, location and dimensions of buildings, adjacent land uses and physical features meant to protect adjacent land uses as well as any additional elements specified by the town board in such zoning ordinance or local law.

Town Law § 274-a [McKinney's 2017]

The Babylon Town Code defines “site plan” as

- A rendering, drawing or sketch prepared to all relevant specifications and containing necessary elements ... which show the arrangement, layout and design of the proposed use of a single parcel of land as shown on said plan ...

Town of Babylon Administrative Code § 186-2 [2017]

As relevant herein, the Town Code further conducts site plan review according to the following enumerated factors:

1. That all proposed vehicular and pedestrian accessways, entrances and exits are adequate in width, grade, alignment and visibility; are not located too near street corners or other places of public assembly; and other similar design and safety considerations.
 2. That adequate off-street parking and loading spaces are provided to prevent parking in public streets of vehicles of any persons connected with or visiting the site, and that the interior vehicular and pedestrian circulation system is adequate to provide safe and reasonably viable accessibility to all required off-street parking lots, loading bays and building services.
 3. That sites are reasonably screened from the view of adjacent and/or nearby residentially zoned or developed parcels and residential streets and that the general landscaping and general character of the site is such as to enhance the character of the Town and local community and is in character with the neighborhood.
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11. That the refuse containment and disposal facilities are adequate for the site and do not intrude upon adjacent property, streets or other public ways or individuals visiting or working on the site.
 12. That the general health, safety and welfare of the Town and the local community is not negatively affected by the proposed site plan.
 13. That the proposed site plan will provide development in harmony with and which will have a positive influence upon the community.

Babylon Town Administrative Code § 186-9(b)(1) - (13) [2017]

In support of their petition, 7-Eleven argues that respondents’ denial of their site plan and its accompanying building permit was arbitrary and capricious for their failure to credit expert evidence over speculative and conclusory community opposition. Further, petitioners claim that to the extent that the denial relied on a business competitor’s self-serving, biased and incompetent claims on enforceability of the tractor trailer deliveries, petitioners posit that crediting unsworn testimony over 7-Eleven’s corporate representative’s affidavit was illogical and irrational. Lastly, petitioners maintain that they demonstrated by objective and credible expert evidence that the proposed use complied with Town code and should have been approved.

Arguing in opposition to the petition, respondents counter that its determination was sound, rational, and backed by substantial evidence. Curiously, at threshold, respondents advocate that the instant proceeding is not ripe, as petitioners have failed to seek zoning variance relief, and thus the denial of site plan review and the building permit is not truly final.

DISCUSSION

Beginning from this point, precedent clearly holds that only justiciable matters may be judicially adjudicated. To determine whether a matter is ripe for judicial review, it is necessary ‘first to determine whether the issues tendered are appropriate for judicial resolution, and second to assess the hardship to the parties if judicial relief is denied’ ”(*E. End Resources, LLC v Town of Southold Planning Bd.*, 135 AD3d 899, 900, 26 NYS3d 79, 82 [2d Dept 2016]). Within the confines of land use and zoning, “[a] final decision exists when a development plan has been submitted, considered and rejected by the governmental entity with the power to implement zoning regulations” and “[a] property owner, for example, will be excused from obtaining a final decision if pursuing an appeal to a zoning board of appeals or seeking a variance would be futile. That is, a property owner need not pursue such applications when a zoning agency lacks discretion to grant variances or has dug in its heels and made clear that all such applications will be denied” *Id.*

Courts reviewing an agency’s administrative determination must conclude whether it “has arrived at a definitive position on the issue that inflicts an actual concrete injury and whether the resolution of the dispute requires any fact-finding, for ‘[e]ven if an administrative action is final, however, it will still be “inappropriate” for judicial review and, hence, unripe, if the determination of the legal controversy involves the resolution of factual issues’ ” Stated conversely, the agency’s administrative determination is nonfinal and not concrete “if the injury is not actual or concrete if the injury purportedly inflicted by the agency could be prevented, significantly ameliorated, or rendered moot by further administrative action or by steps available to the complaining party” (*Ranco Sand and Stone Corp. v Vecchio*, 124 AD3d 73, 81, 998 NYS2d 68, 74–75 [2d Dept 2014], *affd*, 27 NY3d 92, 49 NE3d 1165 [2016]).

This Court does not accept respondents’ exceedingly narrow interpretation of the ripeness doctrine as applied here. Petitioners sought both site plan review and for a permit to commence demolition and new construction on their intended site. Respondents granted neither application, with the practical import of each denial being that petitioners cannot move their project forward. Thus, to conclude as respondents seek that petitioners have not yet been injured, or rather, that respondents’ determination is not yet in final form contorts logic. This is all the more the case where, as here, petitioners argue that they should not be required, as respondents contend, to seek variance relief where its proposed 24 hour retail convenience store is a permitted as-of-right use within the business district, pursuant to an express reading of the Town’s code.

Further, as petitioner has argued, the administrative record contains some evidence eroding any support for respondents’ position that the matter is unripe. The record indicates that the planning examiner who initially reviewed the building permit concluded that the site was subject to certain setback requirements which petitioners disputed on the basis that the subject lot was a “corner lot”. Thus, pursuant to the Town’s zoning code, it was eligible for review under a lesser setback requirement. The parties discussed their various positions and petitioners

prevailed, with respondents adopting petitioners corner lot analysis. Thus, viewing this fact in a light most favorable to petitioners, respondents contention that the matter is unripe lacks further support. The practical significance of respondents' adoption on the record of petitioners position is that no variance would be required, as petitioners have consistently maintained. Therefore, respondents denial on the one hand, while continuing to argue a lack of finality on the other, is controverted by their own record submissions and is not persuasive.

Land use applications are not immune from prosecuting nonjusticiable claims, and the Second Department has found prior land use challenges unripe under varying circumstances. For instance, had petitioners not sought a building permit, but instead sought advisory opinions or had not yet received a conclusive determination one way or the other, the matter might be in a different posture, but that is not the case presented by the parties and their record. (*see e.g. Waterways Dev. Corp. v Lavalle*, 28 AD3d 539, 540–41, 813 NYS2d 485, 486 [2d Dept 2006] [dismissing petitioner's proceeding as unripe for judicial review and nonjudiciable for want of final determination where no application for building permit was ever submitted to Town respondents for consideration]; *Loskot-D'Souza v Town of Babylon*, 137 AD3d 751, 752–53, 26 NYS3d 577, 578–79 [2d Dept 2016][court dismissing proceeding challenging denial determination as unripe for review where applicants failed to submit building permit application beyond mere submission of architectural drawings and plans to Town Planning Board, but made no further steps to complete application process for consideration or approval with Zoning Board of Appeals]. While these may not present exhaustive examples, this Court finds that petitioners' application was prosecuted to a final denial, and given the position that under the Town's code it presented as an of right permissive use, the issue of whether the respondents' determination was arbitrary or was rationally made or supported by record evidence is presently ripe for judicial review.

Turning to the merits of the petition, as noted above, courts recognize that local planning boards in conducting preliminary site plan review, are required to set appropriate conditions and safeguards which are in harmony with the general purpose and intent of the Town's zoning code, and which give particular regard to, *inter alia*, achieving conformance of the final site development with the Town Development Plan (*Commerce Bank, N.A. v Planning Bd. of Town of Bedford*, 47 AD3d 810, 850 NYS2d 542, 543 [2d Dept 2008]). Our Courts therefore will not lightly set aside the local town's planning board decision or "substitute its judgment for that of the planning board" unless it has abused its discretion or otherwise acted in an arbitrary or illegal manner (*Hudson Canyon Const., Inc. v Town of Cortlandt*, 289 AD2d 576, 735 NYS2d 807 [2d Dept 2001]; *Valentine v McLaughlin*, 87 AD3d 1155, 1158, 930 NYS2d 51, 53 [2d Dept 2011]). Therefore, the court's review on a land use special proceeding challenging the local planning board's denial is constrained to consider substantial evidence only to determine whether the record contains sufficient evidence to support the rationality of the Board's determination" (*In-Towne Shopping Centers, Co. v Planning Bd. of Town of Brookhaven*, 73 AD3d 925, 926, 901 NYS2d 331, 332 [2d Dept 2010]; *see also Hejna v Planning Bd. of Vil. of Amityville*, 105 AD3d 846, 846, 961 NYS2d 801, 802 [2d Dept 2013][local planning board has broad discretion in deciding applications for site-plan approvals, and judicial review is limited to determining whether the board's action was illegal, arbitrary and capricious, or an abuse of discretion]).

The gravamen of petitioners' claim is that respondents caved to public outcry, pressure and opposition from the residential community that believed it was inappropriate to site an additional 7-Eleven location on Straight Path, with an already existing 7-11 a half mile away

and/or that the additional store would harm property values and lead to increased crime, threats to public safety by increased vehicle traffic and congestion. The administrative record is replete with references of residents concerned about increased crime or other threats to public safety in the neighborhood that they believed would accompany the opening of the petitioners' store. Moreover, petitioners aver that despite orally representing and agreeing to accept deed covenants and restrictions to bar tractor trailer truck delivery and restrict overnight delivery hours, respondents relied upon a business competitor's self-serving and unsworn testimony and credited it over expert engineering and traffic studies provided in conjunction with a sworn affidavit by a 7-Eleven's regional director for delivery and supplies.

This Court in its research finds the present situation strikingly similar to that presented before the Nassau County Supreme Court in *7-Eleven v Inc. Vil. of Mineola*. There 7-Eleven applied before the Incorporated Village of Mineola's Planning Board for approval of a special use permit in connection with the opening of a new convenience store within the village. Similar to the proceeding at hand, the village received substantial community opposition raising concerns of increased vehicle traffic and congestion. The application was denied on that basis and petitioners brought a proceeding arguing that the denial of their permit was arbitrary and capricious, where the village relied on community opposition over empirical expert evidence tending to show the concerns baseless, unwarranted or otherwise not grounded in objective factual bases. On appeal, the Second Department held that to the extent that claims of Board members and nearby property owners that the granting of the special use permit application would, among other things, exacerbate existing traffic congestion were unsupported by empirical data, and were contradicted by the expert opinions offered by the petitioners. Therefore, the determination was indeed arbitrary and capricious given that no evidence existed showing that the petitioners' proposed use of the premises would have a greater impact on traffic than any as-of-right use (*7-Eleven v Inc. Vil. of Mineola*, 127 AD3d 1209, 1211, 7 NYS3d 517, 519 [2d Dept 2015], *lv to appeal denied* 26 NY3d 902 [2015]). Even more compelling, the Appellate Division noted that the local planning board's refusal to acknowledge the applicant's willingness to accept and comply with restrictions on the size of delivery trucks and timing of deliveries militated further in favor of an irrational or arbitrary determination. *Id.*

This Court finds the *Mineola* precedent applicable and instructive here. Respondents have argued this matter distinguishable to the extent that it involved the application and denial of special use permits, something not presented in the instant litigation. While true, the Court notes that this proceeding involves an as of right use, and thus where a similarly situated litigant prevailed concerning a more stringent analysis attendant to the special use permit, the *Mineola* court's analysis has greater impact bearing on the resolution of this dispute.

The Court acknowledges that the respondents had authority and an obligation to safeguard Babylon town residents' health, safety and welfare as far as pedestrian and property safety, and protection of the residential community from increased vehicle traffic and noise, and accordingly raised concerns, focusing directly on maneuverability, ease of site ingress and egress by trucks, utilized by customers and for deliveries. In response, petitioners agreed to prohibit tractor trailer deliveries, to accept a deed reciting and memorializing that limitation, and to further limit the kinds and times for deliveries on site. Petitioners' site plan underwent substantial and several revisions after numerous rounds of commentary by the Town's Traffic Division. Additionally, petitioners proffered traffic and engineering studies, unchallenged by rival experts on respondents' end, showing no adverse impact to the adjacent residential neighborhood in connection with its proposed use. In the face of opposition thrust by residents

and a business competitor, petitioners swore by affidavit that it could enforce its box truck only delivery concession. Nevertheless, respondents without citation to any rival or competing expert evidence instead credited unsworn testimony by a local 7-Eleven proprietor and business rival, in conjunction with unspecified residential complaints.

Second Department precedent has previously overturned a planning board's conclusions that regarding a proposed use's excessive noise and traffic, inadequacy of parking facilities, and threats to public safety where it could discern no support in the evidentiary record, particularly where the proposed use was a **permissive commercial as of right use** *emphasis supplied* (*Syracuse Bros., Inc. v Darcy*, 127 AD2d 588, 588, 511 NYS2d 389, 390 [2d Dept 1987]). Since then, the cases follow the general proposition that a planning board determination will not be deemed rational if it rests entirely on subjective considerations, such as general community opposition, and lacks an objective factual basis. Thus, courts may rightfully set aside a municipal administrative determination where the record reveals that the "board acted illegally or arbitrarily, or abused its discretion, or that it merely succumbed to generalized community pressure" (*Cacsire v City of White Plains Zoning Bd. of Appeals*, 87 AD3d 1135, 1137, 930 NYS2d 54, 57 [2d Dept 2011]; see e.g. *Richter v Delmond*, 33 AD3d 1008, 1010, 824 NYS2d 327, 329 [2d Dept 2006][finding planning board land use determination irrational, arbitrary and capricious' "where it was founded on no objective factual record basis other than generalized testimony by neighbors raising subjective concerns on traffic and parking conditions such as general community opposition"]).

Concerning permitted uses within respondents' business zone, the Town Code provides

In an E Business District, no building or premises shall be used and no building shall be hereafter erected or altered unless otherwise provided in this chapter, except for one or more of the following uses:

- A. Shops and stores for the sale of retail or consumer merchandise and services.

Babylon Town Administrative Code § 213-129 (A)

The parties do not dispute that petitioners' proposed use constituted a permitted as of right use within the business district. Thus, in the face of empirical data submitted by petitioners evidencing that the proposed use would not carry deleterious impact or effects on the adjacent residential neighborhood as far as increased traffic or public safety was concerned, respondents needed to have objective, factual or scientific support to warrant giving McArdle and other residents' testimony credence on its fears of increased competition, increased vehicle traffic and inadequate truck parking, all taken as a whole creating additional risk to the residential community. Even after giving respondents' due deference in its expertise in local planning matters and site plan review, this Court finds that respondents did not attempt to counter petitioners' scientific and factual evidence, but instead rather relied upon conclusory and speculative concerns to justify denial of petitioners' applications.

Because this is exactly the sort of irrational, arbitrary and capricious exercise of discretion that our courts have found inappropriate in the land use arena, this Court having applied applicable precedent, finds and determines that respondents' denial of petitioners site was not supported by credible, objective, factual or scientific evidence sufficient to counter

petitioners submissions on the matter.

Therefore, this Court holds that the denial of petitioners' applications was for arbitrary, capricious and/or irrational reasons, and does not withstand judicial scrutiny and was not supported by credible, objective, factual or scientific evidence sufficient to counter petitioners submissions on the matter.

Accordingly, it is

ORDERED that branch of the Verified Petition seeking to vacate, annul, or set aside respondents' denial of petitioners' site plan review is hereby **GRANTED**; and it is further

ORDERED that respondents' determination denying petitioners' site plan review is hereby reversed as arbitrary, capricious, or otherwise irrational use of local land use planning board discretion; and it is further

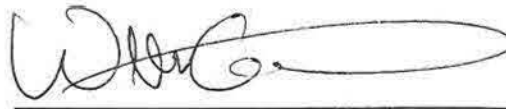
ORDERED that the Petition is denied in all other aspects; and it is further

ORDERED that counsel for the petitioners shall serve a copy of this memorandum and decision with notice of entry on respondents on or before August 1, 2017.

The foregoing constitutes the decision and order of this Court.

Submit judgment on notice.

Dated: July 7, 2017
Riverhead, New York



WILLIAM G. FORD, J.S.C.

FINAL DISPOSITION

NON-FINAL DISPOSITION