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# MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 27

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GENOVESE DRUG STORES, INC.,

Petitioner,

For a Judgment under Article 78 of the Civil Practice Laws and Rules,

- against -

THE TOWN BOARD OF THE TOWN OF ISLIP and MOSO BAY SHORE, LLC,

Respondents.

..... X

By: Costello, J.
Dated: March 4 ,2003

Index No. 02-21034

Mot. Seq. #001 - CDISP
#002 - XWDN
#003 - XMG; CDISPSUBJ

Return Date: 9/20/02
Adjourned: 1/28/03

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In this Article 78 proceeding petitioner, Genovese Drug Stores, Inc. ("Genovese"), seeks an order annulling the determination of respondent Town Board of the Town of Islip (the "Board"), which granted respondent Moso Bay Shore, LLC's ("Moso") application to modify existing recorded covenants and restrictions and vary certain parking and buffer requirements necessary for Moso to proceed with site plan approval to construct a CVS Pharmacy.

Respondent Board moves to dismiss the petition pursuant to CPLR 7804(f) on the ground, ***inter alia,*** that Genovese lacks standing to maintain this proceeding.

The record before the court reveals the following. Genovese is a tenant in a shopping center located at 599 Main Street, Bay Shore, New York. Moso is the contract vendee of a parcel of property (the "subject property") located across from the shopping center at 456 Montauk Highway, Bay Shore, New York, upon which presently exists an Ethan Allen Furniture Store. On August 6, 2001 Moso entered into a contract of sale with Restful Furniture Corporation, the owner of the subject property. Thereafter, representatives of Moso met with Town of Islip Planning Department staff to discuss plans to raze the existing furniture store

and construct a CVS Pharmacy on the subject property. In furtherance thereof Moso filed applications requesting a waiver of the applicable parking and buffer requirements, together with an application to modify certain covenants and restrictions affecting the subject property. Moso also submitted a Short Environmental Assessment Form ("EAF"), as required by the State Environmental Quality Review Act ("SEQRA") under the New York State Conservation Law, Article 8.

On February 28, 2002 Moso's application was the subject of a public hearing held before the Town's Planning Board. After that meeting, at the request of the Planning Board, Moso submitted a Traffic Impact Study, dated May 2002, and made certain architectural and site plan modifications. On June 6, 2002 the Planning Board voted to recommend that the Town Board approve Moso's application, subject to a series of stipulations and recommendations by the Town's planning staff.

On July 18, 2002 respondent Board held a public hearing on Moso's application. On that same date the Town Environmental Analyst declared that the proposed action "will not result in any significant adverse environmental impact." At the conclusion of the July 18, 2002 public hearing, the Board voted unanimously to approve Moso's application, subject to the filing of a Declaration of Covenants and Restrictions. Soon thereafter Genovese commenced this Article 78 proceeding.

Genovese contends, ***inter alia,*** that its affiliate, Eckerd Drug Stores, Inc. ("Eckerd"), entered into a contract for the sale of the subject property in the year 2000, conditioned upon receiving those approvals from the Town needed to construct and operate a Genovese Drug Store. Genovese contends that Eckerd presented nine different site plans to the Town of Islip Planning Department, including the last one which allegedly adopted all of the directions and suggestions issued by the then Director of the Town of Islip Planning Department, Dan Gulizio. Mr. Gulizio informed Eckerd that none of the proposed site plans would receive the recommendation of the department's staff to the Town Planning Board. As a result, Eckerd and Genovese abandoned their plans for a drug store and abandoned the contract of sale for the subject property in March, 2001.

Genovese further argues, ***inter alia,*** that the Board, in their consideration of the application, failed to adopt a resolution under SEQRA, failed to properly notice the public hearings on the proposed project, failed to take the requisite "hard look" at the environmental impacts of the proposed project and Moso failed to present evidence as to why it could not comply with both the parking and buffer requirements of the Town's laws.

The Board has moved to dismiss the proceeding pursuant to CPLR 7804(f) on the grounds that Genovese lacks the requisite standing to commence this proceeding, Genovese failed to join the property owners as a necessary party pursuant to CPLR 3211(a)(10), Genovese failed to state a cause of action upon which relief can be granted pursuant to CPLR 3211(a)(7), and a defense is founded upon documentary evidence pursuant to CPLR 3211(a)(1). Whether a person seeking relief is a proper party to request an adjudication is an aspect of justiciability which must be considered at the outset of any litigation ***(Matter of Dairylea v Walkley***, 38 NY2d 6, 377 NYS2d 451 [1975]). Therefore, the court must first address the threshold issue of standing.

There is a two-part test for determining when a party has standing to contest an administrative action. A petitioner needs to show that the administrative action will in fact have a harmful effect on the petitioner and that the interest asserted is arguably within the zone of interest to be protected by the statute ***(Matter of Mobil Oil Corp. v Syracuse Industrial Development Agency,*** 76 NY2d 428, 559 NYS2d 947 [19901). With respect to the requirement of an injury in fact, something more than the interest of the public at large is required to entitle the person to seek judicial review ***(Matter of Sun-Brite Car Wash, Inc. v Board of Zoning Appeals of the Town of North Hempstead,*** 69 NY2d 406, 515 NYS2d 418 [1987]). The petitioning party must have a legally cognizable interest that is or will be affected by the determination. However, proof of special damages or in-fact injury is not required in every instance to establish that the value or enjoyment of one's property is adversely affected ***(Matter of Douglaston Civic Association v Galvin,*** 36 NY2d 1, 364 NYS2d 830 [19741). Certain property owners with an especially close relationship to property affected by an agency action are presumptively aggrieved by such action and do not have to plead special damages or injury in fact ***(see, Matter of Har Enterprises v Town of Brookhaven,*** 74 NY2d 524, 549 NYS2d 638 [19891). The status of neighbor does not, however, automatically provide the entitlement, or admission ticket, to judicial review in every instance ***(Matter of Sun-Brite Car Wash v Board of Zoning Appeals of the Town of North Hempstead,*** 69 NY2d 406, ***supra).*** The petitioner must also satisfy the other half of the test for standing -- that "the interest asserted is arguably within the zone of interest to be protected by the statute ***(see, id.,*** citing ***Matter of Diarylea v Walkley***, 38 NY2d 6, ***supra).***

Here, Genovese, although presumptively entitled to standing given its close proximity to the subject property, has failed to demonstrate a legally protectable interest so as to confer standing ***(see, Matter of State Funding Corporation v Planning Board of the Town of Poughkeepsie,*** 147 AD2d 705, 538 NYS2d 314 [1989]). Indeed the only legitimate objection to the determination of the Board by Genovese would be increased competition as a result of the construction of a CVS Pharmacy, and zoning laws do not exist to insure limited business competition ***(see, Scannell v Town Board of the Town of Smithtown,*** 250 AD2d 832, 673 NYS2d 449 [19981; ***Matter of Big V Supermarkets, Inc. v Town of Walkill***, 154 AD2d 669, 546 NYS2d 668 [19891). Genovese's allegations in the petition fail to demonstrate that it will suffer an injury that is environmental and not solely economic in nature. Furthermore, allegations that the Board failed to assess the environmental impacts of the proposed project, failed to take the requisite "hard look" at the proposed project, and failed to consider the potentia1 impacts of the Town's multiple relaxations of the parking requirements and vegetated buffer are belied by the record before the court.

Based on the sum of the foregoing, the Board's motion to dismiss the petition, pursuant to CPLR 7802(f), is granted and the petition is dismissed.

The Board's prior motion to dismiss has been withdrawn by counsel by letter dated January 14, 2003.

Submit judgment.

RALPH F. COSTELLO

J.S.C.