Matter of Weinberg v Planning Bd. of the Vil. of Southampton
2011 NY Slip Op 32122(U)
July 29, 2011
Sup Ct, Suffolk County
Docket Number: 24370-2009
Judge: Jeffrey Arlen Spinner
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SUPREME COURT OF THE STATE OF NEW YORK
IAS PART XXI - COUNTY OF SUFFOLK

PRESENT:

HON. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

COPY

In the Matter of the Application of
ROBERT WEINBERG and **MARY WEINBERG**, Individually and d/b/a **LMR ASSOCIATES**,
Petitioners,

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

-against-

The **PLANNING BOARD OF THE VILLAGE OF SOUTHAMPTON**, Suffolk County, New York, and The **VILLAGE OF SOUTHAMPTON**, Suffolk County, New York,
Respondents.

INDEX NO.: **24370-2009**

MTN SEQ NO: 001 - MG
ORIG. MTN DATE: 07/31/09

MTN SEQ NO: 002 – Mot D
ORIG. MTN DATE: 10/29/10

FINAL MTN DATE: 07/06/11

UPON the following papers numbered 1 to 7 read on this Petition:

1. Petition [001];
2. Respondents' Answer;
3. Petitioners' Order to Show Cause [002];
4. Record and Return;
5. Respondent's Opposition;
6. Petitioners' Reply;

it is,

ORDERED, that the Petitioners applications are hereby decided as follows: Petition is granted to the extent set forth herein below; and the Order to Show Cause is hereby denied as moot.

Petitioners move this Court [001] for a judgment pursuant to CPLR Article 78:

1. Annulling, reversing and setting aside the decision of Respondent Planning Board of the Village of Southampton (PLANNING BOARD) which denied Petitioners' site plan application, alleging same is invalid, illegal, void, arbitrary, capricious, irrational and unreasonable, not warranted by the facts, in violation of any discretion vested in Respondent PLANNING BOARD, not based on substantial evidence in the record before it, in violation of the duties expressly enjoined upon Respondent PLANNING BOARD by law and was made in violation of lawful procedure; and
2. Remanding the site plan application back to Respondent PLANNING BOARD with the direction to approve the application or to reconsider the application consistent with the

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Court's decision and order, without the alleged deficiencies and errors that plagued Respondent PLANNING BOARD's decision; and

3. Granting Petitioner costs and other such relief the Court may deem just and proper.

Petitioners move this Court [002] for an Order, pursuant to CPLR 7804(e) and /or CPLR 3126(3), granting Petitioners default judgment for Respondents' failure to serve and file the certified transcript of the record of the proceedings under consideration, including all the documents and transcripts of the hearings that were conducted, or, in the alternative, ordering Respondents to serve and file the certified transcript of the record of the proceedings under consideration, including all the documents and transcripts of the hearings that were conducted, and adjourning the return date to give Petitioners a reasonable amount of time to review the record of the filed record.

Petitioners do business under the name LMR Associates, and used the name LMR Associates to file all land use applications for the subject property. Respondent PLANNING BOARD is a municipal board duly constituted under and existing by virtue of the laws of the State of New York and the Code of the Village of Southampton, with jurisdiction to review and approve, approve with modifications, or disapprove site plans. Respondent Incorporated Village of Southampton (VILLAGE), is a municipal corporation duly constituted under and existing by virtue of the laws of the State of New York and the Code of the Village of Southampton.

Petitioners are the owners in fee of the subject parcel ("subject property" or "Parcel 4"), situated on the northwest corner of Hampton Road and Elm Street in the Village of Southampton, County of Suffolk, State of New York, and consisting of a total lot area of 23,387 square feet. The subject property is the fourth lot in a four-lot minor subdivision, consisting of four contiguous lots (parcel Nos. 1, 2, 3 and 4) located on the north side of Hampton Road in the Village of Southampton, County of Suffolk, State of New York and designated on the Suffolk County Tax Map as Parcel Nos. 0904-007.00-01.00-028.001 (Parcel 1), 0904-007.00-01.00-028.002 (Parcel 2), 0904-007.00-01.00-028.003 (Parcel 3) and 0904-007.00-01.00-028.004 (Parcel 4, the subject property) (the four-lot subdivision).

The four-lot subdivision was approved by Respondent PLANNING BOARD in 1986. As a condition of said approval, said Respondent required the four-lot subdivision's owner to enter into a Declaration of Covenants, Restrictions and Easements (the 1986 Declaration). Said 1986 Declaration provided, among other things, that "[t]here shall be no vehicular access either to or from the parking area to be constructed on Lot 4 [the subject property] and the combined parking area to be constructed on Lots 1, 2 and 3..." and that "street access to and from the parking space to be constructed on Lot 4 [the subject property] shall be at a single point to be located on the easterly boundary of Lot 4 and shall provide access to and from Elm street." Such restrictions meant that Parcel 4's owners could only develop the subject property as a stand-alone parcel with its own dedicated parking area and ingress and egress.

The four-lot subdivision, including the subject property, was located in the "OD Office Business District" under the Zoning Ordinance and Map of Respondent VILLAGE, through on or about January 26, 2006. The "OD Office Business District" permitted the construction of a two-story 6,300 square-foot office building on the subject property.

On or about January 3, 2002, Petitioners submitted a site plan to Respondent PLANNING BOARD, which was placed on said Respondent's agenda for a public meeting on January 7, 2002, for the purpose of a pre-submission conference/informal discussion about the proposed site plan. The site plan proposed the construction of office buildings on Parcels 1, 3 and 4 (the subject property). The proposed building for the Parcel 4 was a two-story building with a total of 5,539 square feet. The ingress and egress from Parcel 4 was at a single point on Elm Street, as required by the 1986 Declaration.

On or about this time, Petitioners learned that officials of Respondent VILLAGE (including members of the Village Board of Trustees and members of Respondent PLANNING BOARD) expressed interest in acquiring the subject property for use as a public park. At a meeting of Respondent PLANNING BOARD, held on January 7, 2002, one of its members, referring to the subject property, commented that he hated to lose the property to another building and asked Petitioners' then-attorney if it would be possible to let Respondent VILLAGE purchase the land for a park.

Petitioners continued to pursue approval of their site plan. By letter dated January 25, 2002, Petitioners submitted a revised site plan and a revised parking plan to Respondent PLANNING BOARD. The submission informed Respondent PLANNING BOARD that access to and parking on the subject property could not be coordinated with the other three parcels in the subdivision because of Respondent PLANNING BOARD's 1986 Declaration.

By letter dated March 22, 2002, Petitioners informed the Planning Board they had decided to limit their proposals for development to Parcels 1 and 3 of the approved subdivision at that point in time.

Respondent VILLAGE continued to pursue its attempts to acquire the subject property. By letter dated October 23, 2002, then-Mayor Joseph P. Romanosky, Jr. asked Petitioners to meet with him "to discuss ideas to how we might preserve" the subject property. The letter states, in part, "[t]he residents of our community feel that the beautiful open green spaced land on the southwest corner of Elm Street and Hampton Road is of utmost importance to preserve. We feel that this particular parcel is a keystone of the Village's remaining open green space."

In January of 2005, Petitioners renewed their attempts have Respondent PLANNING BOARD award site approval for the subject property. By letter dated January 13, 2005, Petitioners requested that Respondent PLANNING BOARD schedule the site plan for a pre-submission conference at said Respondent's January 31, 2005 meeting. At said meeting, a member of said Respondent, referring to the subject property, stated that Respondent VILLAGE should really purchase the subject property, if at all possible.

Shortly after Petitioners submitted their site plan to Respondent PLANNING BOARD for approval, said Respondent asked Petitioners to consider modifying the 1986 Declaration imposed on the four-lot subdivision which isolated Parcel 4 from the other three parcels in the subdivision, requesting the following modifications to the 1986 Declaration: (1) to allow for a combined parking area for Parcels 1, 2, 3 and 4, (2) to eliminate vehicular access to and from

Parcel 4 on Elm Street, and (3) to have a common vehicular access point to and from Parcels 1, 2, 3 and 4 on Hampton Road. Petitioners were not able to comply with said Respondent's requests, because any modification of the 1986 Declaration would require the consent of the owners of parcels 1, 2 and 3. Parcels 1 and 2 had been conveyed to new owners on May 19, 2005, therefore making it impossible for Petitioners to unilaterally alter the 1986 declaration.

Respondent PLANNING BOARD continued to pursue the idea of parking modification, requesting that Petitioners conduct a Traffic Impact Study (dated May 2, 2005), a revised Traffic Impact Study (dated August 29, 2005), and an Addendum to the revised Traffic Impact Study (dated September 6, 2005), to examine the impacts of alternative parking and access plans for the subject property.

Respondent PLANNING BOARD was informed, by letter dated February 6, 2006, that the owners of Parcels 1 and 2 would not agree to modify the 1986 Declaration, that they had purchased the properties in reliance on the 1986 Declaration, and that they would commence litigation against the Planning Board if it modified the 1986 Declaration.

On or about July 11, 2005, the Department of Land Management, Community Preservation Division, of the Town of Southampton, wrote a letter to Petitioners advising them that the Town was interested in purchasing the subject property, and asking Petitioners for "an expression of willingness to allow the Town to order a confidential independent appraisal" of the subject property. At that time, the Mayor of Respondent VILLAGE served as said Respondent's representative on the Town of Southampton Department of Land Management, Community Preservation Fund Advisory Board. That Board reviews recommendations on proposed acquisitions of real property using monies from the Peconic Bay Region Transfer Tax.

Petitioners informed the Town, by letter dated July 27, 2005, that it could proceed with the appraisal of the subject property. Petitioners, however, continued to press forward with their site plan approval request. By letter dated August 19, 2005, Petitioners submitted documentation in support of their application.

In or around the summer and/or fall of 2005, while the Town of Southampton was proceeding with an appraisal of the subject property, and while Petitioners were continuing their request for site plan approval, the Board of Trustees of Respondent VILLAGE began consideration of an amendment to Respondent VILLAGE's zoning code that would impact the subject property, which included provisions to: (1) reduce the size of any building that could be constructed on the subject property to a maximum size of 4,000 square feet for a two-story building (Petitioners' application being for a 6,300 square foot, two-story building then permitted by the zoning code); and (2) increase the setbacks for the subject property (thereby limiting the number of parking spaces that could be provided on the subject property).

On September 19, 2005, Petitioners submitted a statement to the Respondent VILLAGE's Board of Trustees in opposition to the proposed zoning code amendment.

On November 7, 2005, Respondent PLANNING BOARD heard Petitioners' site plan application for the two-story 6,300 square foot office building. The proposed site plan sought permission to

construct an office building as was permitted under the existing zoning code, and in accordance with the 1986 Declaration. Respondent PLANNING BOARD adjourned the meeting on the application to its next regular meeting in December, 2005.

By letters dated November 9, 2005, and December 7, 2005, Petitioners informed Respondent VILLAGE of their opposition to the proposed local laws to rezone the subject property, and requested that their subject property be excluded from the local law. By letter also dated December 7, 2005, the Town of Southampton, by and through the Department of Land Management, Community Preservation Division, offered to purchase the subject property for the sum of $810,000.00.

Petitioners then asked Respondent PLANNING BOARD, by letter dated December 22, 2005, to request that Respondent VILLAGE's Trustees remove the threat of rezoning the subject property while the site plan application was pending and while discussions were pending for municipal acquisition of the property. Despite this request, on January 26, 2006, said Board of Trustees adopted Local Law No. 2 of 2006.

Local Law No. 2 of 2006 rezoned Parcel 4 from the "OD Office Business District" to the newly-created "HRO Hampton Road Office District." Banks and business and professional offices are permitted uses in the HRO Office District. The zoning amendment, as adopted, (1) reduced the size of any building that could be constructed on Parcel 4 to 4,000 square feet for a two-story building; and (2) increased the setbacks for the subject property, reducing the number of parking spaces that could be provided on the subject property.

Additionally, the zoning amendment did not exempt Parcel 4 from its effect, while it did exempt property that had site plan approval; but as Respondent PLANNING BOARD had not yet decided Petitioner's application, the subject property lacked site plan approval, and therefore, it was the position of Respondents that same was subject to the limitations of the new zoning provisions.

Subsequent thereto, on or about February 9, 2006, Petitioners submitted another site plan to Respondent PLANNING BOARD. This site plan proposed the construction of a smaller two-story office building, with drive-in facilities for a bank consisting of 3,999 square feet, in compliance with the more restrictive dimensional provisions of the recently adopted zoning amendment. This site plan was modeled after the previously approved Bridgehampton National Bank (hereinafter "BNB") site plan.

Petitioners' site plan sat before Respondent PLANNING BOARD, which delayed making any decision thereon, and then directed that Petitioners' site plan application be the subject of joint hearings with the Board of Architectural Review and Historic Preservation (BARHP) of Respondent VILLAGE. By letter dated May 30, 2006, Petitioners' attorney wrote to said Respondent and the BARHP, in an effort to bring about a decision by said Respondent. Additionally, Petitioners revised the February 2006 site plan in May, 2006, and submitted it in its final form to said Respondent on or about August 18, 2006, which proposed construction of a two-story building, with drive-in facilities for a bank consisting of 3,960 square feet, that

complied with the more restrictive dimensional provisions of the recently adopted zoning amendment.

Petitioners' attorney wrote yet another letter on December 11, 2006 to Respondent PLANNING BOARD and the BARHP, in yet another attempt to move the application forward to a decision. The letter included: (1) a legal memorandum explaining that the inclusion of a permitted use in a zoning ordinance was tantamount to a legislative finding that the permitted use – a bank – was in harmony with the general zoning plan and would not adversely affect the neighborhood, and explaining that a land use application could not be denied based solely on the generalized objections and concerns of neighboring residents when the use in question was a permitted use; (2) information on landscaping and plant species; (3) a discussion of the similarities between Petitioners' site plan application for a bank and the site plan for the BNB bank located diagonally across Hampton Road from the subject property that had recently been approved by the Planning Board; (4) information demonstrating that seven out of eight banks in the Respondent VILLAGE had a drive-in teller's window; and (5) a floor plan for the bank that was being proposed for the site.

In a submission dated February 7, 2007, Respondent PLANNING BOARD's environmental, planning and engineering consultant concluded, among other negative comments, the Petitioners' application was "not in keeping with the character of" the HRO Hampton Road Office District, while, in fact, according to the HRO Hampton Road Office District, a bank and an office building are permitted uses its district.

The Planning Board's consultant based this conclusion on generic trip data contained in the Institute of Transportation Engineers reference manual entitled "Trip Generation" that the consultant utilized in preparing its report for the said Respondent. Although this manual is a nationally accepted standard for gauging the future traffic a proposed land use may generate, the manual itself states that local data will generate a more accurate prediction. Furthermore, said manual bases its conclusions on data collected from two studies performed in the 1970s and 1980s in California on "Walk-in Banks". The manual bases its data on "Drive-in Banks" on 21 studies, nine of which they performed before 1987. Some of the studies they performed during the early 2000s and many of the studies they performed were in Virginia, New Jersey and California. The manual based its data contained in the "Trip Generation" on old projection factors, and since such projection factors were set forth, the nature of banking has changed. The advent of electronic banking, direct deposit, and debit cards has reduced the need to go to the bank and thus may have an impact on how much traffic a bank may generate.

In order to obtain more accurate data on the amount of traffic the proposed bank would generate, Petitioners' traffic counts were taken at the site of the Bridgehampton National Bank (BNB), which has a drive-in teller's window, ATM machine, depository box, and vacuum-tube drive-up teller's device, and which is located less than 500 feet from the proposed site on Hampton Road, with a single access onto an intersecting side street, and is of similar size, with drive-in facilities. The counts were taken on March 30, 2007. Petitioners used this data to demonstrate that Respondent PLANNING BOARD's consultant had mistakenly relied on generic trip generation data contained in the "Trip Generation" manual when they prepared their report.

It should be noted that this consultant used by Respondent PLANNING BOARD, who did not recommend approval of Petitioners' application herein, had in fact been the consultant for BNB's successful and extremely similar application just a few years before, causing BNB to receive site plan approval on April 28, 2005, granted by this very same Respondent, for a bank with a drive-in teller and ATM on their property, less than not five hundred feet down the road from the subject property.

On September 4, 2007, Respondent PLANNING BOARD rendered a decision on Petitioners' application, which they filed in Respondent VILLAGE's Administrator's office on January 8, 2008. Said Respondent issued a "Conditional Determination," which did not make a final ruling in Petitioner's application. The Court notes that Southampton Village Code § 116-38D and Village Law § 7-725-a [2] (a), provide that Respondent PLANNING BOARD shall review and approve, approve with modification, or disapprove site plans.

In its "Conditional Determination", Respondent PLANNING BOARD stated that "[a]lthough the board requested the applicant submit a site plan for a retail bank without a drive through teller service or ATM facility, the applicant declined to do so," and therefore, "no site plan was reviewed, or presently exists, upon which the board may base an unconditional approval." Although Petitioners, at that time, had no objection to filing an application so amended, Respondent PLANNING BOARD was obligated to render a decision on Petitioners' site plan as submitted, either approving or denying same, as filed, if applicant refuses to make modifications it has requested.

The "Conditional Determination" states that "the present site plan is unacceptable" because "[t]he board disapproves the use on the site of an outdoor drive through teller service and ATM facility as depicted on the site plan..." despite the board's acknowledgment "that a drive through teller-service and an ATM facility are permitted uses, and [the] board has approved such uses in previous site development applications." These conflicting statements are perplexing at minimum, and arbitrary and capricious at best.

Two weeks later, the 2008 above cited "Conditional Determination" of Respondent PLANNING BOARD's were the subject of an CPLR Article 78 filed by Petitioners in Supreme Court, Suffolk County, to overturn the "Conditional Determination." As in the present case, Petitioner argued that said Respondent abused its authority by acting with bias to reject their application. Justice Gary J. Weber granted the CLPR Article 78 application, finding that Petitioner must "submit revisions to their plans as had been requested by the Respondent [Planning Board]", and that Respondent PLANNING BOARD must "exercise its discretion in a manner in keeping with the resolution of previous applications made by others similar situated.

Subsequent to Justice Weber's decision, by letter dated August 20, 2008, Petitioners submitted a revised site plan to Respondent PLANNING BOARD, together with a response to seventeen comments contained in Schedule A, as annexed to said Respondent's determination that was filed January 8, 2008.

On September 17, 2008, Petitioners' attorney and consultant met with Respondent PLANNING BOARD's attorney and consultant, to review the site plan and to discuss ways to address said Respondent's comments on the site plan.

At a public hearing, said Respondent held on October 6, 2008, Petitioners' consultant presented revisions to the proposed site plan, and explained the similarities between Petitioners' site plan and the approved BNB bank site plan. Furthermore, by letter dated November 18, 2008 prepared by Petitioners' consultant, Petitioners submitted yet another revised site plan to said Respondent, together with a response to comments prepared and submitted by the Respondent PLANNING BOARD's consultant. Said Respondent placed Petitioners' site plan application on its agenda for the public hearing on December 1, 2008.

Respondent PLANNING BOARD's Chairman refused to close the hearing on Petitioners' site plan application on December 1, 2008, and stated that he wanted to hear "one more time" from Respondent PLANNING BOARD's counsel, and from its staff, before closing the hearing. By letter dated January 20, 2009, Petitioners submitted responses, including a letter dated January 5, 2009 from Petitioners' consultant, to additional comments by said Respondent's consultant.

At a public hearing held on May 4, 2009, Respondent PLANNING BOARD adopted a decision that denied Petitioners' site plan application for a bank with a drive-in teller's window, a vacuum-tube and intercom drive-in teller's device and an ATM machine. Instead, said Respondent approved a building without these facilities, depriving Petitioner of requisite services commonly expected for a functional modern bank.

The Planning Board's decision of May 4, 2009 concluded that Petitioners' revised plan, last dated November 17, 2008, resolved twelve out of seventeen purported "site plan deficiencies" that were identified in Schedule A of the Planning Board's previous decision, dated September 4, 2007. As to the five other purported "site plan deficiencies," said Respondent found that item thirteen should be determined at a later time, prior to the issuance of a building permit, and that items four, five, six, and eight, were all related to the drive-in teller's window and the ATM, which said Respondent refused to approve.

Respondent PLANNING BOARD's decision of May 4, 2009 found that section 116-17D of the Southampton Village Code requires that Petitioners provide a total of thirty queuing spaces, as follows: a queue line of ten spaces for the drive-in teller's window; a separate queue line of ten spaces for the ATM; and a third separate queue line of ten spaces for the vacuum-tube and intercom drive-in teller's device. This determination did not adhere to its prior precedent, when it approved the BNB bank site plan, with the same drive-in facilities, but with two queuing lines providing spaces for a total of ten vehicles. According to evidence presented by Petitioners, the BNB site plan provided two queuing lanes approaching the window, but those lanes do not accommodate five cars per lane. One lane accommodates four vehicles and the other lane accommodates six vehicles, if 18 foot long vehicles are used as the measure. If 20 foot long vehicles are used as the measure, then one lane can hold three vehicles and the other can hold six vehicles, for a total of just nine instead of ten vehicles.

Respondent PLANNING BOARD's decision of May 4, 2009 attempts to reconcile its disparate treatment of Petitioners' site plan application, as compared to its previous approval of the similar BNB site plan for a bank across the street with an ATM, a drive-in teller's window, a vacuum-tube and intercom drive-in teller's device, a night depository box and two queuing lanes with a total capacity of just ten queuing spaces, by stating that its approval of the BNB site plan "may have been an oversight by the Board", and by factually distinguishing the site plan applications for each bank. Said Respondent's decision, however, falls short of finding that it *actually* committed an oversight or an error when it approved the BNB site plan. Said Respondent's decision of May 4, 2009 fails to provide any actual explanation for reaching a different result, on substantially similar facts, as to Petitioners' site plan application, than it did on the prior BNB site plan application for a virtually identical bank located just across the street.

On June 24, 2009, Petitioners filed this current application for a judgment pursuant to CPLR Article 78 against Respondent PLANNING BOARD and Respondent VILLAGE.

From the start, it should be noted that it is well settled law in the State of New York that a Court may not substitute its own judgment for that of a reviewing board (*see*: ***Janiak v Planning Board of the Town of Greenville***, 159 AD2d 574 [2 Dept], *appeal denied*, 76 NY2d 707 [1990]; ***Mascony Transport and Ferry Service v Richmond***, 71 AD2d 896 [2 Dept 1979], *aff'd*, 49 NY2d 969 [1980]). Therefore, if the decision rendered by the reviewing board is within the scope of the authority delegated to it, the Court may not interfere and annul it, unless said decision is illegal, arbitrary, or an abuse of discretion (see ***Fuhst v Foley***, 45 NY2d 441, ***Miller v Zoning Board of Appeals of the Town of East Hampton***, 276 AD2d 633), the Zoning Board's decision will be sustained if it has a rational basis and is supported by substantial evidence (see *Miller*, supra).

In the previous action in front of Justice Weber, the Court directed Respondent PLANNING BOARD to "exercise its discretion in a manner in keeping with the resolution of previous applications made by others similar situated." This Court has determined that said Respondent failed to cooperate with Justice Weber's initial ruling, by making its decision of the subject property's application in direct contravention to its decision to allow the construction of BNB. In doing so, this Court finds that said Respondent acted with bias and without any sufficient evidence to reinforce its decision, resulting in a decision, that is clearly an abuse of discretion. This Court, therefore, is compelled to rule in favor of Petitioners, granting their application pursuant to CPLR Article §78.

Although this Court is not to substitute its own judgment for that of Respondent PLANNING BOARD, it is clear that said Respondent's decision was arbitrary, inconsistent and motivated by bias. Said Respondent admits that the central issue in determining the validity of Petitioner's application is "whether the site can accommodate the drive-in teller facilities desired by the [Petitioners]." A comparison between the BNB site that said Respondent previously approved, and Petitioner's application that it denied, shines light onto the bias that said Respondent continuously and inexcusably demonstrated throughout this application process.

Respondent PLANNING BOARD authorized BNB to install one ATM outside the building, adjacent to the drive-in teller's window. Additionally, that site plan calls for a vacuum-tube and

intercom device located on an island outside of the building, near the drive-through teller's device. BNB's site plan, however, depicts only ten cars located in two queuing lines around the building. When there are seven cars, the bypass lane is blocked. In contrast, said Respondent refused to approve Petitioners' site plan for a bank with an ATM, a drive-in teller's window and a separate island for the vacuum-tube and intercom device. Petitioner's application also depicts ten cars located in two queuing lines around the building, and besting the BNB application by allowing that the bypass lane is only blocked after the tenth car enters the queuing lanes, not the seventh. Clearly, in regards to the external facilities of the bank, both site plans are remarkably similar. Given the order by Justice Weber to remain consistent, it perplexes this Court as to how Respondent PLANNING BOARD rejected the subject application after approving BNB, violating the precedent that it established.

The examples of bias set forth herein, specifically while comparing BNB and the subject property, are numerous and extensive. When discussing the problem of traffic flow into the subject property, Respondent PLANNING BOARD never made a specific request to Petitioners to correct any potential problem. Alternatively, said Respondent's decision of May 4, 2009 states that the "Bridgehampton National Bank, as a condition for approval of the project, agreed to construct a traffic control device at its own cost and expense at the corner of Hampton Road and Little Plains Road is needed by traffic flow generated by the facility or otherwise necessary." Said Respondent never requested that Petitioners make such a commitment regarding the Elm Street-Hampton Road intersection. If there were a legitimate traffic problem in the subject property, fair treatment might have been to ask Petitioners to agree to install a traffic control device at an off-site intersection, upon proper substantiation of such a need by said Respondent. Instead, Respondent PLANNING BOARD cites this as a reason that the BNB plan should be differentiated, a rather convenient, yet ineffectual attempt to explain itself.

Parking spaces were another situation that showed inconsistency between the treatment of BNB and the subject property. Southampton Village Code § 116-14(I)(6) provides that, "[a]ccessory off-street parking areas shall be marked off into parking spaces either with a minimum width nine feet and a minimum length of 19 feet or with a of 10 feet and a minimum depth of 18 feet..." Respondent PLANNING BOARD approved the BNB bank site plan with parking stalls that are 9 feet wide and 19 feet long, which are exactly the same size as the parking stalls on Petitioners' site plan, yet in regards to Petitioners' site plan, said Respondent's decision of September 4, 2007 sets forth another inconsistency, determining that those dimensions in the zoning ordinance only applied to compact or subcompact vehicles, and that Petitioners were required to provide larger parking stalls that the code required, to accommodate SUVs, light trucks and similar size vehicles, which said Respondent stated were of the type generally in use in the Southampton Village area.

The dumpster provides yet another example of arbitrary and capricious bias in the handling of Petitioner's application.. Respondent PLANNING BOARD's Schedule A states, "the orientation of the dumpster, located in the northwest corner of the property, requires the vehicle servicing the unit to do so from the south, which is against oncoming through traffic and banking traffic". It might be possible to service the dumpster unit during non business hours, but the Board has no ability to monitor or enforce such a restriction. Reasonable planning requires that the applicant propose a better design."

However, in order to access the dumpster on the BNB site (the location of which was approved by the Board), the pickup vehicle must position itself across the only access to the site; trapping any vehicle in the site, and closing the access to Little Plains Road. Closing access means that vehicles wishing to turn into the site will be stuck in the travel lanes of Little Plains Road, blocking traffic on that public road. Further, the location of the dumpster on the BNB site is less than ten feet from Little Plains Road and therefore in a non-permitted location, according to Section 116-9A(14) of the Village Code.

In contrast, the location of the dumpster for Petitioners' site has been designed to function within the use of the subject property. The dumpster will be serviced during non-business hours by using a small truck designed specifically to service sites such as the subject property. The property will be serviced by entering Elm Street, using the circulation drive on the north side of the building, turning in front of the dumpster and backing into it for pickup. The truck will then exit via the bypass isle.

Respondent PLANNING BOARD tried to differentiate the properties by pointing out that they are not exactly diagonal to each other. They also seemed to focus on the fact that they face different ways. This Court finds those distinctions to be essentially meaningless in this regard, and an apparent grasp by said Respondent to find any difference between the sites, and to desperately attempt to explain its conduct.

Respondent PLANNING BOARD also displayed examples of bias throughout the application process, unrelated to its approval of BNB. It seems clear that Respondent VILLAGE was so intent on purchasing the subject property for a park, that it clouded Respondent PLANNING BOARD's exercise of proper discretion, creating a bias against allowing Petitioners to build on the property. Respondent PLANNING BOARD first introduced such an idea, in a meeting on January 7, 2002, declaring that they hated to lose the property. Later in the year, the Mayor sent a letter, floating the idea of Respondent VILLAGE purchasing the property. Three years later Respondent PLANNING BOARD once again mentioned purchasing the property at a meeting. Respondent VILLAGE's interest in purchasing the subject property is relevant because it provides the backdrop against which an explanation for Respondent's conduct must be considered regarding the subject property, as the record herein, from beginning to end, seems to be an unreasonable and contentious history of absurd roadblocks to an application that is virtually a carbon copy of a granted application in the immediate proximity.

As Petitioner's application sat in front of Respondent PLANNING BOARD, more evidence of bias became apparent. Said Respondent, during the spring of 2005, spent inordinate and costly time considering making parking modifications to the application, made impossible by the 1986 Declaration imposed by said Respondent. Later that year, said Respondent considered a zoning change, which would negatively affect the subject property. Despite Petitioners' requests to either make a decision on the subject property's application or exempt it from the new zoning, said Respondent did neither. In 2006, said Respondent chose to hire a consultant to evaluate the subject property's application, a consultant, who was once directly associated with the approval of the BNB application, representing BNB in that application. That consultant mysteriously and unfairly criticized the application for not fitting in with the zoning, despite the fact that the

zoning ordinance in question specifically allows for banks. Additionally, the data he relies upon does not accurately describe the subject property's situation. The consultant's recommendation effectively eliminates a potential competitor for BNB, his former client, a conclusion that one is inexorably drawn to, as there exists no viable or legally sufficient explanation for the completely inconsistent recommendation for denial of Petitioners' site plan application, after the consultant recommended approval of the BNB site plan mere short years before.

Finally, when Respondent PLANNING BOARDs directed Petitioners to submit a proposed revised site plan that did not contain a drive-in teller's window or automated teller machine, it displayed another example of bias, as it is unrealistic for Petitioners to submit such a modification. A bank without any of the outdoor facilities would render such an approval worthless. Petitioners did not apply for, nor can they use, a bank without a drive-in teller's window or automated teller machine, now commonly expected services at virtually all banking institutions. So, in essence, what said Respondent was saying to Petitioner's was, modify your application so that it has nothing to do with what you were applying for. The examples of bias, arbitrariness, capriciousness, abuse of discretion and conduct outside the scope of the authority delegated to a public body in this case are endless.

Respondent PLANNING BOARD claims that there "may have been an oversight" when it allowed BNB to build its structure with drive-in teller facilities. Said Respondent and Respondent VILLAGE, however, offers nothing of substance, nor the merest of fact, to support such a determination, foregoing any opportunity to validate such a claim, nor offering any legislative action to avoid future error by the making an such an alleged oversight, instead creates a substantial record supporting the conclusion that what was exercised in this matter was an incredible amount of bias, over a long period of time.

Of further note is the Building Permit issued by Respondent VLLAGE's Building Inspector on April 21, 2005 for BNB bank, followed by a Certificate of Occupancy, said Certificate providing that the building:

> conform(s) to all applicable provisions of the ZONING ORDINANCES of the Village of Southampton as amended to date. Same conform(s) substantially to the approved plans and specifications heretofore filled [sic] with this office and with the Application for the Building Permit...

This Court is hard pressed to find that the relief granted to BNB "may have been an oversight". At each stage where there existed an opportunity to review the site plan for issues contrary to the Village Zoning Ordinance, none were taken, none addressed.

Even without allegations of bias and comparisons with the approved site application of BNB, this Court still finds Respondent PLANNING BOARD's decision to be meritless, arbitrary and devoid of substantial evidence. Southampton Village Code § 116-14 requires a "ten-space queuing line for each drive-in teller's window." The Code is absent of any mention of an ATM or a vacuum-tube. It is clear and without contention that the site plan must have at least ten queuing spaces for the drive-in teller.

Respondent PLANNING BOARD argues that the vacuum-tube requires as additional ten queuing spaces, even though such a conclusion is unsupported in the Village Code. Furthermore, this argument fails to take into consideration the actual impact of vacuum-tube service at a bank. Instead of brining in extra traffic as an additional drive-in teller, the purpose of the vacuum-tube supposed to be is to assist the drive-in teller in their duties, making the entire process more efficient. Rather than slowing the process down, the vacuum tube is used to actually increase efficiency and the speed of the line, creating a reduced need for queuing spaces. Only one actual teller will operate both the drive-in teller window and the vacuum-tube. Interpreting the code to require an additional ten spaces for the vacuum tube is inconsistent with the meaning and purpose of the code, unless Respondent VILLAGE and engaged in a proper and credible study analyzing the actual impacts of vacuum-hose lanes that demonstrated this presumption employed by banks across the country was incorrect. No evidence to support their presumption was contained in the record.

Similarly, Respondent PLANNING BOARD also considered the ATM to be a "drive-in teller's window", relying on the same presumption. The Court is drawn to the arbitrary nature of this conclusion for exactly same reasoning set forth in the prior paragraph. Although drivers can perform many of the same activities at an ATM as they can at a Teller window, they are very different. ATMs are located all over the county, and not just at banks. It seems illogical to presume that drivers would waste time even pulling up to an ATM with several cars in a queue, in light of the abundance of ATMs in any given area, let alone a downtown village business district. Alternatively, it is clear that banks rely on ATM in order to only shorten queuing line, as some drivers who are waiting for the drive-in teller may decide that the ATM could satisfy their needs just as fine. Of course, had Respondents engaged in a proper and credible study analyzing the actual impacts of ATM machine availability at banks that demonstrated this presumption employed by banks across the country was incorrect, there might have been a legitimacy to their presumptions, but alas, once again there is no evidence to support this contained in the record.

Respondent PLANNING BOARD expresses concerns that drivers might block the bypass lane after a specific number of cars are queuing, but the Southampton Village Code makes no requirement of a bypass lane, and the provision of same in a site plan, therefore, not being a justification to reject an otherwise valid application. Said Respondent cites safety reasons in their justification of this argument, speculating that safety vehicles would be stuck without a bypass lane, and that traffic would get backed up. A closer look at the subject property's plans would reveal, however, that there would never be a need for safety vehicles to enter the bypass lane, because it only connects one end of the parking lot to the other, around the back of the building. If either a driver or a safety vehicle wanted to go from one end of the parking lot to the other, and the bypass lane was blocked, they could just go through the parking lot and avoid the bypass lane altogether.

Despite Respondent PLANNING BOARD's focus on the outdoor facilities of the subject property, it also alleges some other problems with the application, such as potential back-ups onto the road from this bank (yet said Respondent failed to offer any reliable evidence of same) and general observations, such as a school nearby (although they failed to demonstrate the dangers of a bank located near a school). None of this general talk will suffice. When they did

use trip data, it was from national sources, not local sources. Petitioners argued successfully that BNB, which has almost exactly the same layout as the subject property, does not have any major traffic problem.

Petitioners have demonstrated numerous examples of inconsistencies in how Respondent PLANNING BOARD treated their site plan application, as opposed to how it treated the BNB bank site plan application, and Respondents having failed to explained away any of the its rationale for such disparate treatment. When two site plans are so utterly identical, and the Board approves one application, yet denies the other, the Court must take a close look at the reasoning behind same, and determine if there is a rational justification.

The Court is further mystified by the apparent lack of cooperation and compliance with requisite procedures regarding the Record and Return, the nexus of all discovery in an Article 78 proceeding, by Respondents. A review of same, and it's amended iteration, reveals at inordinate period of time before substantial missing items were supplied, and the complete failure to ever provide other documents that are not only necessary for Petitioners to substantiate their claims, or Respondents to substantiate their actions, but for the Court to be assisted in formulating and issuing its review, such as the transcripts of hearings. Failure to comply with such requirements, and the placing of such burdensome obstacles to Petitioners, and even more importantly to the operations of the Court, are nothing less than inexcusable.

In conclusion, not only can this Court not find any rational basis for the conduct and determination of Respondent PLANNING BOARD, but it is inescapable that one must be drawn to the inexorable conclusion that said Respondent's decision is arbitrary, capricious, an abuse of discretion and beyond the scope of the authority delegated to these public bodies. Therefore, this Court is compelled by law to grant the relief requested in the underlying Petition, as set forth herein below.

For all the reasons states herein above and in the totality of the papers submitted herein, it is,

ORDERED, that the above referenced Petition [001], is hereby granted to the extent set forth herein:

1. The decision of Respondent PLANNING BOARD is hereby annulled, reversed and set aside;
2. This matter is hereby remanded to Respondent PLANNING BOARD for proper site plan review, with the direction to approve the application consistent with the Court's decision, with all due haste;

and it is further

ORDERED, that the above referenced application of Petitioner [002], is hereby denied as moot, in that a default judgment is unnecessary in light of the decision on the merits set forth herein; and it is further

ORDERED, that this Court hereby retains jurisdiction over this proceeding, for all purposes; and it is further

ORDERED, that Counsel for Petitioner is hereby directed to serve a copy on this Order, with Notice of Entry, upon Counsel for all other parties, within 20 days of entry of this Order by the Suffolk County Clerk.

Dated: Riverhead, New York
July 29, 2011

HON. JEFFREY ARLEN SPINNER, JSC

✓ FINAL DISPOSITION	NON-FINAL DISPOSITION
✓ SCAN	DO NOT SCAN

TO:

Esseks Hefter & Angel LLP
108 East Main Street, PO Box 279
Riverhead, NY 11901

Robinson & Robinson PC
61 Main Street
Southampton, NY 11968