

Apple Farm Realty LLC v Pascale

2020 NY Slip Op 31960(U)

June 15, 2020

Supreme Court, Suffolk County

Docket Number: 1986/19

Judge: John J. Leo

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**SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 51 SUFFOLK COUNTY**

DECISION & ORDER

APPLE FARM REALTY LLC AND
ANTOINETTE R. GIORDANO

INDEX NO.: 1986/19

Petitioner

PETITIONER'S ATTORNEY:

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VINCENT PASCALE CHAIRMAN,
STEVE WILUTIS VICE CHAIR,
RICHARD SMITH, PETER
ZARCONI, KAREN DUNN, PATRICIA
KELLY, AND JOSE ROSE IN THEIR
CAPACITY AS MEMBERS
CONSTITUTING THE PLANNING
BOARD OF THE TOWN OF
BROOKHAVEN

RESPONDENT'S ATTORNEY:

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Respondent.

In this Article 78 proceeding Apple Farm Realty LLC and Antoinette R. Giordano ("Petitioners") seek a judgment against Respondents Vincent Pascale Chairman, Steve Wilutis Vice Chair, Richard Smith, Peter Zarcone, Karen Dunn, Patricia Kelly and Jose Rose in their capacity as members constituting the Planning Board of the Town of Brookhaven ("Respondent") annulling the Respondent's determination dated March 18, 2019 that denied the Petitioners' site plan application and special use permit to construct a convenience store with related site improvements; and for a judgment directing the Respondent to grant and issue the relief sought in the Petitioners' application and a determination of all questions which may be presented for determination under CPLR §7803; and granting Petitioners' cost and disbursements of this proceeding together with such other and further relief which this Court deems just and proper.

Petitioner, Antoinette Giordano, is a resident of Suffolk County, State of New York, and is the fee title owner of real property at 2164 Route 112, Medford, Town of Brookhaven, New York, designated on the Suffolk County Tax Map as 0200-771.00-

09.00-.001.000, ("Premises"). The Premises is located at the southwest corner of N.Y.S. Route 112 and Jamaica Avenue in Medford, New York. The Premises is 0.804 acres (or 35,035 square feet).

Petitioner Apple Farm Realty LLC ("Apple Farm") is a domestic limited liability company existing under and by virtue of the laws of the State of New York and maintains a principal place of business at 1520 Northern Boulevard, Manhasset, New York. Petitioner Apple Farm entered into a contract of sale for Ms. Giordano's vacant land at 2164 Route 112, Medford, New York where Apple Farm proposed to construct a 7-Eleven convenience store and related site improvements.

The Premises are in the Town of Brookhaven "J. Business 2" zoning district. That zoning district requires a Planning Board site plan approval and special use permit to build a freestanding convenience store.

In or about January 31, 2018, with Ms. Giordano's consent, Apple Farm as applicant and contract vendee, filed an application in the Town of Brookhaven for a special use permit and site plan approval.

Respondents, Vincent Pascale Chairman, Steve Wilutis Vice Chair, Richard Smith, Peter Zarcone and Karen Dunn are named herein as members of the duly constituted Planning Board of the Town of Brookhaven ("Board"). A public hearing was held in this matter on January 7, 2019 and the Board held the record open for ten days for submission of written comment and closed the public hearing portion.

The Premises is a vacant wooded lot at the southwest corner of N.Y.S. Route 112 and Jamaica Avenue in Hamlet of Medford, New York. The Premises is larger than one-half acre, having 35,035 square feet or 0.804 acres of land that extends from NYS Route 112 all the way through to Glendale Avenue. Three streets surround the parcel. NYS Route 112 on the east, Jamaica Avenue is on the north and Glendale Avenue is to the west. The Premises has approximately 147.84 feet of frontage along NYS Route 112, also known as Medford Avenue and approximately 274.02 feet of frontage along Jamaica Avenue.¹ Pedestrians may access available crosswalks at the intersection to maneuver across the roadways safely. Crosswalks and pedestrian signals are provided

¹Respondents admit this fact in their Answer.

across both approaches of Jamaica Avenue. A crosswalk with pedestrian signals is provided across the southerly side of the intersection that provides access between the subject site and a neighborhood park at the southeast corner of Route 112 and Jamaica Avenue.²

The surrounding area has commercial and industrial uses along the east and west side of NYS Route 112/Medford Avenue. The surrounding uses include auto dealerships, auto repair shops, shopping centers and office buildings.³

Shawn Dixon Memorial Park is across the street at the southeast corner of Jamaica Avenue and Route 112. The park entrance is on Jamaica Avenue, and not along Route 112. The park's frontage along Route 112 is blocked by a chain link fence and guardrail that prevents access from the park onto Route 112.

A retail shopping center occupied by the Medford Shooting Range, a gun shop and barbershop adjoin the park to the south.⁴

There are residences on Glendale Avenue and on the north side of Jamaica Avenue, a gasoline station operates a convenience store at the northeast corner of Route 112 and Jamaica Avenue. Further north, at 2222 Medford Avenue a/k/a Route 112, a freestanding building operates a convenience store on a parcel smaller than the Premises.

In January 2018, Petitioners filed an application for a special use permit and site plan approval. Petitioners went through the site plan review process and revised plans to incorporate various municipal departments as well as its professional's input, as well submitting a traffic study and Aerial Plans that demonstrated ingress and egress along Jamaica Avenue.

The J Business 2 zoning district, Town Code §85-427(f) requires a Planning Board special permit for a freestanding convenience store. Town Code §85-

²Respondents admit the fact in their Answer.

³Respondents admit the fact in their Answer.

⁴Respondents admit the fact in their Answer.

433(A)(1)(J) allows a convenience store, with the Board's discretion, on a parcel having one-half acre or more and less than one acre, with certain conditions.

Town Code §85-433(A) states in pertinent part:

§85-433 Special permit criteria. In addition to the criteria set forth within Article VI, §85-67 or Article §85-107, the following special permit criteria shall be required for the use so indicated:

A. Convenience store.

(1) Freestanding convenience stores.

(a) One off-street truck loading space with a minimum width of 12 feet and a minimum length of 40 feet shall be required. Aisles and turning areas shall provide adequate internal circulation, as determined by the Planning Board.

(b) All aisles within parking areas shall have a minimum width of 24 feet.

(c) A dumpster enclosure for one dumpster for rubbish, as well as one dumpster for cardboard recycling, unless adequate space for cardboard recycling storage can be demonstrated by the applicant within the convenience store. The dumpster enclosed shall consist of walls measuring eight feet in height, which complements the building facade.

(d) Buffers and planting shall be in accordance with §85-50B(2)(b), except that the rear yard setback shall be 25 feet. Said buffers and planting shall be maintained and dead or diseased planting shall be replaced as necessary.

(e) A minimum six-foot-high solid (opaque) fence shall be placed along any property line adjacent to a residential district or use.

(f) Outdoor sales, storage and display of goods shall be prohibited.

(g) Neon lights in windows shall be prohibited.

(h) Waste receptacles for customer use shall be provided and maintained on site.

(i) A maintenance plan shall be provided for management of litter and general upkeep of the premises.

(j) The required minimum lot size shall be one acre, unless the Planning Board, in its discretion and upon a finding of compliance with the criteria set forth in Subsection A(1)(a) through (h) above, and Article VII, §85-107, approves a small lot size of no less

than one-half acre. In considering a lot size smaller than one acre, the Planning Board shall impose the following conditions:

[1] Prohibition against deliveries by tractor trailer;

[2] Adequate area for traffic circulation;

[3] Any other condition as the Board determines will protect neighboring properties and enhance community character, including, but not limited to, architectural design and enhancement thereto.

In an August 27, 2018 memo to the Town of Brookhaven Planning Division, the Town of Brookhaven Highway Department's Division of Traffic Safety stated:

"As requested we have reviewed the latest submission dated August 20, 2018 and received August 21, 2018, requesting traffic review comments with regard to the above-referred site plan application.

Comments:

1. Traffic Impact Assessment was prepared and submitted. Project will not have significant operational or safety impacts.
2. Autoturn templates for truck maneuvers at driveways and on site, including deliveries, trash pickup etc. indicates adequate circulation for single unit deliver and sanitation trucks. Applicant has agreed to prohibit large truck deliveries.
3. Site plan modification eliminates the manhole from the curb ramp.
4. We have no further comments or concerns regarding this submission.

By copy of this memo, we are informing NYSDOT of our comments..."

The J Business 2 zoning district allows as of right uses for an art gallery, banks without accessory drive-through facilities, bowling alleys, commercial centers, day-care facilities, delicatessens, dry cleaners, exhibit halls, health clubs, laundromats, live performance and community theater, movie theaters, museums, non-degree-granting sports instruction/program, except those associated with truck driving, nurse/y/garden centers, offices, personal services shops, pharmacies, places of worship, parish house, or rectory, retail sales establishments, shops and stores for the sale at retail of consumer merchandise and services, shops for custom work and for making articles to

be sold at retail on the premises, take-out restaurants, undertaking establishments, and veterinarians provided that all activities take place within the building.

The Planning Department circulated Petitioners' application to its various departments and agencies for their review and comment. The application generated revisions to the site plan and led to the submission of a Traffic Impact Study before the public hearing.⁵

The Petitioner accepted all of the planning staff's recommendations in the design of the site. The Respondent in the Answer denies information and belief regarding this allegation. This is a fact Respondents should know in making a decision especially since there is an admission regarding meetings and revisions to the site plan.

Since the plot area is slightly smaller than a full acre, the Petitioners agreed to comply with the usual condition imposed for plot area waivers by prohibiting tractor-trailer deliveries and the Petitioners also offered to place a covenant on the property enforceable by the Town.⁶

In January 2019, the Respondent held a public hearing on the Petitioner's application. At that hearing the Petitioners submitted testimony from its counsel, a traffic expert, a real estate expert, and a civil engineer expert. The Hearing record was held open for ten days for ten days within which the Petitioners submitted their real estate expert's letter report.

Petitioners submitted evidence that the Respondents approved other convenience stores on parcels smaller than a full acre, including 7-Eleven convenience stores at the following locations:

- (a) Northeast corners of Route 112 & Morris Street, Patchogue, 0.32 acres a 7-Eleven
- (b) Southeast corners of Long Island Expressway \Service Road and Route 112, Medford, 0.69 acres, a 7-Eleven
- (c) Northwest corner of North Ocean Avenue & Horseblock Road, Farmingville, 2222 Route 112 Medford, 0.36 acres, a convenience store.

⁵Respondents admit the fact in their Answer.

⁶Respondents admit the fact in their Answer.

Stonefield Engineering & Design by Frank A. Filiciotto, PE prepared the Traffic Impact Study and testified that the site plan is code compliant in its design and provides adequate onsite parking and vehicular circulation for the proposed 7-Eleven convenience store. The traffic study provided empirical data that car queues on Jamaica Avenue would not reach the driveways 85% of the time and as such permits vehicles to enter or exit into Jamaica Avenue immediately. The site plan designed the driveways with the most distance from the intersection so that six cars do not queue along the roadway all the time.

Mr. Filiciotto specifically testified that the full movement driveway on Jamaica Avenue is 140 feet west of the intersection and based on the traffic study's peak and off-peak traffic counts, this driveway distance allows trucks and vehicles to maneuver into or off the site without blocking the driveway. Based on the empirical data in its traffic study, 85% of the time, there are six cars or less, queued on Jamaica Avenue from the traffic signal, which length of said six cars never reaches the Jamaica Avenue driveway. A queue of six cars or less occupies 120 feet or less from the intersection assuming twenty feet per car. Thus the queue would not reach the driveway on Jamaica Avenue, which is 140 feet from the intersection. Also, 85% of the time vehicles may enter from or exit onto Jamaica Avenue immediately. He went on to testify that the Route 112 driveway is, approximately 90 feet south of the intersection to afford the optimum separation distance from the signalized intersection and it is limited to right-turn in and right-turn out, as a safety feature.

Mr. Filiciotto testified that the NYS Department of Transportation cleared the site for a highway work permit in the State's right-of-way on Route 112 and that the Petitioners were willing to covenant against deliveries by tractor-trailer and allow deliveries by single-unit box trucks only.⁷ Mr. Filiciotto's testimony was not opposed or refuted by another expert.

Mr. Chris Tartaglia, an engineer expert, testified that the illuminated signage for the store would be shielded and Dark Sky Friendly. By the use of LED bar lighting that only illuminates the sign directly downwards, the light would not be visible otherwise.

⁷Respondents admit the fact in their Answer.

Tartaglia further testified that the applicant would redesign the parapet wall to lower its profile and reduce the appearance of large mass as suggested by one of Respondent's board members.⁸

John Breslin, testified as Petitioner's real estate expert. He testified that a convenience store would not prevent the orderly and reasonable use of adjacent properties or adversely impact properties in adjacent use districts; that a convenience store would not adversely affect safety, health, welfare, comfort and convenience or order of the Town; that a convenience store would be in harmony with and promote the general purposes and intent of the ordinance; and that if the special use permit were granted, a convenience store would not have any adverse impact upon existing use and future probable development of the area. He further testified that the use would adversely affect property values of adjacent properties, both residentially zoned and business zoned; that the site provides adequate on-site parking, that the utilization of the premises as proposed by the Petitioner would not constitute an over-crowding of land or undue concentration of population.⁹

Finally, Breslin testified that based on his review, the Town approved other convenience stores on smaller sites than what the applicant proposed. Mr. Breslin's opined that the site's use is contemplated by the zoning code and is appropriately located at a signalized intersection.

Mr. Breslin and Respondent's Chairman agreed that over saturation is a factor of the special permit process.

There were speakers opposing this application. These speakers fell into two categories: local business owners and business competitors (some of which were 7-Eleven owners or representatives) and local residents. The local business owners (including 7-Eleven owners) testified mainly regarding competition and too many 7-Elevens but also about traffic. Residents testified about traffic, litter, crime, congestion

⁸Respondents admit the fact in their Answer.

⁹Respondents admit the fact in their Answer.

and too many 7-Elevens. There were no experts presented in opposition to the application.

On March 18, 2019, the Respondent voted to deny the application. However, in its decision, Respondent stated the following:

- (1) Paragraph Eleventh states in pertinent part, "...As the project is in conformance with the zoning its use is consistent with the area's present and likely future uses..."
- (2) Paragraph Twelfth in pertinent part states, "...The Board further finds that the most appropriate use of the land is in accordance with the proposed use as a convenience store. As there is no testimony indicating a reduction in home values and weighing the conservation of land values against the proposed and existing use of the land, and further considering that the site is buffered from the adjoining homes with natural vegetation supplemented with additional vegetation and the site is located on heavily commercial NYS Route 112, the Board finds the proposed use as a convenience store encourages the most appropriate use of the land and appropriately conserves property values."
- (3) Paragraph Fourteenth stating the premises would be adequately served by its septic system.
- (4) Paragraph Fifteenth states there is no evidence of emissions
- (5) Paragraph Sixteenth states the use conforms to the Town's Dark Skies Ordinance, the dumpster and loading area are adequately buffered from residents.
- (6) Paragraph Nineteenth states the use does not pose a hazard and the site plan was approved by the Division of Fire Prevention.
- (7) Paragraph Twentieth states the application conforms with the legislative standards and will not cause overcrowding of land or undue concentration of population.
- (8) Paragraph Twenty-fourth states the plot area is sufficient, appropriate and adequate for the use and the photographs of truck deliveries to other sites are not suitable to this application because those 7-Eleven stores received their special permit before the Town amended its code to prohibit tractor-trailer deliveries to sites with less than one acre of plot area.

Respondent set forth its basis for denial as follows:

"The proposed site plan does not depict a delivery truck egress plan that is sufficient. The use of the ingress access as means for the delivery truck egress is unacceptable, especially considering the testimony of the applicant's traffic expert that 85% of the time the traffic light at Jamaica Avenue has six cars waiting for the signal to change. This does not allow enough room for delivery trucks to exit onto Jamaica Avenue and thus, will not allow the ingress to be used by other vehicles entering from Jamaica Avenue. This will also create a blockade of the parking stalls along the front of the store while the delivery trucks wait to exit. Whereas the site plan does not provide sufficient means of access for delivery trucks, the site plan must be denied.

As the site plan has been denied, the special permit too must be denied, as there is no site plan which can accommodate the use. However, the Board analyzed the special permit criteria and finds that assuming, arguendo, that the site plan was granted, the special permit to must be denied. The Board acknowledges that a special permit is tantamount to a legislative finding that the permitted use is in harmony with the community's general zoning plan and will not adversely affect the neighborhood. While this does not mean the special permit is a matter of right, the applicant's burden of proof is a relatively light one. The applicant has failed to meet even this light burden. The proposed special permit application meets specific criteria under Town Code §85-433, it is a false compliance as it related to the prohibitions on tractor trailer deliveries. The applicant's representative agrees to comply with the no tractor trailer deliveries, however, that is not the business model of the applicant, as testified to by current operators. This Board cannot approve this special permit knowing that is impossible to comply. There is no evidence in the record that the 7-11 Corporation, has agreed to the condition. The only agreement is from the applicant, who is not 7-11.

The application also does not meet the generic special permit criteria for all special permits under Town Code 85-107. Further, as the truck delivery trucks must use the ingress access to egress the site, the anticipated operation of the site is unreasonable and will lead to an undue increase in traffic on Jamaica Avenue. Therefore, the special permit is denied as well. "

A special use permit is an authorized use of land permitted by the zoning ordinance although not necessarily allowed as of right. Classifications of a use as a special permit constitutes a recognition that the use is harmonious with a community's zoning plan and will not adversely affect the neighborhood. Town Law §274-b: Matter of Retail Prop. Trust v. Board of Zoning Appeals of Town of Hempstead, 98 N.Y.2d 190, 746 N.Y.S.2d 662 (2002); North Shore Steak House v. Board of Zoning Appeals of Village of Thomaston, 30 N.Y.2d 235, 331 N.Y.S.2s 645 (1972).

The burden of proof on an owner seeking a special exception is lighter than that on an owner seeking a use variance, the former only being required to show compliance with any legislatively imposed conditions on an otherwise permitted use, while the latter must show an undue hardship in complying with the ordinance, 7-Eleven v. Inc. Vil. of Mineola, 127 A.D.3d 7 N.Y.S.3d 517 (2nd Dept. 2015); Matter of M & V 99 Franklin Realty Corp. v. Weiss, 124 A.D.3d 783, 2 N.Y.S.3d 51 (2nd Dept. 2015).

A planning board has discretion to deny a special permit for failure to comply with a legislative condition, however, such a determination must be supported by substantial evidence. Matter of 7-Eleven, Inc. v. Planning Bd. Of Town of Islip, 21 A.D.3d 383, 798 N.Y.S.2d 912 (2nd Dept.2005); Matter of Holbrook Assoc. Dev. Co. v. McGowan, 261 A.D.2d 620, 690 N.Y.S.2d 686 (2nd Dept. 1999); Matter of Chernick v. McGowan, 238 A.D.2d 586 656 N.Y..2d 392 (2nd Dept. 1997). The denial of special exception permit may not be based solely upon community objection. Matter of Twin County Recycling Corp. v. Yevoli, 90 N.Y.2d 1000, 655 N.Y.S.2d 627 (1997); Matter of White Castle Sys. Inc. v. Board of Zoning Appeals of Town of Hempstead, 93 A.D.3d 731, 732, 940 N.Y.S.2d 159 (2nd Dept. 2012).

In this case, the record did not contain substantial evidence (for example, authoritative reports, opposing experts or empirical data) that significantly opposed the Petitioners' competent evidence. The Respondent determined that the site is appropriate for a convenience store. It denied the special use permit in part upon speculation raised by the community opposition, some of which were area rival business owners, that the anticipated operation of the site would be unreasonable because of the possibility of tractor-trailer deliveries.

The Respondent partly based the determination that the condition of prohibition of tractor-trailer would not be met because it was not 7-11's business model. No business model is in the record. The Respondent accepted the testimony of motivated competing franchisees or competing businesses with photographs of other locations as that business model. The Petitioners are not 7-Eleven and 7-Eleven was not before the Respondent (nor was any other potential supplier of the Petitioners). There is no evidence that deliveries are mandated by tractor-trailers by 7-Eleven or any other entity Petitioners may have a franchise agreement with.

Respondents are legislatively required to impose the conditions in Code §85-433(a)(1)(j) which the Petitioners accepted, i.e., the covenant to ban deliveries by tractor-trailers. Respondent admitted that Petitioners accepted this condition and agreed to file a covenant. The Brookhaven Highway Department Division of Traffic Safety in its letter of August 2018 specifically states "applicant has agreed to prohibit large truck deliveries." The Respondent had ample opportunity to request proof that the condition could be complied with or to inquire about any restrictions imposed on Petitioners by 7-11 regarding deliveries.

The Respondent wants to impose a new condition to wit: that an applicant show proof of compliance with an operational condition prior to being operational. The Respondent denied the application based upon a covenant that it believed could not be complied with before the covenant was ever put into place. Nowhere is there any evidence that the covenant cannot be complied with or that Petitioners have not complied with similar covenants. The record is vacant as to whether the Respondents have ever denied a permit based on a supposition that the future covenant will not be complied with as a basis for denial. If it is a new basis, it is not codified.

The Respondent in its decision and in their Answer admit that the plot size and site plan's aisle width conform with the site plan criteria. Respondent further did not deny the site plan complies with required aisle widths, number of parking stalls and loading stalls.

Respondent ignored the truck ingress and egress plans dated July 26, 2018 and March 13, 2018. Instead, the Respondent set forth truck maneuvers to and from the site only along Jamaica Avenue. Those maneuvers are not to the exclusion of vehicles using the Route 112 driveway. Vehicles including trucks may use either driveway. Respondent failed to acknowledge that the Premises has not one but two access points for vehicles. Respondent's decision expressed an impression that trucks would always exit onto Jamaica Avenue, when the Premises has two points of exit. Respondent's decision was also in error in stating that Jamaica Avenue is the only access point for delivery trucks heading north when the Premises has access on Jamaica Avenue west of the intersection with New York Route 112.

The Town Highway Department Division of Traffic Safety recommended site plan approval based on the aerial plans and the site plan's aisle widths, which provides adequate onsite traffic circulation. The Highway Department Division of Traffic safety stated, the "Project will not have significant operational or safety impacts." It further stated other than what was in its memo it had "no further concerns or comments."

The Traffic Impact Study dated, July 19, 2018, showed an 85% queue along Jamaica Avenue site frontage during the weekday morning and evening peak hours would not block the site driveway and therefore it was not anticipated that vehicles queuing at the eastbound approach to the intersection would conflict with vehicles exiting the site.

Respondent's decision was arbitrary and capricious. Petitioners met the special use permit criteria applicable for a freestanding convenience store in Town Code §85-433(a)(1)(j) and the general criteria in Town Code §85-107. Respondents ignored traffic and engineering studies, disregarded the promised covenant and accepted the unsubstantiated objections (of over-saturation of convenience stores and traffic) where the record does not contain substantial evidence or opposing expert opinion to support such findings.

The decision in 7-Eleven v. Inc. Vill. Of Mineola, 127 A.D.3d 7 N.Y.S.3d 517 (2nd Dept. 2015) annulled the Board's special permit denial as arbitrary and capricious where the Board concluded that the proposed convenience store would fail to comply with the applicable legislatively imposed conditions where there was no evidence that the proposed use would have a greater impact on traffic than any as-of-right use. See: Matter of Robert Lee Realty Co. v. Village of Spring Val., 61 N.Y.2d 892, 894 (1984).

The Second Department in 7-Eleven Inc. Vill. Of Mineola determined that:

"...the Board entirely discounted 7-Eleven's expressed willingness to abide by certain restrictions on the size of delivery trucks and the timing of deliveries (citing Matter of J.P.M. Props v. Town of Oyster Bay, 204 A.D.2d at 723-724; Matter of Triangle Inn v. Lo Grande, 124 A.D.2d at 738; Matter of Old Ct. Intl. v. Gulotta, 123 A.D.2d 634, 635 (1986). In addition, although the Board claimed that it arrived at its traffic findings in part because 7-Eleven failed to provide certain proprietary information, the Board had never requested that information, which, in any event was not required by law."

An owner seeking a special exception permit is only required to show compliance with any legislatively imposed conditions in an otherwise permitted use. Conclusions that proposed development would fail to comply with the applicable legislatively imposed condition in the future and a determination to deny the Petitioners's application is arbitrary and capricious. Matter of Kabro Assoc., LLC v. Town of Islip Zoning Bd. of Appeals, 95 A.D.3d 1118 944 N.Y.S.2d 277 (2nd Dept.2012).

Respondent's reliance on testimony uncorroborated by empirical data or any expert opinion is not sufficient to counter testimony by Petitioner's experts, Matter of Chernick v. McGowan, 238 A.D.2d 586 656 N.Y..2d 392 (2nd Dept. 1997); Matter of Frankie Realty Corp. v. Hinck, 229 A.D.2d 501, 631 N.Y.S.2d 177 (2nd Dept. 1995).

The findings of Respondent were not supported by substantial evidence with regard to the alleged increased volume of traffic. There was no showing that the proposed use would have a greater impact on traffic than would other uses that are unconditionally permitted. Even if there was evidence of an increase in traffic, there was no evidence indicating that the proposed use would have any greater impact than would other permitted uses. The alleged increase in traffic issue is an improper ground

for the denial of the special permit. Quick Clerk Corp. v. Town of Islip, 166 A.D.3d 982, 89 N.Y.3d 210 (2nd Dept. 2018).

Granting the special use permit would not adversely affect the health, safety and welfare of the community based upon the Board's positive finding that a convenience store would not prevent the orderly and reasonable use of permitted or legally established uses in the zoning district or in the adjacent residential district and further, that the Petitioners' use would not adversely affect future permitted or legal uses in adjacent use districts.

The Court annuls the Respondent's determination since it was arbitrary and capricious and not supported by substantial evidence. Matter of Robert Lee Realty Co. v. Village of Spring Val., 61 N.Y.2d 892, 474, N.Y.S.2d 475 (1984); Matter of Huntington Health Care Partnership v. Zoning Bd. Of Appeals of town of Huntington, 131 A.D.2d 481, 516.N.Y.S. 2d 99 (2nd Dept. 1987).

The Board's findings are arbitrary because the record does not contain opposing expert data or substantial evidence to support the site plan denial, Matter of In-Towne Shopping Ctrs., Co. v. Planning Bd. Of the Town of Brookhaven, 73 A.D.3d 925, 901 N.Y.S.2d 331 (2nd Dept. 2010). Here the record fails to support Respondent's view as to the access to and from Jamaica Avenue. The evidence does not demonstrate that six cars always queue along Jamaica Avenue and would block the driveway, as erroneously determined by the Respondent. Nor does the record reflect that the Petitioners' would violate the covenant prohibiting tractor-trailer deliveries where the Town legislatively remedied the tractor-trailer issue raised by the opponents when it enacted §85-433(a)(1)(j). By that enactment there is a prohibition imposed on tractor-trailer deliveries for sites under one acre. A finding that the Aerial Plan by itself without explanation and relation to empirical data is sufficient to deny the sites plans's truck ingress and egress on Jamaica Avenue is similarly arbitrary.

For the reasons stated herein, the record lacks sufficient evidence to support the rationality of the site plan denial. A decision of an administrative agency which neither adheres to its own prior precedent or indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious. Matter of Tall Trees Constr. Corp. v. Zoning Bd. Of Appeals of Town of Huntington, 97 N.Y.2d 86, 93, 735 N.Y.S.2d

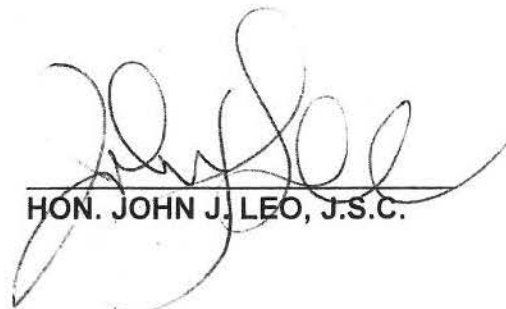
873 (2001); Matter of Knights v. Amelkin, 68 N.Y.2d 975,977, 510 N.Y.S.2d 550 (1986); Matter of Lucas v. Board of Appeals of Vill. Of Mamaroneck, 57 A.D.3d 784, 785, 870 N.Y.S.2d 78 (2nd Dept. 2008). Where a board is faced with an application that is substantially similar to a prior application that had been previously determined, the board is required to provide a rational explanation for reaching a different result. "[T]o justify a departure from a prior determination, there must be a change of circumstances sufficient to justify the contrary result- i.e.- that there were substantive differences between the application or that there has been some other material change in circumstances (such as a change in the character of the neighborhood) to justify the different decision. Matter of Lucas v. Board of Appeals of Vill. Of Mamaroneck, 14 Misc. 3d 1214, 836 N.Y.S.2d 486 [Sup. Ct. Westchester County 2007], affd 57 A.D.3d 784, 870 N.Y.S.2d 78 (2nd Dept. 2008). The reason cited by Respondent's to justify denying the Petitioners' application does not support a finding that there was a material change in circumstances to warrant different result from other 7-Eleven or convenience store applications and the previously granted applications. The Respondent did not do a sufficient or any such analysis.

Administrative due process prohibits inconsistent treatment of similarity situated parties. Matter of Knight, supra; Exxon Corp. v. Board of Standards & Appeals of City of N.Y., 128 A.D.2d 289, 515, N.Y.S.2d 768 (1987), lv denied 70 N.Y.2d 614, 524 N.Y.S.2d 676 (1988).

Accordingly, the petition is granted to the extent, that the application is remanded to the Respondent with direction to grant the site plan application and special use permit to construct a convenience store with related site improvements; and directing the Respondent to grant and issue the relief sought in the Petitioners' application to subdivide the Parcel and to permit the related area variances.

Submit judgment.

J/SC May 15, 2020
 Dated: May 15, 2020
 Central Islip, New York


 HON. JOHN J. LEO, J.S.C.