

**Matter of Red Hook/Gowanus Chamber of Commerce v  
New York City Bd. of Stds. & Appeals**

2006 NY Slip Op 51064(U)

Decided on June 2, 2006

Supreme Court, Kings County

Lewis, J.

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Decided on June 2, 2006

**Supreme Court, Kings County**

**In the Matter of Red Hook/Gowanus Chamber of  
Commerce, Petitioner,**

**against**

**New York City Board of Standards and Appeals, the  
City of New York, and 160 Imlay Street Real Estate,  
LLC, Respondents.**

Yvonne Lewis, J.

Upon the foregoing papers in this CPLR Article 78 proceeding, petitioner Red Hook/Gowanus Chamber of Commerce (the Coalition) seeks a judgment vacating and annulling the resolution by respondent New York City Board of Standards and Appeals (BSA) which granted respondent 160 Imlay Street Real Estate LLC (Imlay) a variance to convert an existing building located at 160 Imlay Street in Brooklyn (the building) in a nonresidential M2-1 zoning district into a (primarily) residential building containing condominium units.

### ***Background Facts and Procedural History***

The subject building is a six-story box-shaped structure that was built in 1913 and has approximately 220,000 square feet of interior space. The building is located in an M2-1 Manufacturing Zone along the waterfront in the Red Hook section of Brooklyn. M2-1 Manufacturing Zones allow for various commercial uses, such as manufacturing, retail, and office space, but do not permit residential use.<sup>[FN1]</sup> Between 1975 and 2000, the building was owned by Mercedes Distribution Center (Mercedes) and used as a warehouse. In or about 2000, Mercedes sold the building to Imlay. According to Imlay, it purchased the building with the intention of leasing it to a telecommunications business [\*2] for use as a "telecom hotel."<sup>[FN2]</sup> However, this plan failed to materialize when the telecommunications industry declined shortly after Imlay took possession of the building. Thereafter, Imlay maintains that it spent the next two years trying to market the building to a variety of prospective conforming use tenants, but was unsuccessful in this regard due to the building's structural deficiencies. Accordingly, Imlay concluded that the only viable option for obtaining a reasonable return on its investment was to convert the building to residential use.

On September 18, 2002, Imlay submitted an application to the BSA which requested a variance be granted to permit the conversion and enlargement of the building into a nine-story, 284,329 square foot residential building with approximately 145 condominium units and on-site parking. The application was referred to Community Board No. 6 which ultimately recommended against the variance by a 32 to 4 vote. Thereafter, the matter was sent back to the BSA, which held four separate public hearings on the variance application between March and December 2003.

During the course of the public hearings process, the BSA heard from people both in favor of and opposed to the variance and reviewed numerous documents which were submitted. Among these documents was a "dollars and cents" economic analysis performed by Freeman/Frazier & Associates, Inc., which projected a rate of return of only 1.56% if the premises was developed as a conforming manufacturing building as opposed to a projected return of 11.41% if the premises was developed as the proposed residential building. Furthermore, in response to concerns expressed by members of the BSA during the course of the hearings, Imlay scaled back its proposed building plan so as to eliminate the addition of three new stories to the premises and to replace some of the planned condominium units with conforming use retail space on the first floor of the building.

In a resolution dated December 23, 2003, the BSA voted in favor of granting the variance by a majority vote of three to one. On January 23, 2004, The Coalition, which is a coalition of businesses from the Red Hook area, brought the instant petition against BSA and the City of New York (the City) seeking an order reversing, annulling, and setting aside the BSA's determination which granted the variance. Among other things, the petition

alleged that the BSA acted arbitrarily and capriciously and without a rational basis in law, violated lawful procedure, and issued a decision that was affected by errors of law and was not supported by substantial evidence. On or about February 17, 2004, the City moved to dismiss the petition based upon the Coalition's failure to name Imlay, a necessary party, as a respondent. Thereafter, the Coalition cross-moved for leave to file an amended petition which included Imlay as a respondent. In an order dated July 30, 2004, the court denied the City's motion to dismiss the petition and granted the Coalition leave to file an amended petition. This amended petition is now before the court.

### *Initial Matters*

*[\*3]*

Although the Coalition's petition and amended petition do not raise the issue, during the pendency of this action, the Coalition alleged that the BSA's majority vote in favor of granting the variance was the product of political corruption and, therefore, the variance should be vacated. In support of this claim, the Coalition points out that, during the course of the public hearings, three out of the four BSA Commissioners deciding on the matter indicated they were opposed to issuing the variance. The Coalition maintains that, after hearing these comments, Imlay hired a lobbyist, met with a Deputy Mayor, and made a \$100,000 donation to a project supported by the Deputy Mayor. According to the Coalition, after this meeting, two of the three Commissioners who were opposed to granting the variance changed their positions and the third Commissioner (Chairman Chin), was removed from his position as Chairman of the BSA shortly after he voted against issuing the variance.

Assuming, for argument sake, that the Coalition was entitled to raise

allegations of corruption for the first time in reply papers, the fact of the matter is that there is no hard evidence to support the Coalition's claim. Specifically, there is no evidence that the Deputy Mayor ever contacted the BSA members, much less that he pressured them to change their vote on the pending variance. Furthermore, the City has introduced evidence which indicates that it planned to replace Chairman Chin long before the vote on the subject variance took place. Consequently, the Coalition's corruption allegations must fail as they lack substantive probative value.

The Coalition also argues that the variance should be vacated because the BSA wrongfully segmented Imlay's development plans in violation of the State Environmental Quality Review Act (Environmental Conservation Law, Article 8 [SEQRA]). In this regard, the Coalition points out that Imlay also owns the building at 162 Imlay Street, next door to the subject building. This "sister building" is nearly identical to the subject building. According to the Coalition, Imlay will undoubtedly seek to develop the sister building for residential use and, when viewed in conjunction with the development of the subject building, this project would require an environmental impact statement under SEQRA. Under the circumstances, the Coalition argues that the BSA erred in failing to conclude that Imlay improperly segmented one large-scale project into two smaller projects in order to avoid a full-scale environmental review.

The court finds the Coalition's SEQRA argument to be without merit. When a single development plan is segmented into two or more individual projects or stages, a zoning board must consider the environmental impact of the entire project and may not lower the environmental review threshold by treating the individual projects or phases as separate or unrelated (*Matter of Teich v Buchheit*, 221 AD2d 452, 453-454 [1995]). However, unlike in *Teich*,

here there is no evidence that the development of the subject building is the first phase or otherwise part of an overall development project that includes converting the sister building into condominiums. In fact, Imlay has not applied for a variance for the sister building.<sup>[FN3](#)</sup>

Finally, there is no merit to the Coalition's argument that the BSA's decision granting the variance is null and void because Imlay failed to provide copies of all its submissions to the Brooklyn Borough President, Community Board Number 6, and the City Councilmember for the [\*4]subject district as required by the BSA. The City has submitted proof of service demonstrating that these parties were served with the submissions.

### ***Standard of Review***

Turning to the BSA's determination that Imlay was entitled to a variance under the applicable zoning laws, the court initially notes that "[b]road discretion is vested in local zoning boards in considering applications for variances, and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary, or an abuse of discretion" (*Zoning Bd. of Town of Mt. Pleasant*, 304 AD2d 575 [2003]). "Thus, a determination of a zoning board should be sustained upon judicial review if it has a rational basis and is supported by substantial evidence" (*Matter of Ifrah v Utschig*, 98 NY2d 304, 308 [2002]).

### ***Applicable Law***

The subject variance is governed by New York City Zoning Resolution § 72-21 (ZR § 72-21) which sets forth five findings that the BSA must make before it may grant a variance. Specifically: (1) ZR § 72-21(a) requires a finding that the subject property has "unique physical conditions" which create

"practical difficulties or unnecessary hardship in complying strictly" with the permissible zoning uses and that such practical difficulties are not due to the general conditions of the neighborhood; (2) ZR § 72-21(b) requires a finding that the physical conditions of the property preclude any "reasonable possibility" of a "reasonable return" if the property is developed in strict conformity with the zoning regulations, and a variance is "therefore necessary to enable the owner to realize a reasonable return" from the property; (3) ZR § 72-21(c) requires a finding that the variance "will not alter the essential character of the neighborhood" or "substantially impair the appropriate use or development of adjacent property" and "will not be detrimental to the public welfare"; (4) ZR § 72-21(d) requires a finding that the "practical difficulties or unnecessary hardship claimed as a ground for a variance have not been created by the owner"; and (5) ZR § 72-21(e) requires a finding that the variance be "the minimum variance necessary to afford relief."

***ZR § 72-21 (a)***

In its December 23, 2003 resolution, the BSA found that Imlay satisfied its burden under ZR § 72-21(a) by submitting substantial evidence which demonstrated that the building had unique physical conditions which, in the aggregate, rendered the building obsolete and created practical difficulties and unique hardships in complying strictly with the permissible commercial uses. In particular, the BSA pointed to evidence in the form of Imlay's statements, as well as letters submitted by Cetra/Ruddy Incorporated, KTR Newmark, and R&O Consulting indicating that building was not suitable for modern manufacturing/commercial businesses due to the multi-story nature of the building, the presence of numerous support columns breaking-up the floor space, and undersized above-grade loading docks, as well as substandard elevators and electrical wiring.

In petitioning to overturn the BSA's resolution granting Imlay a variance, the Coalition argues that the BSA's determination regarding the unique physical conditions of the building was irrational, arbitrary and capricious, and not supported by substantial evidence. In support of this [\*5] argument, the Coalition points out that Imlay's own expert report described the building as being a "typical" waterfront storage warehouse. The Coalition also points out that, for the 25 years prior to Imlay taking possession of the premises, the building was fully occupied as a complying use warehouse facility, thereby belying the claim that the obsolescence of the building prevented it from being used as a warehouse. In addition, the Coalition maintains that the BSA's finding was not based on substantial evidence inasmuch as there was no proof that the other buildings in the neighborhood did not suffer from the same type of problematic features and conditions as those affecting the subject building. Finally, the Coalition argues that the BSA's findings regarding the obsolescence of the building were not supportable, given the fact that the building had seven loading docks, two of which were accessible by full-sized tractor trailers, and the lack of any evidence as to how the support columns, low ceilings, and multiple floors would interfere with modern manufacturing uses.

Contrary to the Coalition's claims, the court finds that the BSA's determination that Imlay satisfied the requirements of ZR § 71-21 (a) was not irrational, arbitrary and capricious. The Coalition's reference to the statement in Imlay's report about the building being "typical" of other storage warehouses is taken out of context. The report merely states that the building is typical in being set back from the water and does not state that the conditions cited by Imlay in support of its variance application were typical. Furthermore, the fact that the previous owner of the building (Mercedes) was able to use the building as a warehouse before Imlay took possession of the premises does not

demonstrate that the BSA acted in an irrational, arbitrary and capricious manner in determining that Imlay could not do likewise, given the fact that Mercedes' president testified before the BSA that "the only reason [Mercedes] was able to continue through all these years is because [it] owned the property at a very, very low rate and, in turn, [Mercedes] could charge substantially below market rate for the space." In addition, there was no evidence in the record before the BSA which indicated that the overall obsolescence of the building was a problem common to other buildings in the neighborhood. To the contrary, the "statement of facts and findings" which Imlay submitted as part of its application for the variance (*see* BSA Record and pp. 1293-1295) indicated that the building was unique in terms of its height, depth, and internal configuration inasmuch as most of the industrial use building in the zoning district and on Imlay Street were one-story buildings. While it is true that the sister building located next door has similar characteristics and conditions as those which created the hardship at the subject building, the presence of one such building does not demonstrate that these conditions were generally present throughout the neighborhood (*Douglaston Civic Ass'n v Klein*, 51 NY2d 963 [1980]). Finally, there was ample evidence in the record to support the BSA's finding that the support columns, undersized and above-grade loading docks, substandard wiring and elevators, and multi-floor nature of the building presented serious problems if the building were to be used as a conforming use warehouse or manufacturing facility.

***ZR § 72-21 (c)***

In its resolution granting the variance, the BSA found that there was substantial evidence that the proposed residential building would not alter the essential character of the surrounding neighborhood, impair the use or development of adjacent properties, or be detrimental to the public welfare as

required under ZR § 72-21 (c). In particular, the BSA pointed out that lawful [\*6]non-conforming residential buildings already existed within a 400 foot radius of the subject building and that, under the revised plan submitted by Imlay, the building would have conforming uses on the first floor, thereby minimizing the impact of the proposed residential use on other properties in the immediate vicinity of the building, and be more in keeping with the mixed-use character of the neighborhood. The BSA also noted that there was a major housing project in the general vicinity of the building and that there was no credible evidence that the proposed residential use would have an adverse impact on the development of adjacent properties.

The Coalition argues that the BSA's determination that Imlay satisfied the requirement of ZR § 72-21 (c) was irrational, arbitrary and capricious, and not based upon substantial evidence. In particular, the Coalition maintains the BSA improperly looked beyond the boundaries of the zoning district in which the building is located in determining the character of the surrounding neighborhood. The Coalition also argues that the BSA failed to take into account the fact that the building abuts a container port which conducts outdoor operations 24 hours a day using noisy machinery. According to the Coalition, the presence of this container port within close proximity would undoubtedly create conflicts with the residents residing in the building.

Contrary to the Coalition's argument, it is well settled that, in determining whether a variance would alter the essential character of a neighborhood or district under ZR § 72-21 (c), the BSA may look beyond the zoning district where the building is located to the surrounding neighborhood (*Matter of Soho Alliance v New York City Bd. of Stds. & Appeals*, 95 NY2d 437, 442 [2000]; *Matter of West Village Houses Tenants' Assoc. v New York City Bd. of Stds. &*

*Appeals*, 302 AD2d 230, 231 [2003]). Thus, the BSA properly considered the proximity of other residential buildings in the neighborhood in determining that the building was located in a mixed-use area. Accordingly, the court finds that the BSA's determination that Imlay satisfied the requirements of ZR § 71-21 (c) was based upon substantial evidence and was not irrational, or arbitrary and capricious.

**ZR § 72-21 (d)**

In its resolution granting the variance, the BSA found that the hardship which served as the basis for Imlay's variance application was not created by Imlay itself as required under ZR § 72-21 (d). The Coalition argues that this determination was irrational. In particular, the Coalition points out that Imlay was aware of the zoning restrictions, as well as the physical limitations of the building, at the time it purchased the premises and, therefore, any hardship Imlay faces as a result of the zoning laws and the physical characteristics of the building is self-created. The Coalition also argues that Imlay exacerbated the situation by failing to maintain the building and make needed repairs, thereby destroying any possibility that it could lease the building to a conforming-use tenant.

Generally, "[a]n owner who knowingly acquires land for a use prohibited by zoning may not obtain a use variance on the ground of hardship" (*Matter of Friends of Lake Mahopac v Zoning Bd. Of Appeals of Town of Carmel*, 15 AD3d 401 [2005]). There was evidence in the record before the BSA that, at the time Imlay purchased the building, it intended to lease it to telecommunications businesses as a "telecom hotel," which would not be impacted by the inadequate loading bays, support columns, low ceilings, and other physical limitations inherent in [\*7]the building. The evidence also

indicates that this plan failed to materialize when the telecommunications industry declined shortly after Imlay purchased the building. While some may have their doubts regarding the validity of Imlay's claims regarding this intended use, the BSA chose to credit Imlay's version of events and it cannot be said that the BSA acted irrationally in doing so. Furthermore, there was ample evidence in the record before the BSA that the hardships faced by Imlay in attempting to use the building in compliance with the zoning laws were the result of the overall obsolescence of the building, rather than any lack of maintenance on Imlay's part. Accordingly, the court finds that the BSA's determination that Imlay satisfied the requirements of ZR § 71-21 (d) was based upon substantial evidence and was not irrational, arbitrary and capricious.

***ZR § 72-21 (e)***

In its resolution granting the variance, the BSA found that the variance was the minimum necessary to afford Imlay relief as required under ZR § 72-21 (e). In particular, the BSA noted that, in response to concerns expressed about the original proposal, Imlay modified its plan so as to eliminate the construction of three additional floors on the building and also agreed to place conforming uses on the first floor of the building so as to minimize the impact of the proposed residential use on the surrounding neighborhood.

Although it states in a conclusory manner that the BSA's determination that the variance was the minimum necessary to afford relief was not supported by substantial evidence, the Coalition has failed to offer any substantive argument backing up this claim. In fact, given the substantial modifications made to the building plans, it is clear that the BSA had ample basis for determining that the

proposed residential building was the minimum necessary variance to afford relief.

***ZR § 72-21 (b)***

In its resolution granting a variance, the BSA found that Imlay demonstrated that there was no reasonable possibility that developing the site as a conforming use building would yield a reasonable return as required under ZR §72-21 (b). In so ruling, the BSA noted that Imlay presented it with evidence documenting its failed attempts to market the property for conforming uses for two years, as well as a list of prospective tenants who inspected the building but did not seek to lease any space therein. The BSA also noted that the opposition questioned the validity of these marketing efforts, but the BSA found these claims to be uncorroborated. In addition, the BSA noted that Imlay had submitted a feasibility study which showed that, given the unique physical conditions of the building, a conforming use would not yield a reasonable return. Finally, the BSA observed that, although the opposition challenged the methodology of Imlay's study and submitted its own report indicating that a conforming use could be viable, after examining this evidence, the BSA found that developing the building as an as-of-right development would not yield a reasonable return.

The Coalition now argues that the BSA's determination that Imlay satisfied the requirements of ZR § 72-21 (b) was irrational, arbitrary and capricious, and not based upon substantial evidence. In this regard, the Coalition raises several arguments. First, the Coalition maintains that ZR § 72-21 (b) requires that Imlay provide a "dollars and cents analysis" [\*8] demonstrating that no permissible use would generate a reasonable return. Because Imlay only provided a dollars and cents analysis for a single conforming use

(manufacturing), the Coalition reasons that the BSA's findings were not based upon substantial evidence. In support of this contention, the Coalition points out that during the public hearing process, members of the BSA specifically requested that Imlay provide a dollars and cents analysis for other conforming uses, but Imlay never complied with these requests.

The Coalition also argues that the dollars and cents analysis that Imlay did provide was so fundamentally flawed that there was no rational basis for the BSA's determination that it satisfied the requirements of ZR § 72-21 (b). In particular, the Coalition points out that the analysis extrapolated a rate of return for the conforming use based upon the market value of the building, rather than what Imlay actually paid for the premises. In addition, the Coalition points out that the analysis did not consider what Imlay's rate of return would be if it sold the building. Additionally, the Coalition argues that the economic analysis failed to adequately take into account certain tax incentives which would offset development costs, overstated brokerage commissions, and inflated the renovation costs by relying upon contractor's estimates, rather than the "Means Square Foot Cost Manual" or "Marshall & Swift Valuation Services." Finally, the Coalition maintains that the BSA's finding that the building could not be rented was unsupported by substantial evidence. In particular, the Coalition maintains that there was no showing that Imlay made a bona fide effort to lease the building since there was no evidence of what Imlay's "asking price" was for the space or whether Imlay offered to subdivide the space. The Coalition points out that Imlay failed to provide any proof, such as newspaper advertisements, of a bona fide effort to lease the space.

As an initial matter, the court finds no merit to the Coalition's argument that the BSA acted irrationally, arbitrarily and capriciously in relying upon the

economic analysis submitted by Imlay which projected a 1.56% return if the premises were developed as a conforming manufacturing use. The Coalition points to numerous purported flaws in the methodology employed in the analysis. However, Imlay's expert addressed these alleged flaws in a report that responded to the economic analysis provided by the Coalition. Moreover, it is apparent from the record that the BSA considered the parties' respective arguments and financial analyses. Reasonable minds can no doubt differ on matters involving theoretical financial projections, such as the extent to which tax incentives will offset development costs, methods of estimating renovation costs, and whether a building should be pegged at market value or at what the developer paid for the building. However, the issue before the court is not which methodology and analysis it finds to be the more persuasive or accurate, rather, the issue is whether the BSA had a rational basis for favoring Imlay's economic analysis over the Coalition's economic analysis. Given the broad discretion which is vested in the BSA, the court cannot say that the BSA's determination lacked a rational basis.

The court also finds no merit to the Coalition's argument that ZR § 72-21 (b) required that the BSA consider whether Imlay could have earned a reasonable return by selling the building. The subject provision requires a showing that there is no reasonable possibility that the *development* of the property in conformity with the zoning resolutions will yield a reasonable return and makes no mention of the possible sale of the property as a means of earning a reasonable return. Indeed, the Coalition has failed to cite any authority supporting its argument [\*9] that the ability to sell the property at a profit, in effect, nullifies a finding under ZR § 72-21 (b) that a conforming use will not yield a reasonable return.

This court also concludes that there was a rational basis for the BSA's determination that Imlay was unable to lease the building to conforming use tenants despite its efforts to do so. In particular, there was evidence in the record that numerous prospective tenants toured the subject building, but none of them thereafter expressed any interest in leasing the building. The BSA's determination in this regard was also supported by the fact that, during the one-year period that Imlay's variance application was pending, the parties opposed to the variance were unable to identify any conforming use tenants who were prepared to lease the building.

However, to the extent it found that a dollars and cents analysis for a single use group was sufficient to satisfy the requirements of ZR § 72-21 (b), the court finds that the BSA's determination to be irrational, arbitrary and capricious, and not based upon substantial evidence. ZR § 72-21 (b) requires that a landowner seeking a variance "must demonstrate factually, by dollars and cents proof, an inability to realize a reasonable return under existing permissible uses" (*Matter of Bella Vista Apt. Co., v Bennett*, 89 NY2d 465, 469 [1997], quoting *Matter of Village Bd. of Vi. of Fayetteville v Jarrold*, 53 NY2d 254, 256 [19 ]). Conclusory statements that the property cannot yield a reasonable return without a variance "are simply insufficient" (*Matter of Conte v Town of Norfolk Zoning Bd. of Appeals*, 261 AD2d 734, 736 [1999]).

While it may be true that ZR § 72-21 (b), as opposed to its counterparts in the Town Law and General City Law, does not require a dollars and cents analysis for each and every permissible use (*Matter of West Village Houses Tenants Assoc.*, 302 AD2d at 231; *but see Matter of Kingsley v Bennett*, 185 AD2d 814, 816 [1992]), it is clear that providing an analysis for a single permissible use group was woefully inadequate in this case. Indeed, during the

course of the public hearings, the BSA itself recognized this fact and specifically directed Imlay to provide economic analysis for other permissible use groups.<sup>[FN4]</sup> However, Imlay never provided such additional analysis. Instead, Imlay merely submitted two letters by Freeman/Frazier & Associates containing conclusory statements to the effect that other permissible uses, such as a retail store, hotel, or office building would not yield a reasonable return. As noted above, such conclusory statements are not sufficient under ZR § 72-21 (b). In short, these claims need to be supported by economic evidence in the form of a dollars and cents analysis.

Accordingly, the petition to vacate the variance is granted and the matter is remanded to the BSA for the submission of additional evidence in the form of economic analysis projecting the rate of return for other permissible use groups.

This constitutes the decision, order, and judgment of the court.

ENTER,

J. S. C.

### **Footnotes**

**Footnote 1:** M2-1 Manufacturing Zones contain 12 different "use groups." Within those use groups, there are hundreds of specific uses that are permissible.

**Footnote 2:** A "telecom hotel" is a building used to house a variety of telecommunications equipment, such as routers and switches.

**Footnote 3:** Of course, if Imlay does ultimately seek to convert the sister building into condominiums, the BSA may well have to consider the environmental impact of such development in conjunction with any previous

residential development of the subject building.

**Footnote 4:** Commissioner Caliendo, who voted in favor of the variance, told Imlay's representative during the public hearings: "There is a whole host of uses that are permitted in a . . . M2-1 that we don't see on paper which I don't know if you guys analyze. It needs to be done. It needs to be documented."