MEMORANDUM

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 SUFFOLK COUNTY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

Kabro Associates LLC,

Plaintiff,

-against-

Town of Islip Zoning Board of Appeals consisting of William D. Wexler, Chairman of the Zoning Board of Appeals, Richard Scheyer, former Chairman of the Zoning Board of Appeals, and Michael Gadjos, Kurt Pahlitzsch, Barbara O'Conner, and James H. Bowers, as Members of the Zoning Board of Appeals, and the Town of Islip,

Defendants.

Motion Sequence No.: 001;
CDISPO
SETTJ

Motion Date: 7/1/10
Submitted: 10/6/10

Index No.: 21975/2010

Attorney for Plaintiff:

Rosenberg Calica & Birney LLP
100 Garden City Plaza
Garden City, NY 11530

Attorney for Respondents:

Alicia A. O'Connor, Esq.
Islip Town Attorney
655 Main Street
Islip, NY 11751

In this Article 78 proceeding the petitioner seeks a judgment annulling and reversing a determination by respondent Zoning Board of Appeals of the Town of Islip denying the petitioner's application for a special exception. The petition is dismissed.

In 1995, the petitioner purchased a strip shopping center located on the south side of Montauk Highway between Sequams Lane and Eaton Lane in West Islip, New York. The property is split-zoned with the front 125 feet of the property facing Montauk Highway being situated in the Business I district and the rear 75 feet of the property being zoned Residential A. The property, which is surrounded on three sides by residential properties, is presently developed with two separate buildings, the first one containing a CVS pharmacy and the second containing various businesses and retail shops. The petitioner desires to construct a 3,000 square foot extension to the east side of the second building thereby increasing the density of the shopping center and requiring the removal of some of the existing parking spaces. The petitioner applied

to the respondent Board for a special exception to extend the parking for the shopping center 50 feet into the residentially-zoned portion of the property.

On September 1, 2009, a public hearing was held on the petitioner's application. At the hearing, the Board considered the testimony of the petitioner's engineering expert, who testified as a traffic expert, the petitioner's real estate expert, and the petitioner's site planner, who designed the proposed configuration of the shopping center. The Board also considered testimony from at least 10 adjoining and nearby residents in opposition to the application. Following the hearing, the respondent Board, in a determination, dated May 11, 2010, voted unanimously to deny the petitioner's application.

Petitioner commenced the instant Article 78 proceeding challenging the respondent Board's determination denying the application for a special exception on the alleged basis that the determination was arbitrary and capricious and was not supported by the substantial evidence on the record.

The judicial responsibility is to review zoning decisions but not, absent proof of arbitrary and unreasonable action, to make them. Upon judicial review, the general rule is that, absent evidence of illegality, a court must sustain the determination if it has a rational basis in the record before the zoning board (see, Matter of Brady v. Town of Islip Zoning Bd. of Appeals, 65 AD3d 1337 [2nd Dept., 2009]). Thus, the determination of a local zoning board is entitled to great deference and will be sustained as long as it has a rational basis, is not arbitrary and capricious, and is supported by substantial evidence (see, Matter of North Shore F.C.P., Inc. v. Mammina, 22 AD3d 759 [2nd Dept., 2005]).

"Unlike a variance which gives permission to an owner to use property in a manner inconsistent with a local zoning ordinance, a special exception gives permission to use property in a way that is consistent with the zoning ordinance, although not necessarily allowed as of right. The significance of this distinction is that the inclusion of the permitted use in the ordinance is tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood. Thus, the burden of proof on an owner seeking a special exception is lighter than that on an owner seeking a 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."(Retail Prop.Trust v. Bd. of Zoning Appeals, 98 NY2d 190 [2002]).

Although there is no entitlement to a special permit or exception, once a petitioner shows that the contemplated use is in conformance with the conditions imposed, a special permit or exception must be granted unless there are reasonable grounds for denying it that are supported by substantial evidence. Moreover, a zoning board is free to consider matters related to the public welfare in determining whether to grant or deny a special permit or exception. However, a zoning board may not deny a special permit solely on the basis of generalized objections and

concerns expressed by the community's residents (see, Leon Petroleum, LLC v. Bd. of Trs., 309 AD2d 804 [2nd Dept., 2003]). Furthermore, an applicant for a special use permit must establish that the proposed use complies in all other respects with the zoning ordinance. A zoning board of appeals does not have authority to waive or modify any conditions set forth in the ordinance. Failure to meet any one of the conditions set forth in the ordinance warrants a denial of the special permit application (see, Matter of Navaretta v. Town of Oyster Bay, 72 AD3d 823 [2nd Dept., 2010]; Dost v. Chamberlain-Hellman, 236 AD2d 471 [2nd Dept., 1997]).

Pursuant to Section 68-415[B] of the Islip Town Code, where a district boundary line divides a property, the Board of Appeals may permit the uses allowed in the less restricted district to extend to the entire lot, but not more than 50 feet beyond the boundary line of the district in which such use is authorized.[1] Before approving a special exception, the Board of Appeals must determine that: A) the use will not prevent the orderly and reasonable use of adjacent properties or of properties in adjacent use districts; B) the use will not prevent the orderly and reasonable use of permitted or legally established uses in adjacent use districts; C) the safety, heath, welfare, comfort, convenience or order of the Town will not be adversely affected by the property's use and its location; and D) the use will be in harmony with and promote the general purpose and intent of this ordinance (see, Islip Town Code §68-416).

Pursuant to §68-417 of the Code, the Board of Appeals must, among other things, give consideration to the following: the character of the existing and probable development of uses in the district and the peculiar suitability of such district of the location of any such permissive uses; the conservation of property values and the encouragement of the most appropriate uses of land; the effect that the location of the proposed use may have upon the creation of an undue increase of vehicular traffic congestion on the public streets and highways; the availability of adequate and proper public or private facilities for the treatment, removal or discharge of sewage, refuse or other effluent (whether liquid, solid, gaseous or otherwise) that may be caused or created by or as a result of the use; whether the use or materials incidental thereto or produced thereby may give off obnoxious gases, odors, smoke or soot; whether the use will cause disturbing emission of electrical discharges, dust, light, vibration or noise; the necessity for bituminous-surfaced space for the purposes of off-street parking of vehicles incidental to the use, and whether such space is reasonably adequate and appropriate and can be furnished by the owner of the plot sought to be used within or adjacent to the plot where the use shall be had; whether the use or the structures to be used therefor will cause an over crowding of land or undue concentration of population; whether the plot area is sufficient, appropriate and adequate for the use and the reasonably

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[1] The Court notes that the petitioner maintains that the fifty foot limitation of §68-415[B] was repealed in 2007, and thus was not applicable to the petitioner's application. The Court's copy of the current Code does, in fact, set forth such limitation. It is unclear whether the 50 foot restriction was never repealed or whether it was restored via a June, 2010 amendment to the Code. In any event, since the petitioner's application provided for only a 50 foot extension into the residential portion of the property, the 50 foot restriction is of no moment.

anticipated operation and expansion thereof; and the physical characteristics and topography of the land.

In reaching its determination to deny the petitioner's application for a special exception, the respondent Board specifically concluded, *inter alia*, that the proposed expansion of the shopping center would result in the over-utilization of the site given its close proximity to the neighboring residential properties; and that, despite the testimony of the petitioner's traffic and real estate experts to the contrary, the expansion of the petitioner's use of the property into the residential zone would create traffic nuisances, generate objectionable levels of noise, unpleasant odors and overcrowding at the site which the petitioner candidly admitted had historically been a poor neighbor. For these reasons and others, the Board rejected outright the petitioner's real estate expert's assertion that the expansion of the shopping center would actually increase the value of the surrounding residential properties.

Although it is impermissible to deny a special use permit based solely on generalized objections or community pressure where there are other grounds in the records to support a denial, deference must be given to the discretion and common sense judgment of the board (see, Dries v. Town Bd., 305 AD2d 596 [2nd Dept., 2003] *app den* 100 NY2d 515). Scientific or expert evidence is not necessary (see, Metro Enviro Transfer, LLC v. Vill. of Croton-on-Hudson, 5 NY3d 236 [2005]). Here, the Board's determination was based on evidence submitted by the petitioner's expert and knowledge of the Board and community members about the traffic flow in the vicinity. The Board reasonably concluded that the traffic generated by the proposed use could further congest an already overburdened area. Contrary to petitioner's contentions, the members of the zoning board may rely on their own personal knowledge of the community in deciding a zoning matter (see, Leon Petroleum, LLC v. Bd. of Trs., 309 AD2d 804 [2nd Dept., 2003]).

The Court also concludes that there is substantial evidence in the record to support the respondent Board's determination that petitioner failed to show compliance with the legislative conditions that the proposed project be compatible with adjoining land uses and that the proposed project is needed at the present time (see, Burke v. Dickman, 6 AD3d 1163 [4th Dept. 2004]). The Court therefore gives deference to the discretion and common sense judgment of the Zoning Board (see, MacGregor v. Derevlany, 7 AD3d 624 [2nd Dept., 2004] app den 3NY3d 606). Where substantial evidence exists, a court may not substitute its own judgment for that of the board, even if such a contrary determination is itself supported by the record (see, Retail Prop.Trust v. Bd. of Zoning Appeals, 98 NY2d 190 [2002]; see also, Matter of Navaretta v. Town of Oyster Bay, supra; Franklin Sq. Donut Sys., LLC v. Wright, 63 AD3d 927 [2nd Dept., 2009]; Tricon Global Rests, Inc. v. Curran, 309 AD2d 868 [2nd Dept., 2003]).

Accordingly, the petition is denied and the proceeding is dismissed.

Settle judgment (see, 22 NYCRR §202.48).

So ordered.

Dated: November 29 2010

William B Rebolini
HON. WILLIAM B. REBOLINI, J.S.C.

___X___ FINAL DISPOSITION_____ NON-FINAL DISPOSITION