SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE TRIAL/IAS PART 18

_____X

In the Matter of the Application of

JOEL HARRIS for an Order pursuant to the Provisions of the New York Civil Practice Law and Rules Article 78,

Index No.: 017764/10
Motion Sequence...01
Motion Date...03/09/11
XXX

Petitioner,

-against-

BOARD OF APPEALS FOR THE TOWN OF HEMPSTEAD and CHEVRA HATZALAH OF THE ROCKAWAYS AND NASSAU COUNTY,

Respondents.

_____X

Papers Submitted:
Notice of Petition.....x
Verified Answer and Return.....x
Supplement to Return.....x
Affirmation in Opposition.....x
Verified Answer.....x
Affirmation in Reply.....x

In this special proceeding, the application by the Petitioner, JOEL HARRIS (hereinafter "Harris"), pursuant to Article 78 of the CPLR, for a judgment annulling the determination of the Respondent, BOARD OF APPEALS OF THE TOWN OF HEMPSTEAD's, (hereinafter "Board") granting of CHEVRA HATZALAH OF THE

ROCKAWAYS AND NASSAU COUNTY's (hereinafter "Hatzalah") application for a special permit (and certain area variances) is determined as hereinafter provided.

In this Article 78 proceeding, the Petitioner seeks to annul the determination of the Respondent, Board dated July 28, 2010 which granted the request of the Respondent, Hatzalah[1] for a special permit (and certain area variances) permitting the construction and use of a four bay volunteer ambulance depot/garage, with space on the second floor of the building for training of volunteers.

PROCEDURAL HISTORY:

The Respondent, Hatzalah's initial building permit application (May 20, 2009) to construct the subject volunteer ambulance garage/training facility was denied by decision by the Department of Buildings on the grounds that the proposed use was non-permitted and required the issuance of a use variance.[2] Thereafter, the Respondent, Board granted the applicant's appeal and by decision dated January 20, 2010,[3] determined that the proposed use, i.e., a building to be used as a volunteer ambulance garage and training facility constituted

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[1]According to its certificate of incorporation, executed May 28, 2008, the corporation was organized exclusively for religious and charitable purposes including, *inter alia*, the spreading of the principles and doctrine of Orthodox Jewish Religious Law among people of the Jewish faith and the establishment of a volunteer ambulance service to serve the community in accordance with Orthodox Jewish Religious Law; to assist in transporting the ill, injured and infirm to medical facilities; to secure and provide volunteers; to offer aid and assistance; and to purchase, own, lease, control, operate and maintain ambulances to accomplish such services.

[2]The application originally sought to obtain a waiver of off-street parking requirements in connection with the construction of a volunteer ambulance garage.

[3]No appeal was taken from the January 20, 2010 decision of the Respondent, Board.

a philanthropic use of the property and the application should be heard as an application for a special exception for philanthropic use under § 272 (A) (1) of the Building Zone Ordinance of the Town of Hempstead, and not as an application for a use variance.

The matter was set down for a public hearing on April 14, 2010, at which time the Respondent Board considered the application as one for a special exception and request for certain variances including:

> a. variance of the front yard on West Broadway, where 25 feet are required and 24 feet are proposed;
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> b. a variance of the side yard, where 20 feet are required and 15 feet are proposed;
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> c. a variance of the rear yard, where 25 feet are required and 20 feet are proposed;
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> d. a variance of the off-street parking requirement, where no off-street parking spaces are provided and 35 are required.
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> e. a variance for lot coverage where 30% is proposed and the maximum allowable is 27.5%.

By decision dated July 28, 2010, the Respondent, Board granted the requested variances and special exception permit with conditions based on findings that, *inter alia*:

> the philanthropic use as proposed meets the standards of the Building Zone Ordinance for a special exception;
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> the proposed use, in and of itself, is a benefit to the community and, as conditioned, would not create an undesirable change in the character of the neighborhood or detriment to nearby properties; and
>
> the area variances sought, with the exception of that for off-

street parking, are not substantial.

The Petitioner seeks to annul the Respondent, Board's determination as arbitrary and capricious, in contravention of law and against substantial evidence, contending that real property adjacent to the subject property, along with the neighborhood in general, would be adversely impacted by the variances requested and proposed construction of an ambulance garage. The Petitioner argues further that the granting of the applications at issue would increase motor vehicle traffic and congestion/accidents on the streets in the immediate vicinity of the property resulting in a significant threat to the health and safety of residents.

ANALYSIS:

Unlike a variance which gives permission to an owner to use property in a manner inconsistent with a local zoning ordinance, a special exception involves a use permitted by the zoning ordinance, but under stated conditions. *Capriola v. Wright*, 73 A.D.3d 1043, 1045 [2d Dept. 2010]; *Brady v. Town of Islip Zoning Bd. of Appeals*, 65 A.D.3d 1337, 1339 [2d Dept. 2009], *lv to app den.* 14 N.Y.3d 703 [2010]. Pursuant to § 272 of the Town of Hempstead Building Zone Ordinance, the Board of Appeals may, after public notice and hearing, permit a philanthropic use of property located in a B Residence District as a special exception. 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. *Retail Property Trust v. Board of Zoning Appeals of Town of Hempstead*, 98 N.Y.2d 190, 195 [2002]; *G&P Investing Co. v. Foley*, 61

A.D.3d 684 [2d Dept. 2009]. The administrative authority is required to grant a special use permit unless reasonable grounds, supported by substantial evidence, exist for its denial. *Leon Petroleum, LLC v. Board of Trustees of Inc. Village of Mineola*, 309 A.D.2d 840, 806 [2d Dept. 2003]. As such, an applicant's burden is much lighter than the burden on one seeking a variance. Entitlement to a special exception permit, however, is not a matter of right. The controlling consideration in reviewing the request of a church, school or religious corporation for permission to expand into a residential area is always the overall impact on the public's welfare.

A special permit application affords a zoning board an opportunity to weigh the proposed use in relation to neighboring land uses and to cushion any adverse effects by the imposition of conditions designed to mitigate such effects. *Cornell University v. Bagnardi*, 68 N.Y.2d 583, 596 [1986]. Compliance with local ordinance standards/conditions must be shown before a special exception permit may be granted. *Navaretta v. Town of Oyster Bay*, 72 A.D.3d 823, 825 [2nd Dept. 2010]. Pursuant to § 267 (D) (2) (a) of the Ordinance herein, the Respondent, Board must determine, *inter alia*, that:

> "The use will not prevent the orderly and reasonable use of adjacent properties or of properties in adjacent use districts;
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> The use will not prevent the orderly and reasonable use of permitted or legally established uses in the district wherein the proposed use is to be located or of permitted or legally established uses in adjacent use districts;
>
> The safety, the health, the welfare, the comfort, the convenience or the order of the Town will not be adversely affected by the

> proposed use and its location; and
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> The use will be in harmony with and promote the general purposes and intent of this ordinance."

In so doing, the Respondent, Board must consider, *inter alia*:

> "The character of the existing and probable development of uses in the district, and the peculiar suitability of such district for the location of any of such permissive uses;
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> The conservation of property values and the encouragement of the most appropriate use of land;
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> The effect that the location of the proposed use may have upon the creation of undue increase of vehicular traffic congestion on public streets, highways or waterways;
>
> Whether the use or the structures to be used therefor will cause an overcrowding of land or undue concentration of population;
>
> Whether the plot area is sufficient, appropriate and adequate for the use and the reasonable anticipated operation and expansion thereof."

Denial of a special use permit may not be based on general objections to the special use or conclusory findings that the proposed use itself is undesirable. *C.B.H. Properties, Inc. v. Rose*, 205 A.D.2d 686, 687 [2d Dept. 1994], *lv to app den.* 84 N.Y.2d 808 [1994]. Pursuant to § 267 (D) (2) (a), the board of zoning appeals may authorize permissive use if it determines that the various factors set forth in the ordinance have been met.

Here, the Respondent, Hatzalah presented evidence showing that the contemplated use of the property was in conformance with the conditions imposed which represent an accommodation between the proposed use of the property and the factors

delineated in § 267 (D) (2) (a).

Turning next to the issue of the area variances granted, the Court notes that local zoning boards have broad discretion in considering applications for variances. Judicial review of the decision herein is limited, therefore, to determining whether the action taken by the Respondent, Board was illegal, arbitrary or an abuse of discretion. *Mann v. Zoning Bd. of Appeals of Town of East Hampton*, 34 A.D.3d 588 [2d Dept. 2006]. In applying the arbitrary and capricious standard, the inquiry is whether the determination under review has a rational basis. The determination will, therefore, not be disturbed unless the record shows that the agency's action is unreasonable, irrational or indicative or bad faith. Arbitrary action is without sound basis in reason and is generally taken without regard to the facts. *Birch Tree Partners, LLC v. Town of East Hampton*, 78 A.D.3d 693, 694 [2d Dept. 2010]; *Halperin v. City of New Rochelle*, 24 A.D.3d 768, 770 [2d Dept. 2005], *lv to app dism.*, 7 N.Y.3d 7608 [2006].

In determining whether to grant an application for an area variance, a zoning board must engage in a balancing test weighing the benefit to the applicant against the detriment to the health, safety and welfare of the neighborhood or community. Town Law § 267-b (3) (b); *Morando v. Town of Carmel Zoning Bd. of Appeals*, 81 A.D.3d 959, 960 [2d Dept. 2011]; *Merlotto v. Town of Patterson Zoning Bd. of Appeals*, 43 A.D.3d 926, 928 [2d Dept. 2007]. The zoning board must also consider whether 1) an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties if the area

variance is granted; 2) the benefit sought by the applicant can be achieved by some method, feasible to the applicant, other than an area variance; 3) the requested variance is substantial; 4) the proposed variance will have an adverse impact or effect on the physical and environmental conditions in the neighborhood if the variance is granted; and 5) whether the alleged difficulty was self-created. In applying the balancing test, the zoning board is not required to justify its determination with supporting evidence with respect to each of the five factors as long as its ultimate determination balancing the relevant considerations is rational. *Genser v. Board of Zoning and Appeals of Town of North Hempstead*, 65 A.D.3d 1144, 1147 [2d Dept. 2009].

In its decision dated July 28, 2010, the Respondent, Board addressed the five statutory factors set forth in Town Law§ 267-b (3) (b), properly weighed the benefit to the applicant as against any potential detriment to the health, safety, welfare of the community and made a rational determination that was supported by the record.

Careful reading of the conditions on which the Respondent, Hatzalah's applications were granted establish, *inter alia,* that:

> 1) no repair/maintenance of ambulances would actually take place at the premises;
>
> 2) the premises would be used as a training facility not more than two (2) times in any given month between the hours of 7:00 p.m. to 9:00 p.m. with the number of persons attending a training session not to exceed thirty (30);
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> 3) the number of ambulances stationed on, and operating from the subject premises, was not to exceed two (2); and

4) the building was required to maintain its appearance as a single family dwelling with no flood lights on the premises and no exterior lighting, etc.

The conditions were obviously designed to mitigate any potential adverse effect on the surrounding community.

Under the facts at bar, the Respondent, Board's favorable determination, as conditioned, was neither arbitrary nor capricious and was rationally based on evidence in the record. The conditions mandated by the Respondent, Board, obviate the concerns raised by the Petitioner regarding public safety and welfare at the subject location and were clearly designed to minimize any potential adverse impact on the neighborhood or community resulting from construction of the ambulance garage.

Accordingly, it is hereby

ORDERED, that the Petition to annul the determination of the Respondent, Board, dated July 28, 2010, is **DENIED** and this proceeding is hereby **DISMISSED.**

This constitutes the decision and order of the court.

DATED: Mineola, New York
April 25, 2011

Hon. Randy Sue Marber, J.S.C.
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