Matter of Gospel Faith Mission Intl., Inc. v Weiss
2012 NY Slip Op 30809(U)
March 23, 2012
Supreme Court, Nassau County
Docket Number: 010774/11
Judge: Robert A. Bruno
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
PRESENT: HON. ROBERT A. BRUNO, J.S.C.

In the Matter of The Application of GOSPEL FAITH MISSION INTERNATIONAL, INC.,

Petitioner,

for Judgment Pursuant to Article 78, Civil Practice Law and Rules,

-against-

DAVID P. WEISS, Chairman, CHRISTIAN BROWNE, FRANK A. MISTERO, JOHN F. RAGANO, KATURIA D'AMATO, GERALD G. WRIGHT, and KIMBERLY A. PERRY, constituting the Board of Appeals of the Town of Hempstead,

Respondents..

TRIAL/IAS PART 20
Index No.: 010774/11

Motion Date: 01/04/12
Motion Sequence: 001

DECISION & ORDER

Papers Numbered

Sequence #001
Notice of Petition, Affidavit, Affirmation & Exhibits 1
Petitioner's Memorandum of Law 2
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Upon the foregoing papers, it is ordered that this motion is decided as follows:

Petitioner seeks an Order pursuant to Article 78 of the CPLR annulling and reversing the decision of the Respondents which denied the applications of Petitioner (a) for a special exception in order to utilize an existing building located at 20 Biltmore Avenue, Elmont, New York as a church, (b) for a waiver of off-street parking requirements, (c) for a variance for insufficient parking stall size and back-up space and (d) for a special exception to park in a Residence "B" District.

Respondent opposes said application.

Petition pursuant to Article CPLR 78 by the petitioner Gospel Faith Mission International, Inc. for a judgment setting aside and annulling a determination of the respondent Board of Zoning Appeals of the Town of Hempstead, dated June 15, 2011, which denied the

petitioner's application for, *inter alia*: (1) a special exception permit to maintain a house of worship; (2) a waiver of off-street parking requirements; (3) a variance for insufficient parking stall size and back-up space; and (4) a special exception to park in a "Residence B" zone.

The petitioner Gospel Faith Mission International ["the petitioner"] is a domestic religious institution organized under Article 10 of the Religious Corporations Law (Pet., ¶¶ 1-2). The petitioner currently owns a 78 by 80 foot long property at 20 Biltmore Road, Elmont, New York in the Town of Hempstead's Residence "B" zone (Pet., ¶¶ 2-4). The subject property is improved with a two-story, mason and wood building to the south and a single-family residence in the northerly portion of the parcel (Pet., ¶¶ 4-5).

The petitioner originally acquired the southerly portion of the property (*i.e.*, Lots 20-22), in 2004, and began operating a Pentecostal church thereon in 2005 (Pet., ¶¶ 5-6). In 2006, the petitioner made a prior application for a waiver of certain off-street parking requirements and to "convert [the building] to a church" – which application was denied by the respondent Zoning Board in December of 1986 ["the Board"](Return, Exh., "86"). Thereafter in 2009, the petitioner acquired the northerly portion of the current property (Lots 12-19), on which the single-family home referenced above is currently located (Pet., ¶¶ 5-7 *see*, February, 2011 Hearing Transcript, at 115-117 ["H-__"]).

In October of 2009, the petitioner made a second application to the Town of Hempstead Building Department for certain approvals necessary to maintain a house of worship in the subject residential zone (Return Exh., "9").

The Building department denied the application, after which the petitioner applied to the respondent Board for, *inter alia*: (1) a "special exception" permit, authorizing the maintenance of a House of Worship in a residential zone (Town Code §§ 402[A]; and; (2) certain variances and/or waivers from applicable, off-street parking requirements, including parking stall size and "back-up" area provisions of the Town Code (Pet.,¶¶ 8-10).

Among other things, and in order to create additional off-street parking, the petitioner advised the Board that it intended to demolish the single-family dwelling situated to the north of the parcel and construct a seven-stall parking lot there (Pet.,¶ 8; H-117). Although the petitioner agreed to modify its plans so that the stalls would be lawful in size, the so-called "back-up" or maneuvering aisle for each space would be at best, only 21 feet – less than the required 24 feet; while the width of the curb cut affording access to the proposed lot would measure some 14 feet, whereas the Code-mandated width is 24 feet (Board Decision ["Dec".], ¶¶ 3-5; H-119, 133, 138).

According to the petitioner, its congregation currently includes some 29 families (approximately 75 to 80 individuals in total). The Church operates a Sunday school program from 10:00; a.m. to 10:45 a.m. conducts bible study classes on Wednesdays from 7:30 p.m. to 9:00 p.m., involving some 20 to 30 attendees, while worship services attended by some 70

persons, are held from 11:00 a.m. to 1:00 p.m (Pet. ¶¶ 7-8; H-122). According to the petitioner, a maximum of some 20 cars, including two, 16-person vans would be used by congregants on Sundays, the Church's busiest day (Pet. ¶¶ 8-9; H-122, 128-130). The petitioner agreed at the hearing that the occupancy of the property would be limited to a maximum of 90 persons, which – under the Code – would therefore require about 30, off-street parking spaces (Dec., ¶¶ 6-7; H-120-123, 128).

At the hearing, the petitioner produced a traffic expert who testified, *inter alia*, that he observed the Church congregants assemble and depart on three successful Sundays; that there were no negative impacts in terms of inconvenience, ingress, egress or parking; that there was ample on-street parking available in the immediate vicinity; and that the proposed permit and/or variances requested would not, if granted, result in traffic congestion or undue, street parking issues (H-138-141, 142). According to the expert, the use of two, sixteen-person vans (to be acquired at a later date) would reduce the Sunday, on-street parking requirements to only three vehicle spots, thereby posing no traffic or congestion issues – even during the Church's peak usage periods (H-128-129, 139-140).

By Notice of Decision dated June 16, 2011, the Board unanimously denied the application in all respects. Thereafter, by verified petition dated July, 2011, the petitioner commenced the within proceeding to sett aside and annul the Board's determination. In September, 2011, the Board issued a formal decision with findings of fact denying the application. The Board noted that Houses of Worship enjoy a preferred status under both Federal and New York Law (*see also,* Town Code § 402 [D], [E]), but that "the proposed use must be denied because of its lack of parking" (Dec., ¶¶ 8-9).

Among other things, the Board reasoned that the petitioner's passenger van calculations and the related, on-street parking estimates, lacked credibility since the petitioner was, *inter alia*, speculatively assuming that each congregant utilizing the van would also be a separate driver. The Board also made a finding that since the parking lot curb cut lot was only 14 feet (ten feet short of the required width), this non conformity – taken together with the limited, back-up space (21 feet, where 24 is mandated) – would greatly increase "the probability of accidents" and thereby negatively impact upon, and be substantially dangerous to, the surrounding area as well as to the "public's health, safety and welfare" (Dec., ¶¶ 12-13). According to the Board, these negative impacts allegedly could not "be substantially mitigated by [the] imposition of appropriate conditions * * *" (Dec., ¶ 13)(*see,* Town Code § 402 [D][1]-[5], [E]).

As to the parking and other variances, the Board found that allowing the construction of the proposed parking lot (which would entail demolition of the existing, single family home), would be inconsistent with the surrounding residential area, since the construction of the lot would generate some 3120 square feet of pavement on a 6240 square-foot lot, which parking lot would abut another, single-family home and therefore be "completely out of character" with the residential nature of the subject community.

The matter is now before the Court for review and resolution of the petitioner's claims. The petition should be granted to the extent indicated below.

Unlike a use variance, a special exception involves a use permitted by the zoning ordinance and is "tantamount to a legislative finding" that the use is in harmony with, and will "not adversely affect the neighborhood" (*Matter of North Shore Steak House v Board of Appeals of Inc. Vil. of Thomaston*, 30 NY2d 238, 243-244 [1972] *see, Retail Property Trust v. Board of Zoning Appeals of Town of Hempstead*, 98 NY2d 190, 196 [2002]; *Twin County Recycling Corp. v. Yevoli*, 90 NY2d 1000, 1001-1002 [1997]; *Matter of Lee Realty Co. v. Village of Spring Val.*, 61 NY2d 892, 893-894 [1984]; *Matter of Capriola v Wright*, 73 AD3d 1043, 1044-1045). Moreover, a special exception permit generally requires a "much lighter" burden of proof than that applicable to a variance (*Franklin Square Donut System, LLC v. Wright*, 63 AD3d 927, 929).

With respect to religious uses, it is "settled that "[r]eligious structures enjoy a constitutionally protected status which severely curtails the permissible extent of governmental regulation in the name of the police powers * * *" (*Matter of Westchester Reform Temple v Brown*, 22 NY2d 488, 496 [1968]; *Matter of Diocese of Rochester v. Planning Bd.*, 1 NY2d 508 [1956] *see*, *Pine Knolls Alliance Church v. Zoning Bd. of Appeals of Town of Moreau,* 5 NY3d 407, 412-413 [2005]; *Cornell University v. Bagnardi*, 68 NY2d 583, 593-594 [1986]; *Jewish Reconstructionist Synagogue of N. Shore v Incorporated Vil. of Roslyn Harbor,* 38 NY2d 283, 288-289 [1975]). Because of the inherently beneficial nature of churches and schools to the public * * * the total exclusion of such institutions from a residential district serves no end that is reasonably related to the morals, health, welfare and safety of the community (*Cornell University v. Bagnardi*, 68 NY2d 583, 593-594 [1986]; *see also, Pine Knolls Alliance Church v. Zoning Bd. of Appeals of Town of Moreau,* 5 NY3d 407, 412-413 [2005]; *Jewish Reconstructionist Synagogue of N. Shore v Incorporated Vil. of Roslyn Harbor, supra*; *Matter of Westchester Reform Temple v Brown*, *supra*). Accordingly, "considerations which may wholly justify the exclusion of commercial structures from residential areas are inadequate to the task when religious structures are involved" (*Matter of Westchester Reform Temple v Brown*, *supra*, 22 NY2d at 496).

Upon considering a special permit application involving a religious institution, zoning officials must "review the effect of the proposed expansion on the public's health, safety, welfare or morals, concerns grounded in the exercise of police power, 'with primary consideration given to the over-all impact on the public welfare'" (*Pine Knolls Alliance Church v. Zoning Bd. of Appeals of Town of Moreau, supra,* 5 NY3d at 512-513; *Cornell University v. Bagnardi*, *supra*, at 596; *Trustees of Union Coll. in Town of Schenectady in State of N.Y. v Members of Schenectady City Council*, *supra*, 91 NY2d at 166). In conformity with this analytical approach, "[a] local zoning board is required to 'suggest measures to accommodate the proposed religious use while mitigating the adverse effects on the surrounding community to the greatest extent possible'" (*Capriola v Wright*, *supra*, 73 AD3d 1043, 1045; *Matter of Genesis Assembly of God v Davies*, 208 AD2d 627, 628 *see also*, *Jewish Reconstructionist Synagogue of N. Shore v*

Incorporated Vil. of Roslyn Harbor, supra, 38 NY2d at 288-289; *Matter of Westchester Reform Temple v Brown, supra,* 22 NY2d 488, 494-495 [1968]; *St. Thomas Malankara Orthodox Church, Inc. v. Board of Appeals, Town of Hempstead*, 23 AD3d 666, 667; *Harrison Orthodox Minyan, Inc. v. Town Bd. of Harrison*, 159 AD2d 572, 573; *Rasheed v Weiss*, ___Misc.3d.___, Index No., 1729-10 [Supreme Court, Nassau County Dec. 23, 2010]). Nevertheless, where an "irreconcilable conflict exists between the right to erect a religious structure and the potential hazards of traffic or diminution in value, the latter must yield to the former" (*Jewish Reconstructionist Synagogue of N. Shore v Incorporated Vil. of Roslyn Harbor, supra,* 38 NY2d at 288), unless it is "convincingly shown" that an application "will have a direct and immediate adverse effect upon the health, safety or welfare of the community" (*Matter of Westchester Reform Temple v Brown, supra*, 22 NY2d 488, 494-495 *see, Cornell University v. Bagnardi, supra*; *Apostolic Holiness Church v. Zoning Bd. of Appeals of Town of Babylon*, 220 AD2d 740, 743).

With these principles in mind, the Court agrees that the Board has impermissibly excluded the petitioner from lawfully maintaining it religious use in the subject zone (*see,* Town Code § 402[E]). It bears noting that Justice Winslow of this Court recently set aside a determination by the same Board which relied on an analogous denial theory, *i.e*., that the nonconforming, back-up space in a parking lot warranted, *inter alia*, denial of religious use permit and/or related variances (*Rasheed v Weiss*, *supra*). The same result is supported here.

At bar, the Board's decision initially declares that the application would be denied exclusively based on "its lack of parking" (Dec., ¶ 8). Subsequent portions of the decision thereafter conclude that the proposed use would have an adverse impact and "endanger the public's health safety and welfare" (Dec., ¶ 13). The principal rationale offered in support of this finding, is the theory that the absence of adequate back-up space (short by some 3 feet) – in conjunction with the 10-foot non-conforming curb cut – could cause accidents and/or increase their probability when vehicles leave and enter the proposed lot (Dec., ¶¶ 12-14).

While traffic safety issues are legitimate concerns (*e.g*., *Cornell University v. Bagnardi, supra*, at 595; *Rasheed v Weiss, supra*), there is no evidence in the record supporting a finding that the curb cut and/or the seven-stall proposed lot will result in conditions materially impacting upon the public safety and welfare. Specifically, there was no testimony adduced depicting the prevailing traffic conditions on Biltmore Avenue so as to support a non speculative inference that the proposed parking lot configuration created a significant traffic risk to the public safety. Rather, the Board's conclusion in this respect is conclusory and unsupported by empirically derived evidence in the record (*e.g., Matter of G & P Investing Co. v Foley*, 61 AD3d 684, 685; *Goldsmith v. Bishop*, 264 AD2d 775, 776; *Matter of Framike Realty Corp. v Hinck,* 220 AD2d 501, 502 *see also, Matter of Oyster Bay Dev. Corp. v Town Bd. of Town of Oyster Bay*, 88 AD2d 978). Notably, "[c]onclusory findings of fact are insufficient to support a determination by a zoning board of appeals * * *" (*Matter of Cacsire v City of White Plains Zoning Bd. of Appeals*, 87 AD3d 1135, 1137)[internal citations and quotes omitted]).

Nor does the Board's decision make any findings that the proposed religious use would impact street parking in a manner materially harmful to the public welfare, or for that matter, that there would be any shortage of on-street parking spaces if the use were to be permitted. This is so despite the fact that the Church has apparently been functioning at the present location now since 2005 while the Town has quietly acquiesced to same since 2006 when the Church first applied for a waiver of off-street parking. Similarly, there was no evidence in the record that since the Church began operating in 2005 parking has been negatively impacted or there has been an adverse impact and danger to the public's health or safety. Moreover, at the hearing, the petitioner's expert testified that he observed the Church congregants assemble and depart on three successful Sundays and that there were no negative impacts in terms of inconvenience or parking (H-138-141, 142). There was no probative, opposing expert evidence presented at the hearing (*see generally*, *Matter of Lerner v Town Bd. of Town of Oyster Bay,* 244 AD2d 336, 337; *Matter of C & A Carbone v Holbrook*, 188 AD2d 599, 600 *cf.*, *Matter of Oyster Bay Dev. Corp. v Town Bd. of Town of Oyster Bay*, *supra*, 88 AD2d 978). In any event, and assuming that the evidence did support some sort of proximately ensuing negative impact, it does not establish an adverse affect at a level of intensity necessary to support the outright exclusion of a religious institution from the subject zone (*Jewish Reconstructionist Synagogue of N. Shore v Incorporated Vil. of Roslyn Harbor, supra*, 38 NY2d at 288-289; *Matter of Westchester Reform Temple v Brown, supra; Rasheed v Weiss, supra*); namely, evidence which "convincingly" shows that an application "will have a direct and immediate adverse effect upon the health, safety or welfare of the community" (*Matter of Westchester Reform Temple v Brown, supra*, 22 NY2d 488, 494-495).

Further, and even apart from the foregoing, the record does not support the conclusion that the Board made any attempts to discharge its affirmative duty to suggest "measures to accommodate the proposed religious use while mitigating the adverse effects on the surrounding community to the greatest extent possible" (*Capriola v Wright*, *supra*, 73 AD3d 1043, 1045; *Matter of St. Thomas Malankara Orthodox Church, Inc., Long Is. v Board of Appeals, Town of Hempstead*, *supra*, 23 AD3d 666, 667 *see*, *Rasheed v Weiss*, *supra*). It bears noting that at one point, the petitioner's counsel offered to work with the Board by possibly widening the curb cut so as to minimize its concerns about access to the proposed lot (H-170-171). There is no evidence in the record, however, that the Board ever weighed this offer – or that it made any other affirmative or concrete suggestions aimed at minimizing the alleged negative impacts it claims to have discerned (*see*, *Capriola v Wright*, *supra*, 73 AD3d at 1046; *Rasheed v Weiss*, *supra*, at 3-4). Rather, the Board's concludes with a quotation from a Town Code provision which, in peremptory fashion concludes among other things, that the proposed religious use allegedly could not "be substantially mitigated by [the] imposition of appropriate conditions" (Dec., ¶ 13)(Town Code § 402[E][3]).

Lastly, as to area variances and other approvals, the Board's findings do not establish that it properly weighed all the relevant factors prescribed by Town Law § 267-b[3][b] (*Nye v. Zoning Bd. of Appeals of Town of Grand Island,* 81 AD3d 1455, 1456; *Matter of Lessings, Inc. v*

Scheyer, 16 AD3d 418, 419), and/or that it actually balanced the needs and rights of involved religious use as against the concerns of the surrounding residents (*see generally, Cornell University v. Bagnardi, supra,* 68 NY2d at 589, 597; *Rasheed v Weiss, supra*).

The Court has considered the Board's remaining contentions and concludes that they are lacking in merit.

Accordingly it is,

ORDERED that the decision of the respondent Board of Zoning Appeals of the Town of Hempstead dated, June 15, 2011, is hereby annulled and the matter is remitted to the Board with the direction to grant the requested special exception permit and/or related approvals upon such reasonable conditions as will permit the requested religious use, while mitigating any detrimental or adverse effects upon the surrounding community.

All matters not decided herein are DENIED.

The foregoing constitutes the decision and order of the Court.

Dated: March 23, 2012
Mineola, New York

E N T E R:

Hon. Robert A. Bruno, J.S.C.

ENTERED
MAR 27 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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