SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

In the Matter of the Application of COUNTRY GLEN, LLC, Petitioner, For a Judgment Pursuant to CPLR Article 78 -against- BOTTICELLI BUILDERS, LLC, BRENT ASSOCIATES INC. and DAVID MAMMINA, Chairman, DONAL McCARTHY, PAUL ALOE, ANNA KAPLAN and LESLIE FRANCIS, constituting the Board of Zoning Appeals of the Town of North Hempstead, Respondents.	TRIAL/IAS, PART 41 NASSAU COUNTY INDEX NO.: 11-012133 XXX MOTION SUBMISSION DATE: 2-17-12 MOTION SEQUENCE NO. 1

The following papers read on this motion:

Notice of Petition and Verified Petition	X
Verified Answer and Return and Exhibits (Town of North Hempstead)	X
Verified Answer (Brent Associates)	X
Affirmation in Opposition (Town of North Hempstead)	X
Affirmation in Opposition to Petition (Brent Assoc.)	X
Affirmation in Support	X
Reply Affirmation	X
Verified Answer and Return (Town of North Hempstead)	X

Proceeding pursuant to CPLR article by the petitioner Country Glen, LLC for an order, *inter alia*, setting aside and annulling a determination of the respondent North Hempstead Board of Zoning Appeals, dated July 13, 2011,

which granted an application by the respondents Botticelli Builders, LLC and Brent Associates, Inc. for a special use permit and related parking variance.

In March of 2009, the respondents Botticelli Builders, LLC and Brent Associates, Inc. ["the respondents"] applied to the North Hempstead Board of Zoning Appeals [the "Board"], for: (1) a conditional use permit; and (2) related parking variance, so as to convert portions of an existing commercial building into a proposed, night club with a dine-in restaurant, to be located at 168C Glen Cove Road, in Carle Place, New York (Pet., ¶¶ 8-9; Return Exh., "F").

In sum, and according to the respondents, the club would be an upscale-type establishment, catering to an older clientele, which would operate primarily from Thursday to Sunday during the hours of 10:00 p.m. to 4:00 a.m. Valet parking would be made available to club patrons (March, 2011 Hearing Tr., 203, 247; October, 2009 Hearing Tr., 159, 160).

By notice of disapproval dated June 2, 2009, The North Hempstead Building Department denied the application on the grounds that there was insufficient parking provided; namely that some 221 spaces were available whereas 461 were required; and that a special permit was necessary to operate the club (Return Exh., "H")(*see*, Town of North Hempstead Code ["Code"], §§ 70-103[A][1]; 70-215[B]; 70-225[B][1], [2]).

A hearing before the Board was conducted with respect to the variance and permit requests, but the respondents later modified their original proposal by, *inter alia*, eliminating the restaurant and down-sizing the club's square footage area (Return Exh., "P"). A second hearing was conducted in connection with the modified application. The petitioner Country Glen, LLC ["Country Glen"], which owns the adjacent Country Glen Shopping Center, appeared at both hearings in opposition to the applications. Country Glen and the respondents each submitted expert traffic evidence in support of their respective positions (Return Exhs., "K," "L").

By decision dated July 13, 2011, the Board granted the requested parking variance and the special use permit, although its approval was made subject to the filing of revised plans and a series of ten, separately framed conditions, including a maximum club occupancy of 668 persons (Decision at 16-18).

Specifically, the Board determined, among other things, that: (1) the subject club property is located in an Industrial "B" zone – the most permissive in North Hempstead – which already contains a large number of shopping centers and food uses; (2) there are no residential zones within a 300-foot radius of the proposed club; (3) the respondents proposed a total of 217 marked parking stalls, which created at least a 47% deficiency in terms of the Code-mandated, off-street

parking requirements; (4) most of the surrounding commercial uses would be closed during the club's peak hours of operation (10:45 p.m. to 12:30 a.m); and (5) the club's valet parking system would be capable of accommodating up to 238 parking spaces (Decision at 5, 6, fn 3, 7-11).

Based on these and other factual findings, the Board determined that the club would not create traffic or safety issues on Glen Cove Road and would not result in any significant, detrimental impacts to the health safety and welfare of the surrounding neighborhood and community – particularly in light of the various condition and requirements imposed in connection with the granting of the application (Decision, 13-15)(Code § 70-225[B][1][a]-[g]). Relying in part on the respondents' expert submissions, as well as its own personal inspections and/or observations (Decision at 3), the Board further determined that the parking plan proposed by the respondents would be sufficient to accommodate the anticipated vehicle volume generated by the club without negatively impacting upon traffic flow along Glen Cove Road (Decision at 7-8; 12-14). The Board concluded that the parking concerns raised by Country Glen were overstated and/or unsupported by the record, *i.e.,* Country Glen's assertion that, *inter alia*, parking overflow would result and cause patrons to park on – and then trespass over – its property in order to reach the club (Decision at 5-10).

Significantly, among the conditions imposed by the Board, was one which authorized the Town to station a Town employee on-site at the club, who would then be charged with ensuring compliance with the Board's decision and applicable zoning Code provisions (Decision at 17, conditions, ¶ 5).

By verified petition dated August, 2011, the petitioner Country Glen, LLC ["the petitioner"], commenced the within proceeding pursuant to CPLR Article 78 to set aside and annul the Board's determination. The respondents, including the municipal respondents, have filed answers denying the material allegations of the petition. The matter is now before the Court for review and resolution of the petitioners' claims.

Upon the record presented, the petition should be denied and the proceeding dismissed on the merits.

It is settled that "[l]ocal zoning boards are vested with broad discretion in considering applications for area variances, and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary and capricious, or an abuse of discretion" (*Wallach v. Wright*, 91 AD3d 881, 882; *JSB Enterprises, LLC v. Wright,* 81 AD3d 955, 956 *see, Gebbie v. Mammina*, 13 NY3d 728, 729 [2009]; *Pecoraro v. Board of Appeals of Town of Hempstead,* 2 NY3d 608, 612-613 [2004]; *Matter of Ifrah v Utschig,* 98 NY2d 304, 307 [2002]; *White*

Castle System, Inc. v. Board of Zoning Appeals of Town of Hempstead, ___ AD3d ___, 2012 WL 833168 [2nd Dept. 2012] *see also*, Town Law 267-b[3][b]). In determining whether to grant an area variance, a zoning board is required by Town Law § 267-b[3][b], to 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 if the variance is granted" (*Matter of Ifrah v Utschig*, 98 NY2d at 307 *see*, Town Law § 267-b[3][b]; *White Castle System, Inc. v. Board of Zoning Appeals of Town of Hempstead, supra*; *Wallach v. Wright*, *supra*; *Qing Dong v. Mammina*, 84 AD3d 820, 820).

Upon applying the test, however, "[a] Zoning Board is 'not required to justify its determination with supporting evidence with respect to each of the five [statutory] factors, so long as its ultimate determination balancing the relevant considerations was rational'" (*Matter of Genser v. Board of Zoning & Appeals of Town of N. Hempstead*, 65 AD3d 1144, 1147, *quoting from, Matter of Merlotto v. Town of Patterson Zoning Bd. of Appeals*, 43 AD3d 926, 929 *see also, Steiert Enterprises, Inc. v. City of Glen Cove,* 90 AD3d 764, 767; *Friedman v. Board of Appeals of Village of Quogue,* 84 AD3d 1083, 1085).

With respect to special permits, "[t]he classification of a particular use as permitted in a zoning district 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' * * *" (*Twin County Recycling Corp. v. Yevoli*, 90 NY2d 1000, 1001-1002 [1997] *see, 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]; *White Castle System, Inc. v. Board of Zoning Appeals of Town of Hempstead, supra*, 2012 WL 833168; Town Code § 70-225[B]). Further, "once it is shown that the contemplated use is in conformance with the conditions imposed, the special use permit must be granted unless there are reasonable grounds for its denial, supported by substantial evidence" (*Plaza Associates, L.P. v. Town Bd. of Town of Babylon*, 250 AD2d 690, 693 *see, Retail Property Trust v. Board of Zoning Appeals of Town of Hempstead, supra*; *Colin Realty Co. LLC v. Town of North Hempstead*, ___Misc.3d.___, 2012 WL 757010 [Supreme Court, Nassau County 2012]).

With these principles in mind, the Court agrees that the challenged variance and permit determinations are rationally based on the evidentiary record developed before the Board. More particularly, the evidence supports the Board's findings, *inter alia,* that the subject location is an exclusively commercial location characterized by a variety of proximately located restaurant uses and retail

establishments; that the proposed club use is of a scope, character, and design appropriate to, and in harmony with, these surrounding uses; and that – considering the occupancy limit and other conditions imposed – the proposed club will neither materially hinder, impair nor discourage the appropriate use and development of the adjacent uses (Town Code § 70-225[B][1][a]-[g] *see generally*, *Matter of Lerner v Town Bd. of Town of Oyster Bay,* 244 AD2d 336, 337; *Green v Lo Grande,* 96 AD2d 524, 525 *see also, Framike Realty Corp. v. Hinck,* 220 AD2d 501, 502; *Matter of C.B.H. Props. v Rose,* 205 AD2d 686, 687). It bears noting that the Board imposed a series of requirements, including on-site compliance observation and an occupancy limit, which would correspondingly lessen the pressure placed on the existing parking resources (*see, Matter of C.B.H. Props. v Rose, supra*).

Although there was conflicting expert testimony relating to what impact the use would have upon, *inter alia*, parking and access to the proposed club, there was evidence presented – which the Board in its discretion could credit – indicating that there would be adequate parking available to support the proposed use, particularly in light of the Club's later hours of peak operation (*see*, *Matter of Metro Enviro Transfer, LLC v Village of Croton-on-Hudson*, 5 NY3d 236, 241 [2005]; *Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of*

Hempstead, *supra*, at 196; *Green v. Lo Grande, supra,* 96 AD2d at 525-526 *cf., Matter of Gordon & Jack v Peterson*, 230 AD2d 856, 857; *Framike Realty Corp. v. Hinck, supra,* 220 AD2d 501, 502). It is settled that "[w]here there is conflicting expert testimony, deference must be given to the discretion and commonsense judgments of the zoning board" (*White Castle System, Inc. v. Board of Zoning Appeals of Town of Hempstead*, *supra*).

Contrary to the petitioner's assertions, the record establishes that the Board rationally engaged in the statutorily mandated balancing test. Moreover, while the variance was significant, its mathematical scope is not alone determinative (*see, Matter of Cacsire v City of White Plains Zoning Bd. of Appeals*, 87 AD3d 1135, 1137; *Friedman v. Board of Appeals of Village of Quogue*, *supra*, 84 AD3d 1083, 1085 *see also, Colin Realty Co. LLC v. Town of North Hempstead*, *supra*), since there was evidence on which the Board could rely, showing that the overall impact of granting the request would not adversely, or otherwise result in an undue detriment to the health, safety, and welfare of the community (*Matter of Cacsire v City of White Plains Zoning Bd. of Appeals*, *supra,* 87 AD3d 1135, 1137-1138). W

While an issue arose at the hearing relating to the proper application of the Code's off-street parking provisions – and the precise number required spaces mandated thereunder (Code § 70-103[A][1] *e.g.,* March, 2011 Hearing Tr., 224-

232) – the Board's determination with respect to parking was predicated upon, *inter alia*, the fixed, maximum occupancy figure it imposed, in conjunction with expert testimony projecting the number of vehicles which would actually utilize the existing parking resources available. The Board acknowledged that the parking variance was mathematically significant, but rationally weighed the factors relevant to the specific proposal before it (*Wallach v. Wright*, *supra*; *Colin Realty Co. LLC v. Town of North Hempstead*, *supra*). Upon doing so, it permissibly concluded that the variance and resulting parking usage would not create an undesirable change in – or adversely impact upon – the character of the neighborhood (*Colin Realty Co. LLC v. Town of North Hempstead*, *supra*, 2012 WL 757010).

Although the petitioner may disagree with the Board's conclusions (*e.g Town of Hempstead v. The Town of Hempstead*, ___Misc.3d___, 2011 WL 4657385 [Supreme Court, Nassau County, 2011]), when a rational basis exists for a challenged decision, reviewing courts may not substitute their own judgment for that of a zoning board, even if the court would have decided the matter differently or if a contrary determination is supported by the record (*Matter of Metro Enviro Transfer, LLC v Village of Croton-on-Hudson*, *supra*, 5 NY3d at 241; *Matter of Retail Prop. Trust v. Board of Zoning Appeals of Town of Hempstead*, *supra*, 98

NY2d at 196 ; *White Castle System, Inc. v. Board of Zoning Appeals of Town of Hempstead*, *supra*, 2012 WL 833168; *Roberts v. Wright*, *supra*). Indeed, where there are grounds in the record supporting the challenged determination, "deference must be given" to the commonsense judgments of the board," which is composed of community members who "generally, possess the familiarity with local conditions necessary to make the often sensitive planning decisions which affect the development of their community'" (*Pecoraro v. Board of Appeals of Town of Hempstead, supra,* 2 NY3d at 613, *quoting from, Matter of Cowan v. Kern*, 41 NY2d 591, 599 [1977] *see*, *Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead*, *supra*, at 196).

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

Accordingly, it is,

ORDERED that the petition is denied and the proceeding is dismissed on the merits.

The foregoing constitutes the order and decision of the Court.

Dated: April 2, 2012

STEVEN M. JAEGER, A.J.S.C.