

**APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW
YORK, SECOND DEPARTMENT**

Tabernacle of Victory Pentecostal Church v. Weiss

101 A.D.3d 738 (N.Y. App. Div. 2d Dep't 2012) · Decided December 5, 2012

SUMMARY

The Appellate Division, Second Department, held that a religious institution was entitled to a special exception permit and an area variance from off-street parking requirements. The court concluded that the zoning board failed to suggest measures accommodating the proposed religious use while mitigating adverse effects on the surrounding community. It annulled the board's determinations and remitted the matter with directions to grant the applications subject to reasonable conditions.

CASE DETAILS

COURT	Appellate Division of the Supreme Court of the State of New York, Second Department
WRITING FOR THE COURT	Plorio, J.P.; Leventhal, J.; Austin, J.; Cohen, J.
JURISDICTION	New York
DECIDED	December 5, 2012
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Article 78 proceeding challenging a town zoning board's denial of an application for a special exception permit and area variance.
STANDARD OF REVIEW	Judicial review of the zoning board's determination in an Article 78 proceeding; the opinion evaluated whether the Board properly accommodated the proposed religious use and whether the evidence rebutted the presumed beneficial effect of that use.
PRECEDENTIAL VALUE	published and precedential New York Appellate Division decision
PARTIES	Tabernacle of Victory Pentecostal Church v. Weiss

TOPICS

[zoning](#) [judicial review of agency action](#) [administrative law](#) [municipal law](#)

PRACTICE AREAS

[real estate](#) [zoning](#) [administrative law](#) [municipal law](#)

QUESTIONS PRESENTED

1. Whether the Board of Appeals improperly denied a special exception permit for the proposed religious use without making reasonable efforts to accommodate that use.
2. Whether the petitioner could properly seek an area variance waiving off-street parking requirements in connection with the special exception permit.
3. Whether the evidence was sufficient to rebut the presumed beneficial effect of the proposed religious use.

HOLDINGS

1. A local zoning board evaluating an application for a religious use must make every effort to accommodate the use and must suggest measures that accommodate the use while mitigating adverse effects on the surrounding community. The Board's complete denial, despite the petitioner's proposed limiting conditions and the absence of suggested alternatives, was improper.
2. The petitioner properly sought an area variance waiving the off-street parking requirement in connection with its application for a special exception permit, and such a variance may be granted in connection with the permit.
3. The evidence was insufficient to rebut the presumed beneficial effect of the proposed religious use.

KEY QUOTATIONS

“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” (739-740)

“while religious institutions are not exempt from local zoning laws, greater flexibility is required in evaluating an application for a religious use than an application for another use and every effort to accommodate the religious use must be made” (740)

“suggest measures to accommodate the proposed religious use while mitigating the adverse effects on the surrounding community to the greatest extent possible” (740)

FACTUAL BACKGROUND

Tabernacle of Victory Pentecostal Church owned split-zoned premises in Franklin Square with no on-site parking and sought permission to conduct religious services. It proposed limiting sanctuary attendance to 105 people and using two vans to transport approximately half of its 60 members, reducing peak off-site parking needs to approximately 8 to 10 vehicles. Despite these proposed limitations and conditions, the Town of Hempstead Board of Appeals denied the special exception permit and area variance without suggesting measures to accommodate the religious use while mitigating its effects on the surrounding community.

PROCEDURAL HISTORY

The petitioner applied to the Board of Appeals of the Town of Hempstead for a special exception permit to conduct religious services and an area variance waiving off-street parking requirements. The Board denied both

applications. The Supreme Court denied the petition and dismissed the proceeding. The Appellate Division reversed, granted the petition, annulled the Board's determinations, and remitted the matter with directions to grant the applications subject to reasonable conditions.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Grant the petition, annul the Board's determinations, and remit the matter to the Board with direction to grant the special exception permit and area variance under reasonable conditions that allow the proposed religious use while mitigating detrimental or adverse effects on the surrounding community.

CASES CITED

- Matter of Retail Prop. Trust v. Board of Zoning Appeals of Town of Hempstead, 98 N.Y.2d 190, 195 (2002)
- Matter of North Shore Steak House v. Board of Appeals of Inc. Vil. of Thomaston, 30 N.Y.2d 238, 243 (1972)
- Matter of Real Holding Corp. v. Lehigh, 304 A.D.2d 583 (N.Y. App. Div. 2d Dep't 2003), aff'd, 2 N.Y.3d 297 (2004)
- Matter of Sunrise Plaza Assoc. v. Town Bd. of Town of Babylon, 250 A.D.2d 690, 693 (N.Y. App. Div. 2d Dep't 1998)
- Matter of Genesis Assembly of God v. Davies, 208 A.D.2d 627, 628 (N.Y. App. Div. 2d Dep't 1994)
- Matter of Capriola v. Wright, 73 A.D.3d 1043, 1045 (N.Y. App. Div. 2d Dep't 2010)
- Matter of St. Thomas Malankara Orthodox Church, Inc., Long Is. v. Board of Appeals, Town of Hempstead, 23 A.D.3d 666, 667 (N.Y. App. Div. 2d Dep't 2005)
- Matter of Harrison Orthodox Minyan v. Town Bd. of Harrison, 159 A.D.2d 572, 573 (N.Y. App. Div. 2d Dep't 1990)
- Matter of Pine Knolls Alliance Church v. Zoning Bd. of Appeals of Town of Moreau, 5 N.Y.3d 407, 412 (2005)
- Matter of Islamic Socy. of Westchester & Rockland v. Foley, 96 A.D.2d 536, 537 (N.Y. App. Div. 2d Dep't 1983)

OPINION

PER CURIAM.

*739The petitioner, Tabernacle of Victory Pentecostal Church, is the owner of certain premises on Hempstead Turnpike in Franklin Square. The property is split zoned, the front situated in a Business District and the rear situated in a Residence "C" District.

The premises have no on-site parking. The petitioner filed an application with the Board of Appeals of the Town of Hempstead (hereinafter the Board) for a special exception permit so that religious services could be held on the premises.

The petitioner also sought an area variance for a waiver of the Town's off-street parking requirements. As a condition to the grant of the applications, the petitioner proposed that only 105 people would be allowed to enter the sanctuary, and that two church vans would transport half of the petitioner's approximately 60 members to the site, resulting in the need for off-site parking for, at most, 8 to 10 vehicles during its peak hours of operation.

After public hearings, the Board denied the petitioner's applications in their entirety. The petitioner commenced this proceeding pursuant to CPLR article 78 to annul the Board's determinations. The Supreme Court denied the petition and dismissed the proceeding.

The petitioner appeals, and we reverse. "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" (*Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead*, 98 NY2d 190, 195 [2002] [citation omitted]).

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" (id. at 195, quoting *Matter of North Shore Steak House v Board of Appeals of Inc. Vil. of Thomaston*, 30 NY2d 238, 243 [1972]).

In connection with its application for a special exception permit, the petitioner properly sought an area variance to waive the off-street parking requirement, which may be granted in connection with the permit (see Town Law § 274-b [3]; *Matter of Real Holding Corp. v Lehigh*, 304 AD2d 583 [2003], affd 2 NY3d 297 [2004]; *Matter of Sunrise Plaza Assoc. v Town Bd. of Town of Babylon*, 250 AD2d 690, 693 [1998]).

In addition, the petitioner suggested conditions for the limitation of its use in order to mitigate the impact on the surrounding community. "[W]hile religious institutions are not exempt from local zoning laws, greater flexibility is required in evaluating an application for a religious use than an application for another use and every effort to accommodate the religious use must be made" (*Matter of Genesis Assembly of God v Davies*, 208 AD2d 627, 628 [1994]; see *Matter of Capriola v Wright*, 73 AD3d 1043, 1045 [2010]; *Matter of St. Thomas Malankara Orthodox Church, Inc., Long Is. v Board of Appeals, Town of Hempstead*, 23 AD3d 666 [2005]).

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" (*Matter of Genesis Assembly of God v Davies*, 208 AD2d at 628; see *Matter of Capriola v Wright*, 73 AD3d at 1045; *Matter of St. Thomas Malankara Orthodox Church, Inc., Long Is. v Board of Appeals, Town of Hempstead*, 23 AD3d at 667).

Here, the record reflects that the Board suggested no measures that would have accommodated the proposed religious use while mitigating the adverse effects on the surrounding community (Matter of St. Thomas Malankara Orthodox Church, Inc., Long Is. v Board of Appeals, Town of Hempstead, 23 AD3d at 667; Matter of Harrison Orthodox Minyan v Town Bd. of Harrison, 159 AD2d 572, 573 [1990]).

Despite the conditions proposed by the petitioner, the Board denied the petitioner's applications in their entirety, even though the proposed religious use could have been substantially accommodated (see Matter of Capriola v Wright, 73 AD3d 1043 [2010]; Matter of Harrison Orthodox Minyan v Town Bd. of Harrison, 159 AD2d at 573). Furthermore, the evidence was insufficient to rebut the presumed beneficial effect of the proposed religious use (see Matter of Pine Knolls Alliance Church v Zoning Bd. of Appeals of Town of Moreau, 5 NY3d 407, 412 [2005]).

Accordingly, we grant the petition, annul the Board's *741determinations, and remit the matter to the Board with a direction to grant the petitioner's applications for a special exception permit and area variance under such reasonable conditions as will allow the proposed religious use while mitigating any detrimental or adverse effects upon the surrounding community (see Matter of Capriola v Wright, 73 AD3d 1043 [2010]; Matter of St. Thomas Malankara Orthodox Church, Inc., Long Is. v Board of Appeals, Town of Hempstead, 23 AD3d at 667; Matter of Islamic Socy. of Westchester & Rockland v Foley, 96 AD2d 536, 537 [1983]).

Plorio, J.P., Leventhal, Austin and Cohen, JJ., concur.