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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

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| In the Matter of the Application of GREEN 2009, INC., | TRIAL / IAS PART 29 NASSAU COUNTY |
| Petitioner, | Index No. 14456/11 |
| - against - | Motion Sequence No. 001 |
| for a judgment pursuant to Article 78 of the Civil Practice law and Rules, | |
| DAVID P. WEISS, Chairman, GERALD G. WRIGHT, KATURIA E. D'AMATO, CHRISTIAN BROWNE, JOHN F. RAGANO, FRANK A. MISTERO and KIMBERLY A. PERRY, constituting the members of the TOWN OF HEMPSTEAD BOARD OF ZONING APPEALS, | |
| Respondents. | |

The following papers having been read on this motion:

Notice of Petition, Affidavits, & Exhibits ..... 1
Answering Affidavits ..... 2
Replying Affidavits .....
Briefs: Plaintiff's / Petitioner's ..... 3
Defendant's / Respondent's ..... 4

The corporate lessee petitioner seeks an order and judgment pursuant to CPLR Article 78 to annul the August 24, 2011 determination by the Town of Hempstead Board of Zoning Appeals. The Board denied the petitioner's application for a special exception to use of a premises designated on the Nassau County land and tax map as Section 57, Block 102 and Lot 518. The petitioner contends, although a Code of the Town of Hempstead

§96-1.(A) applies to previously approved specific cabaret use, any potential ambiguity in that amendment, specifically Town of Hempstead Building Zone Ordinance §272-C (6) effective March 31, 1997, must be strictly construed in its favor. Petitioner maintains it is entitled to operate its new cabaret pursuant to the 1969 special use permit as a prior conforming use that is unaffected by the 1997 amendments to the ordinance, and that it need not apply for a new special exception permit.

The petitioner also contends the August 24,2011 decision reopened and reversed an April 28, 2010 board resolution and June 2, 2010 amendment which approved the initial temporary and sequent permanent special exception for cabaret use, approved the parking variance and denied the determination by the Department of Buildings that a special use exception was required. The petitioner asserts that 2010 approval, by its terms, was set to expire on April 28, 2015. The petitioner maintains it accrued renovation expenses and other related costs in reliance upon the approval initially granted by the respondents. The petitioner avers any earlier decisions and the certificate of occupancy did not limit the premises to a specific cabaret use. The petitioner maintains the Code amendment only applies to previously approved specific cabaret uses, and does not apply to the subject premises which was previously approved for general cabaret use.

The respondents oppose the petition. The respondents point out there was a unanimous request by members of the Board of Zoning Appeals, acting pursuant to the Code of the Town of Hempstead § 267-a(12), to reopen this matter. The respondents indicate a hearing was held on May 28, 2011 on the applications with additional witnesses, evidence and legal arguments submitted for the consideration of the Board of Zoning

Appeals. The respondents assert the Board of Zoning Appeals concluded it misapprehended the actual nature and scope of the petitioner's proposed use, and that misapprehension arose from what reasonably appeared to have been an intentional and studied intent by the petitioner to be less than complete and candid in its description of its planned use and activities, to wit the nature of the so-called "Las Vegas Style" entertainment to be offered there. The respondents aver the petition is fatally defective because the pleadings fail to comply with CPLR 3015(b) regarding alleging corporate status and the failure pursuant to CPLR 1001 to join a necessary party, that is One 55 Day, Inc., the owner of the subject property. The respondents claim, in view of the 1997 Code amendment, the petitioner may not rely on the 1969 special use permit "dancing and live music," so the Board of Zoning Appeals properly denied the petitioner's appeal from the determination of the Town of Hempstead Department of Buildings.

> Local zoning boards have 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 (***see Matter of Pecoraro v. Board of Appeals of Town of Hempstead***, 2 NY3d 608, 613; ***Matter of Ifrah v. Utschig***, 98 N.Y.2d 304, 308; ***Matter of Wallach v. Wright***, 91 AD3d 881). In determining whether to grant an area variance, a zoning board is required 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 (***see Matter of Pecoraro v. Board of Appeals of Town of Hempstead***, 2 NY3d at 612; ***Matter of Ifrah v. Utschig***, 98 N.Y.2d at 307)

***Nathan v. Zoning Bd. of Appeals of Village of Russell Gardens***, --- N.Y.S.2d ----, 2012 WL 1605991 [2d Dept, 2012].

> [a] zoning board of appeals must weigh the benefit of the grant to the applicant against the detriment to the health, safety and welfare of the neighborhood or community if the variance is granted (***see Matter of Ifrah v. Utschig***, 98 N.Y.2d 304, 307, 746 N.Y.S.2d 667, 774 N.E.2d 732 [2002]; ***Matter of Sasso v. Osgood***, 86 N.Y.2d 374, 382, 384, 633 N.Y.S.2d 259, 657

> N.E.2d 254 [1995]). The zoning board is also required to consider whether (1) granting the area variance will produce an undesirable change in the character of the neighborhood or a detriment to nearby properties; (2) the benefit sought by the applicant can be achieved by some method, feasible to the applicant, other than a variance; (3) the requested area variance is substantial; (4) granting the proposed variance would have an adverse effect or impact on physical or environmental conditions in the neighborhood or district; and (5) the alleged difficulty is self-created (***see Matter of Ifrah v. Utschig***, 98 N.Y.2d at 308, 746 N.Y.S.2d 667, 774 N.E.2d 732)...A determination of a zoning board should be sustained on judicial review if it has a rational basis and is supported by substantial evidence (***see Matter of Ifrah v. Utschig***, 98 N.Y.2d at 308, 746 N.Y.S.2d 667, 774 N.E.2d 732; ***Matter of Fuhst v. Foley***, 45 N.Y.2d 441, 444, 410 N.Y.S.2d 56, 382 N.E.2d 756 [1978] ).

***Pecoraro v. Board of Appeals of Town of Hempstead***, 2 N.Y.3d 608, 612-613, 814 N.E.2d 404 [2004].

This Court cannot conclude the respondents' denial of the petitioner's application for a special exception to use here was either an abuse of discretion, irrational or based upon generalized community objections under these circumstances (***see generally Tandem Holding Corp. v. Board of Zoning Appeals of Town of Hempstead***, 43 N.Y.2d 801, 373 N.E.2d 282 [1977]). The Board had the right, after the unanimous request of its members acting pursuant to Town Law §267-a, to reopen, schedule and publicly notice a new hearing for both a special use exception and a parking space variance. The record shows the Town of Hempstead Board of Zoning Appeals reasonably considered all of the factors regarding the petitioner's application for a special exception to use and weighed the petitioner's interest against the interest of the locality and supported its determination as required by law upon the considered presentations of the parties (***see Pecoraro v. Board of Appeals of Town of Hempstead, supra***).

Board action refusing to grant a "special exception" is by definition and in

essential character discretionary and not a denial of a right (***see Matter of Reed v. Board of Stds. & Appeals***, 255 N. Y. 126, ***supra; Barkmann v. Town of Hempstead***, 294 N. Y. 805). Otherwise, there would be no point in listing certain uses as the permitted ones in a use district and listing others as permissible only when specially, exceptionally and affirmatively authorized by the board...For a court to say that those reasons are not good enough would mean that the Judges have taken over the duties and powers of the board. "Special exception" disputes are to be resolved by the "common-sense judgments" of "representative citizens doing their best to make accommodations between conflicting community pressures", and for the courts to intervene, in the absence of clear illegality, would be "contrary to the settled and practical necessities of zoning procedure" (***Matter of Von Kohorn v. Morrell***, 9 N Y 2d 27, 33, 34, ***supra***)

***Matter of Lemir Realty Corp. v Larkin***, 11 N.Y.2d 20, 24-25, 226 N.Y.S.2d 374 [1962].

Accordingly, the petition is dismissed. This decision will constitute the judgment and order of the Court.

So ordered.

Dated: **May 14, 2012**

ENTER:

J. S. C.

FINAL DISPOSITION