Matter of New York Mart Group, Inc. v Srinivasan
2013 NY Slip Op 32892(U)
October 27, 2013
Supreme Court, Queens County
Docket Number: 3095/2013
Judge: Sidney F. Strauss

M E M O R A N D U M

SUPREME COURT STATE OF NEW YORK
COUNTY OF QUEENS IA PART 11
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In the Matter of the Application of
NEW YORK MART GROUP, INC.

Petitioner,

for an Order and Judgment pursuant
to Article 78 of the CPLR

-against-

MEENAKSHI SRINIVASAN, Chairperson,
CHRISTOPHER COLLINS, Vice-Chairman,
DARA OTTLEY-BROWN, Commissioner,
SUSAN M. HINKSON, R.A., Commissioner,
EILEEN MONTANEZ, P.E., Commissioner,
constituting the BOARD OF STANDARDS
AND APPEALS OF THE CITY OF NEW
YORK, the DEPARTMENT OF BUILDINGS
OF THE CITY OF NEW YORK, DON RICK
ASSOCIATES, and BARBIZON
OWNERS, INC.,

Respondents.
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Index No.: 3095/2013

OTSC Date: 06/25/13

Seq. No.: 1

BY: STRAUSS, J.

In this Article 78 proceeding, petitioner New York Mart Group Inc. (Mart) seeks a judgment vacating the resolution issued on January 15, 2013 and filed on January 17, 2013 by respondent Board of Standards and Appeals of the City of New York (BSA) and its members, respondents Meenakshi Srinivasan, Christopher Collins, Dara Ottley-Brown, Susan M. Hinkson, and Eileen Montanez. The resolution denied petitioner's application for a special permit pursuant to New York City Zoning Resolution §§ 73-03 and 73-49.

Petitioner Mart is the long term lessee a one-story building located at 142-42

Roosevelt Avenue, Flushing, New York (Block 5020, Lot 34). Respondent Don Rick Associates is the owner of the subject property which is improved by a 18,033 square foot supermarket. Respondent Barbizon Owners Inc. (Barbizon) is the owner of the real property located at 142-05 Roosevelt Avenue, Flushing, New York (Block 5020 Lot 1). The Barbizon, a residential cooperative, is located on the tax lot adjacent to the subject real property and is to the west of the subject real property. The Barbizon property is improved by a six-story residential building.

The subject premises is located within an R6/C2-2 Zoning District, and Mart operates the supermarket as of right. The certificate of occupancy for the supermarket requires that there be parking for 41 vehicles. To satisfy that requirement the property owner entered into a licensing agreement with Barbizon, whereby it was allowed 41 accessory parking spaces for the supermarket's customers in the cellar and sub-cellar of the adjacent six-story building. Mart seeks to relocate the customer parking area from the adjacent underground facility to the rooftop of the supermarket. A special permit for rooftop parking is required under Zoning Resolution §73-49. It was contemplated that once the rooftop permit application was granted, the license agreement with Barbizon would be terminated.

On February 8, 2012, Mart filed a special permit application with the BSA in which it sought 49 rooftop accessory parking spaces above the first floor of the supermarket building. Mart submitted a statement of facts and findings, along with certain documents. The subject site and surrounding area were visited and examined by respondents Chairperson Srinivasan and Commissioners Montanez and Ottley-Brown.

The BSA conducted its initial review and on February 29, 2012 issued a Notice of Comments and directed Mart to submit its responses to each comment along with the requested

documents. Mart submitted its response dated April 17, 2012, a revised statement of facts and findings, the requested relevant documents. The BSA held the initial public hearing on petitioner's application on June 5, 2012, at which time issues arose with respect to the structural integrity of the roof, new duct work, the need to relocate the existing rooftop HVAC equipment, mitigation of the lighting conditions and noise, and the hours of operation of the proposed rooftop facility. A resident of the adjacent Barbizon building, whose windows face the rooftop expressed his concerns about increased noise and air pollution.

Mart submitted a written response dated August 7, 2012, in which it addressed the issues raised at the June 5, 2012 hearing. Mart also submitted memorandum of understanding dated August 24, 2011 that it along with Don Rick Associates, had entered into with Barbizon, that set forth setting forth 18 conditions that Mart agreed to perform in exchange for Barbizon's consent to the filing of the special permit application.

The BSA continued the hearing on the special permit application on August 21, 2012, at which time issues were raised concerning the height of the proposed parapet, sound proofing and lighting on the rooftop. A resident and shareholder of the Barbizon expressed her concerns about congestion, vehicular traffic, security measures in the parking lot during non-operational hours and, noise. Another resident and shareholder of the Barbizon expressed her concerns about security, privacy, noise and whether the proposed wall would block sunlight. Both resident-shareholders also expressed concerns regarding the appearance of the proposed rooftop parapet or wall. Mart's attorney stated that a monetary settlement had been negotiated with the Barbizon Board. Residents of the Barbizon also submitted a letter dated September 20, 2012, containing signatures of 235

tenant/shareholders, which stated their concerns about the creation of rooftop parking lot, including the environmental impact on the quality of life, pedestrian and vehicular safety, security, negative impact on property values, and certain construction issues. These residents also submitted photographs of the area and other documents. Eighteen neighboring residents submitted forms to the BSA in objecting to Mart's application, and five individuals submitted forms in support of said application.

On October 9, 2012, and October 12, 2012, Mart submitted revisions to its proposed plan relating to lighting, security, safety, privacy and the aesthetic appeal of the proposed fencing, in response to the issues raised at the August hearing, along with certain documents. The hearing was continued on October 23, 2012, at which time Mart did not have an executed consent from Barbizon, and did not have plans from its engineer with respect to its proposal to build a new roof. A tenant representative stated that the certain concerns regarding security, the proposed rooftop lighting, as well as construction issues, had not been addressed by Mart. Following the hearing, Mart submitted a written response dated November 27, 2012, which included Barbizon's affidavit of ownership form , correspondence from its structural engineer, as well as revised drawing and plans.

The final hearing was held on December 11, 2012, at which time counsel for the applicant noted that there were numerous conditions the community sought to impose which related to the operation of the supermarket; that some of the conditions pertaining to the parking and ramp were not necessary; and that the existing condition of the supermarket would be substantially improved by rooftop parking. Following the hearing the applicant submitted a revised statement of facts and findings.

Community Board 7, following a public hearing held on October 22, 2012, approved the application with the following conditions: "the parking spaces be reduce from 49 spaces to 41 spaces; roll down gates shall be installed at the entrance to the roof; the gate shall close at 9:00 p.m. or whenever the roof is not in use; there shall be video cameras installed at the roof and entrance to the roof; an attendant who shall monitor the roof for illegal parking as well as assisting in safety measures shall be on site when the roof is open; speed bumps shall be installed at the down ramp as well as signage altering to pedestrians of cars shall be installed; convex mirrors shall be installed at the base of the ramp for pedestrians and drivers; all air conditioning units on the roof shall be on the Bowne Street side and shall be fenced in; a charcoal filter shall be installed on the food vent; and in the event of icing and snow which make the ramp dangerous, the roof shall be closed.".

On January 7, 2013, the Queens Borough President, following a public hearing on November 28, 2012, recommended approval of the application with the following conditions:

"• Roll down gates should be installed at the to the parking lot;

• An attendant should monitor the parking lot and entrances for safety and security;

• All other safety and security measures such as convex mirrors, signage, speed bumps, flashing lights should be installed and properly maintained;

• The applicant should be considerate to the residents of the adjacent buildings to minimize noise and air pollution and preserve privacy and security;

• The applicant should adhere to and make suer that the listed safety and housekeeping items in the letter to CB 7 dated October 5, 2012 are implemented".

The applicant in its October 5, 2012 letter to Community Board #7 had committed to meeting the conditions set forth by Community Board as stated above.

On January 15, 2013, the BSA members voted 5 to 0 to deny the petitioner's application, and issued the subject resolution, which states, in pertinent part, as follows:

> "WHEREAS, pursuant to ZR § 74-49, the Board may permit parking spaces to be located on the roof of a building in a C2-2 zoning district if the Board finds that the parking is located so as not to impair the essential character or future use or development of the adjacent areas; and"
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> "WHEREAS, the applicant represents that the rooftop parking will not impair the essential character or future use or development of adjacent areas; and"
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> "WHEREAS, the applicant notes that the adjacent uses include the Residential Building, which is six stories and separated from the subject site by an alleyway with a width of 25 feet; the 12-storynursing home at 38-20 Bowne Street (the "Nursing Home"), approximately 34 feet from the site; and several multi-story mixed-use commercial/residential buildings approximately 70 feet from the site; and
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> "WHEREAS, further the applicant asserts that it proposes conditions which fit the special use permit provision that the Board 'may proscribe appropriate conditions and safeguards to minimize adverse effects the character of the surrounding area, including requirements for setback of roof parking area from lot lines or for shielding floodlights'; and "
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> "WHEREAS, the applicant states that the availability of additional off-street parking for grocery store customers will be advantageous to the community; and "
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> "WHEREAS, the applicant performed a noise study and a traffic study to support its claim that (1) any potential sound from cars on the roof will not be noticeable to surrounding residents due to the fact that the site is within the flight path to LaGuardia Airport and (2) there will be no significant adverse impacts related to street condition, transportation, roadway conditions, or parking; and"
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> "WHEREAS, the applicant identified the primary concerns of the Residential Building, the Nursing Home, and the Community Board as being related to (1) security, (2) traffic, (3) hours of operation, (4) lighting, (5) aesthetics, and (6) odors; and"
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> "WHEREAS, the applicant has stated that it has entered into a Memorandum of Understanding with the Residential Building regarding mitigating conditions; and"
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> "WHEREAS, the applicant proposes conditions for the parking facility to address: (1) hours of operation; (2) entrance and egress; (3) lighting ; (4) noise and light

buffering; and (5) odor diffusion; and"

"WHEREAS, the applicant notes that its proposed conditions are intended to safeguard the community and have been negotiated with its neighbors and the Community Board; and"

"WHEREAS, in support of its assertion that the special permit is appropriate at the subject site and meets the required findings, the applicant cites to the Board's prior decision under BSA Cal.No. 319-06-BZ, which also involved rooftop parking adjacent to residential uses; and"

"WHEREAS, at the hearing the Board raised concerns about the appropriateness of the proposed rooftop parking facility at the subject site with adjacency to a significant number of residential units; and"

"WHEREAS, specifically, the Board notes that the potential impacts of rooftop parking are different from surface (at-grade) parking lots, and that, as a result, the Zoning Resolution requires the Board's special permit for approval of rooftop accessory parking; and"

"WHEREAS, in order to approve such special permit, the Board must find that the rooftop parking is located in such a manner that it does not change the essential character of the neighborhood, nor impair future use of the surrounding properties; and"

"WHEREAS, the Board must also find under ZR § 73-03 (general special permit findings) that the hazards or disadvantages to the community at large of such special permit at the particular site are outweighed by the advantages to be derived by the community by the grant of special permit; and"

"WHEREAS, based on the record, the Board believes that it cannot make such findings, and several factors regarding this application and the surrounding context render the proposed rooftop parking inappropriate; and"

"WHEREAS, specifically the factors that contribute to the Board's conclusion include: (1) the location of the rooftop parking facility; (2) the nature and intensity of the use;(3) the nature of and proximity to surrounding uses; (4) limitations regarding proposed safeguards; and (5) Board precedent; and"

"WHEREAS, as to the first factor, the Board notes that the proposed rooftop parking is located in a C2-2 (R6) zoning district, immediately adjacent to an R6 district to the north and across the street from an R6 district to the east, and that the area is a predominately residential neighborhood with local retail; and"

"WHEREAS, the Board notes that the only open parking facility which is located above grade in the general vicinity of the site is a municipal parking garage, which is located approximately 700'-00" to the west; and"

WHEREAS, the Board notes that the municipal parking garage occupies nearly an entire block, is surrounded by streets on three and one-half sides, and is opposite to a mix of uses, including commercial and community facility buildings; and

"WHEREAS, further, the Board notes that all other parking facilities in the blocks surrounding the site are surface parking lots, and many of them are accessory to residential and community facility buildings, which typically do not draw a significant number of vehicles and in and out trips; and"

"WHEREAS, as to the second factor, the Board notes that the proposed rooftop parking would be accessory to an existing grocery store, a use that draws vehicle trips throughout the day, including (according to the applicant's traffic consultant) an estimated 22 vehicles during the morning peak hour, 46 during the midday peak hour, 57 during the evening peak, and 78 during the weekend peak; further the grocery store is open until 10:30 p.m. and likely attracts increased activity during evening hours when residents of nearby buildings have returned home; and"

"WHEREAS, as to the third factor, the Board notes that the proposed parking would be unenclosed and located on top of the grocery store, on the equivalent of a second floor; and"

"WHEREAS, the Board notes that the uses immediately adjacent to the grocery store are the six-story Residential Building to the west and the 12-story Nursing Home to the north, and the uses to the east and south on the opposite side of Bowne Street and Roosevelt Avenue, are a church, a seven-story apartment building and a six-story apartment building; and"

"WHEREAS, further, the Board notes that residential buildings adjacent to and across the street from the grocery all have rows of windows that would face directly onto the rooftop parking, and the Board believes that the number of residential units that would be impacted by noise, lighting, and security issues related to the proposed rooftop parking is significant; and"

"WHEREAS, the Board is especially troubled by the proximity of the six-story Residential Building to the west, which has more than 66 windows facing directly onto the grocery store's roof and where use of the roof for parking would diminish the privacy and general quality of life for the residents of these units; and"

"WHEREAS, as to the fourth factor, the Board notes that the applicant has recommended sound attenuation measures, including a sound barrier wall with a height of 4'-6" along the north and west sides to screen sound and light, signs to patrons to be respectful to adjacent residents, lower lighting to be placed in the middle of the parking area, security cameras, and the closing and securing of the roof parking at 9:00 p.m.; and"

"WHEREAS, however, the Board concludes that such measures fail to fully address the potential impacts on residential units, specifically, the impact sound and light on the adjacent residential windows located above the sound barrier, and the general ineffectiveness of signs; and"

"WHEREAS, the Board also notes that any relocation of rooftop equipment (including mechanicals) away from the adjacent apartment building, as stated in the Memorandum of Understanding, would then have an impact on the residents of the building to the south; and"

"WHEREAS, finally, the Board has reviewed its history of special permit approvals in the past decade, and none of the grants presented similar factors, primarily the extent of surrounding residential uses, and the nature of such rooftop parking; and"

"WHEREAS, the Board has granted nine rooftop parking permits since 1998, which can all be distinguished from the subject facts; most of the sites were either in manufacturing districts or concerned rooftop parking associated with colleges or hospitals within a campus setting; and"

"WHEREAS, the applicant has argued that the Board's grant under BSA Cal. No. 316–0-BZ is similar, and that the applicant is providing similar measures as in that case (including sound attenuation and screening wall and limiting the hours); and"

"WHEREAS, the Board disagrees with the applicant that BSA Cal. No. 316-06-BZ is similar to the subject rooftop parking; in that case, the roof top parking was for automotive storage for an auto-motive service facility in M1-1 zoning district with use and access restricted to employees of the service facility and did not anticipate constant activity of cars entering and exiting the rooftop parking; and"

"WHEREAS, further, the Board notes that the site was in a manufacturing district and boarded a few semi-detached homes to the rear, but that the other adjacent buildings to the sides were occupied by industrial use; additionally, the homes were a total of ten and the roof parking could not be viewed from the adjacent residential windows and the hours were limited to 7:00 p.m., Monday through Friday and closed on weekends; and"

"WHEREAS, the Board concludes that unlike any of the other special permits, the impacts associated with the proposed rooftop parking, the impacts associated with the proposed rooftop parking are much more significant and have the potential to affect many more residential units; and"

"WHEREAS, finally, the Board finds that the applicant has failed to establish that the advantages to the community set off the disadvantages to the surrounding neighborhood; the Board notes that the grocery store already provides required parking to its patrons on the subject zoning lot and, thus, the applicant's assertion that the rooftop parking would be a benefit to its patrons and surrounding community by providing parking and reducing congestion in the streets, is unavailing; and"

"WHEREAS, the Board finds that the applicants assertions about the grocery store's benefits to the community are misplaced as the Board's rejection of the rooftop parking facility is not a rejection of the existing-as-of right grocery store; and"

"WHEREAS, as to the community's involvement, the Board notes that the Community Board's conditions do not relate to the actual rooftop conditions and that the Board has the authority to determine that the conditions set forth in the Memorandum of Understanding do not mitigate the impacts of the parking facility to the extent that the special permit findings are satisfied; and"

"WHEREAS, based upon the above, the Board concludes that the findings required under ZR § 73-49 have not been met; and"

"WHEREAS, the Board does not find that, under the conditions and safeguards imposed, any hazard or disadvantage to the community at large due to the proposed special permit use is outweighed by the advantages to be derived by the community; and"

"WHEREAS, the Board has also determined that the evidence in the record fails to support the findings required to be made under ZR § 73-03."

Petitioner thereafter commenced this proceeding and alleges in its petition that the BSA's determination is arbitrary and capricious and contrary to the evidence in the record and the required findings of ZR§§73-49 and73-03, and is largely based upon speculation and surmise. Petitioner alleges that the BSA, in the subject resolution, failed to acknowledge the overwhelming support of community and local officials, including the adjacent apartment building; that the BSA

failed to acknowledge the significant conditions included as part of the proposal that directly addressed the factors noted by the BSA, including limitations on hours of operation, sound screening, light screening, security measures, including cameras, signage, gates and monitoring personnel; that the BSA failed to demonstrate that its previous determinations prevented the proposed rooftop parking from meeting the required findings of ZR §§73-49 and 73-03. Petitioner further alleges that the evidence in the record fails to indicate any potential adverse effect upon the surrounding community which warrants the denial of its application for a special permit, and argues that the inclusion of the rooftop parking provision is tantamount to a legislative determination that the use is in harmony with the general zoning plan and will not be detrimental to the surrounding area.

Respondent BSA, in opposition, asserts that the determination of January 15, 2013, is neither arbitrary nor capricious, has a rational basis, and is supported by substantial basis in the record.

The BSA is comprised of experts in land use and planning and is the ultimate administrative authority charged with enforcing the New York City Zoning Resolution *(see, Matter of Menachem Realty, Inc. v Srinivasan*, 60 AD3d 854 [2nd Dept 2009]; *Matter of Mainstreet Makeover 2, Inc. v Srinivasan*, 55 AD3d 910 [2nd Dept 2008]). Judicial review of a determination by the BSA is limited to whether its determination was illegal, arbitrary, or an abuse of discretion, and whether it had a rational basis and is supported by evidence in the record (*see, Matter of SoHo Alliance v New York City Bd. of Stds. & Appeals*, 95 NY2d 437 [2000]; *see also, Matter of Vomero v City of New York*, 13 NY3d 840 [2009], *rev'g* 54 AD3d 1045 [2nd Dept 2008]; *Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 613 [2004]; *Kettaneh v Board of Standards*

and Appeals, 85 AD3d 620 [1st Dept 2011]; *Russo v City of Albany Zoning Board*, 78 AD3d 1277 [3rd Dept 2010]).

"In applying the arbitrary and capricious standard, a court inquires whether the determination under review had a rational basis. Under this standard, a determination should not be disturbed unless the record shows that the agency's action was arbitrary, unreasonable, irrational or indicative of bad faith" (*Matter of Rendely v Town of Huntington*, 44 AD3d 864, 865 [2d Dept 2007] [internal quotation marks omitted]; *see Matter of Kabro Assoc., LLC v Town of Islip Zoning Bd. of Appeals*, 95 AD3d 1118 [2d Dept 2012];

Matter of Halperin v City of New Rochelle, 24 AD3d 768, 770 [2d Dept 2005]). "[A] determination will not be deemed rational if it rests entirely on subjective considerations, such as general community opposition, and lacks an objective factual basis" (*Matter of Cacsire v City of White Plains Zoning Bd. of Appeals*, 87 AD3d 1135, 1137 [2d Dept 2011]; *see Matter of Halperin v City of New Rochelle*, 24 AD3d at 772; *see also Matter of Caspian Realty, Inc. v Zoning Bd. of Appeals of Town of Greenburgh*, 68 AD3d 62, 76[2d Dept 2009]).

"Unlike a use variance, a "special exception allows the property owner to put his property to a use expressly permitted by the ordinance . . . subject only to "conditions" attached to its use to minimize its impact on the surrounding area'" (*Matter of Capriola v Wright*, 73 AD3d 1043, 1045 [2d Dept 2010], *quoting Matter of North Shore Steak House v Board of Appeals of Inc. Vil. of Thomaston*, 30 NY2d 238, 243-244 [1972]; *see Matter of Navaretta v Town of Oyster Bay*, 72 AD3d 823, 825 [2d Dept 2010]; *Brady v Town of Islip Zoning Bd. of Appeals*, 65 AD3d 1337, 1339 [2d Dept 2009], *leave to appeal denied*, 14 NY3d 703 [2010]). "The significance of this distinction is that 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' " (*Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead*, 98 NY2d 190, 195[2002], *quoting Matter of North Shore Steak House v Board of Appeals of Inc. Vil. of Thomaston*, 30 NY2d at 243; *see Matter of Kabro Assoc., LLC v Town of Islip Zoning Bd. of Appeals*, 95 AD3d 1118, 1118-1120 [2d Dept 2012]; *Retail Property Trust v Board of Zoning Appeals of Town of Hempstead*, 98 NY2d 190, 195 [2002]; *G&P Investing Co. v Foley*, 61 AD3d 684 [2d Dept 2009]; *Matter of G &P Investing Co. v Foley*, 61 AD3d 684 [2d Dept 2009]). "Thus, the burden of proof on an owner seeking a special exception is lighter than that on an owner seeking a variance" (*Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead*, 98 NY2d at 195). An owner seeking a special exception permit is only "required to show compliance with any legislatively imposed conditions on an otherwise permitted use" (*id*.; *see also see Matter of Kabro Assoc., LLC v Town of Islip Zoning Bd. of Appeals*, 95 AD3d at 1118-1120) .

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 NY2d 583, 596 [1986]). 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 AD2d 804, 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. In approving a special permit, a municipality determines only that the application complies with the municipality's standards and conditions contained in the zoning ordinance (*see Chambers v Old Stone Hill Rd.*

Assocs., 1 NY3d 424, 432 [2004]; *Matter of North Shore Steak House v Board. of Appeals of Inc. Vil. of Thomaston*, 30 NY2d 238, 243-244, 282 [1972]). Compliance with local ordinance standards/conditions must be shown before a special exception permit may be granted (*Navaretta v Town of Oyster Bay*, 72 AD3d 823, 825 [2d Dept 2010]). 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 AD2d 686, 687 [2d Dept 1994], *leave to appeal denied,* 84 NY2d 808 [1994]).

The BSA, pursuant to Section 666(10) of the Charter of the City of New York, has the power to "issue such special permits as the [BSA] is authorized to issue under the [Z]oning Resolution." Zoning Resolution §73-03 provides, in pertinent part, that the BSA "shall have the power, as authorized by Section 73-01, paragraph (a) or (b), and subject to such appropriate conditions and safeguards as the Board shall prescribe, to grant special permit uses or modifications of use, parking, or bulk regulations as specifically provided in this Chapter, provided in each case: (a) The Board shall make all of the findings required in the applicable sections of this Chapter with respect to each such special permit use or modification of use, parking or bulk regulations and shall find that, under the conditions and safeguards imposed, the hazards or disadvantages to the community at large of such special permit use or modification of use, parking or bulk regulations at the particular site are outweighed by the advantages to be derived by the community by the grant of such special permit. In each case the Board shall determine that the adverse effect, if any, on the privacy, quiet, light and air in the neighborhood of such special permit use or modification of use, parking or bulk regulations will be minimized by appropriate conditions governing location of the site, design and method of operation. ...d) For applications relating to Sections 73-243, 73-48 and

73-49, the Board in its discretion shall request from the Department of Transportation a report with respect to the anticipated traffic congestion resulting from such special permit use or modification of use, parking or bulk regulations in the proposed location. If such a report is requested, the Board shall in its decision or determination give due consideration to such report and further shall have the power to substantiate the appropriate finding solely on the basis of the report of the Department of Transportation with respect to the issue referred."

Section 73-49 of the Zoning Resolution, entitled "Roof Parking" provides as follows: "In C2-1, C2-2, C2-3, C2-4, C4-1, C4-2, C4-3, C4-4, C7, C8-1, C8-2, C8-3, M1-1, M1-2, M1-3, M2-1, M2-2 or M3-1 Districts, the Board of Standards and Appeals may permit the parking or storage of motor vehicles on the roof of a public parking garage with a total of 150 spaces or less and, in all districts, the Board may permit modifications of the applicable provisions of Sections 25-11, 36-11 or 44-11 (General Provisions) so as to permit accessory off-street parking spaces to be located on the roof of a building. As a condition of permitting such roof parking, the Board shall find that the roof parking is so located as not to impair the essential character or the future use or development of adjacent areas. The Board may prescribe appropriate conditions and safeguards to minimize adverse effects on the character of the surrounding area, including requirements for setback of roof parking areas from lot lines, or for shielding of floodlights."

Here, Mart presented its revised building plan, and a statement from a structural engineer certifying that he had been retained to perform the structural design for the rooftop parking deck and that it would meet all DOB loading requirements. Mart also presented evidence that it would relocate HVAC equipment away from the Barbizon building to the northeast corner (Bowne

Street) and that it would enclose said equipment with a decorative sound attenuated solid enclosure around the sides. Mart presented a noise and traffic study prepared by Environmental Project Data Statement Company, that showed the there was no significant adverse impacts related to noise and traffic. The BSA did not request a report from the Department of Transportation. Although some of the neighboring property owners claimed that the granting of the special permit would, among other things, increase noise, exacerbate existing traffic congestion, and decrease the value of their properties, these claims are uncorroborated by empirical data, and are contradicted by the traffic and noise report offered by the petitioner.

Petitioner presented evidence that the proposed rooftop parking lot " is so located as not to impair the essential character or the future use or development of adjacent areas" (Zoning Resolution 73-49). The vast majority of the neighboring tenants, property owners and community members who expressed concerns relating to the hours of operation, traffic safety, privacy, security, lighting, and aesthetics, requested that certain conditions be imposed on Mart's construction and operation of the rooftop parking lot. Community Board #7 and the Queens Borough President, with the imput of residents and the management of the adjoining property owners, including the Barbizon property and the nursing home, developed a list of conditions pertaining to security, traffic, hours of operation, lighting, aesthetics and odors. Mart, requested that the conditions cited in the Memorandum of Understanding with the Barbizon, as well as those cited by Community Board #7 and the Queens Borough President, be incorporated by the BSA in its resolution. There was no showing that the applicant's noise and light attenuation proposal were inadequate. The general objections made by some of the adjoining residents and neighbors to this type of use are of no consequence in view of the strong presumption in favor of the use stemming from its inclusion in

the zoning resolution (*see Peter Pan Games, Ltd. v Board of Estimate*, 67 A.D.2d 925 (2d Dept 1979]).

The fact that the applicant provides accessory parking to its customers pursuant to a license agreement between its landlord and Barbizon, this in itself, is not a basis for denying a special permit for rooftop parking. The BSA's conclusions pertaining to noise, lighting, security, and privacy were based largely upon the opposition of some members of the community, and the BSA member's subjective opinions, and was not supported by the evidence in the record. Indeed, one member of the BSA expressed his opposition to the application from the outset. Therefore, the court finds that the BSA's conclusion that the proposed rooftop parking failed to comply with the applicable legislatively imposed conditions (*see* Zoning Resolution 73-03, 73-49), and its concomitant determination to deny the petitioner's application, was arbitrary and capricious, and not supported by substantial evidence in the record.

Accordingly, petitioner's request to vacate the BSA's resolution of January 15, 2013 is granted and the matter is remanded to the BSA for the purpose of issuing the special permit, subject to any conditions or restrictions as may be appropriate.

Settle judgment.

Dated: October 27, 2013

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SIDNEY F. STRAUSS, J.S.C.