

AS ACTED UPON DURING A DULY NOTICED OPEN MEETING OF THE TOWN BOARD OF THE TOWN OF HENRIETTA, COUNTY OF MONROE, STATE OF NEW YORK, HELD AT THE HENRIETTA TOWN HALL AT 475 CALKINS ROAD, HENRIETTA, NEW YORK ON OCTOBER 26, 2022 AT 6:00 P.M.

RESOLUTION #24-337/2022

To approve Special Use Permit Application No. 2022-013 by Planned Parenthood for a Medical Facility for a "NYS Article 28 Diagnostic and Treatment Center and Safety Net Provider" Pursuant to Court Order.

On Motion of
Supervisor Schultz

Seconded by
Councilmember Sefranek

WHEREAS, Planned Parenthood of Central and Western New York (the "Applicant") applied for a Special Use Permit under Henrietta Town Code §295-14[B](6) for a Medical Facility for a "NYS Article 28 Diagnostic and Treatment Center and Safety Net Provider" (the "Application") to be located in a Commercial B-1 Zoned District at 376 Jefferson Road, Rochester, New York 14623 (the "Property"), or as more particularly described in plans on file in the Town Clerk's Office; and

WHEREAS, a public hearing was duly advertised and held relative to the same on June 22, 2022 at 6:00 p.m.; and

WHEREAS, at its June 22, 2022 Town Board meeting, the Henrietta Town Board, by a 3-2 vote, denied the Application; and

WHEREAS, thereafter, the Applicant commenced a lawsuit against the Town challenging the denial; and

WHEREAS, by a Decision, Order & Judgment dated October 19, 2022, the Supreme Court of the State of New York, County of Monroe, ordered as follows (the "Court Order"):

ORDERED, that the Town Board's denial of Planned Parenthood's special use permit is annulled in its entirety; and it is further

ORDERED, that the matter is remitted to the Henrietta Town Board; and it is further

ORDERED, that the Henrietta Town Board issue Planned Parenthood of Central and Western New York a special use permit for the proposed facility.

THEREFORE, BE IT RESOLVED, that, pursuant to the Court Order, and for all the reasons set forth therein, including the record and papers upon which the Court Order was issued, which are all incorporated herein and made a part hereof, the Town Board hereby grants approval of the Applicant's Application for a Medical Facility for a "NYS Article 28 Diagnostic and Treatment Center and Safety Net Provider."

Duly put to a vote:

Councilmember Sefranek	Aye
Councilmember Bolzner	Aye
Councilmember Page	Aye
Councilmember Bellanca	Aye
Supervisor Schultz	Aye

RESOLUTION ADOPTED

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF MONROE**

**PLANNED PARENTHOOD OF CENTRAL AND
WESTERN NEW YORK,**

Petitioner,

-vs-

**DECISION, ORDER &
JUDGMENT
Index No. E2022005635**

**TOWN BOARD OF THE TOWN OF HENRIETTA,
consisting of STEPHEN SCHULTZ, JOSEPH D. BELLANCA, JR.,
LISA BOLZNER, M. RICK PAGE, AND MILLIE SEFRANEK,
and YORUK PROPERTIES, LLC,**

Defendants.

**APPEARANCES: HARTER SECREST & EMERY, LLP
ALLISON E. BARTLETT, ESQ., Of Counsel
PAUL D. SYLVESTRI, ESQ., Of Counsel
Attorneys for Petitioner**

**MUEHE MAUE & ROBINSON
TERENCE L. ROBINSON, JR., ESQ., Of Counsel
Attorney for Town Board of Henrietta**

**BOYLAN CODE
DAVID K. HOU, ESQ., Of Counsel
Attorney for Yoruk Properties**

VICTORIA M. ARGENTO, J.

Planned Parenthood of Central and Western New York (Planned Parenthood) has petitioned the Court, pursuant to CPLR Article 78, for an order annulling a resolution of the Henrietta Town Board that denied their application for a special use permit that would have allowed them to operate a facility on Jefferson Road in the Town of Henrietta. For the reasons that follow, the petition is granted.

Background

On February 21, 2022, Planned Parenthood entered into a lease agreement with Yoruk Properties LLC¹ to lease approximately 7,500 square feet of space in a vacant building at 376 Jefferson Road. The building is part of Jefferson plaza which is located in the Town of Henrietta's B-1 Commercial District and currently houses a number of stores, restaurants, and establishments offering personal services (see Henrietta Town Code §295-4).

Planned Parenthood plans to use the space to operate a medical facility governed by the New York State Department of Health which would provide the following services: "contraception, breast examinations, testing and treatment for sexually transmitted diseases, HIV testing, prevention, counseling, and education, gender-affirming hormone care, cervical cancer screening, gynecological care, pregnancy testing and options counseling, and first trimester abortions."

Henrietta Town Code Section 295-14B(6) permits medical facilities to operate in the Town's B-1 Commercial District if they obtain a special use permit, which is "an authorization of a particular land use which is permitted in a zoning ordinance or law, subject to requirements imposed by such zoning ordinance or local law to assure that the proposed use is in harmony with such zoning ordinance or local law and will not adversely affect the neighborhood if such requirements are met" (NY Town Law §274-b[1]).

¹ Counsel for Yoruk Properties, LLC submitted a letter to the Court stating that Yoruk "takes no position with regard to the claims or rights of the other parties being adjudicated in this proceeding, and does not intend to make any formal admissions in this proceeding in favor of or against any party, unless so directed by the Court." The Court did not solicit submissions from Yoruk.

Planned Parenthood applied for a special use permit on May 3, 2022. The Town's Director of Building and Fire Prevention acknowledged receipt of the permit application and informed Planned Parenthood that their application "was found to be in order, and all necessary documentation was included and correct. The applicant quoted the correct code section; 295-14B(6) which requires a Special Use Permit from the Town Board for any business or commercial use not specifically enumerated as allowed and not specifically prohibited in the Town of Henrietta's B-1 Commercial District."

Pursuant to the Henrietta Town Code Section 295-54, all special use permit applications must be adjudicated by the Town Board on the basis of the following nine factors:

- A. Whether the proposed use is substantially consistent in its scale and character with those uses permitted and the existing built permitted uses in the subject zoning district and neighborhood or will otherwise impair such uses due to inconsistency.
- B. Whether the proposed use aligns with the vision, goals and recommendations of the Comprehensive Plan and other applicable plans and studies conducted by or on behalf of the Town.
- C. Whether the proposed use aligns with the purpose, intent, and applicable design and development standards of the zoning district(s) in which the use is proposed to be located.
- D. Whether the proposed use will be a nuisance in law or in fact due to its being materially noxious, offensive or injurious by reason of the production of or emission of dust, smoke, refuse, poisonous substances, odors, fumes, noise, radiation, vibration, unsightliness or similar conditions, or will contaminate waters.
- E. Whether the proposed use will create material hazards or dangers to the public or to persons in the vicinity from fire, explosion, electricity, radiation, traffic congestion, crowds, parking of vehicles, or other causes.
- F. Whether the proposed use will create materially adverse impacts

that cannot be adequately mitigated, such as to adversely impact natural resources or the environment, agriculture, community services or other areas required to be addressed by the State Environmental Quality Review Act (SEQRA).

- G. Whether the physical conditions and characteristics of the site are suitable for the proposed use considering site size, configuration, location, access, topography, vegetation, soils, and hydrology for effective stormwater management and, if necessary, the ability to be screened from neighboring properties and public roads.
- H. Whether there are adequate public infrastructure, utilities, community facilities and emergency services, either existing or to be provided by the applicant or others, to effectively serve the proposed use. A proposed use shall not create or contribute to an existing inadequacy.
- I. Whether the proposed use will provide, maintain, or enhance, as necessary, safe and efficient vehicular traffic patterns, nonmotorized travel, and pedestrian circulation as well as, where feasible, access to public spaces, parks, recreation, and open resources.

The Town Board, which consists of five voting members: Town Supervisor Stephen Shultz, and Town Board Members Millie Sefranek, Lisa Bolzner, Rick Page, and Joseph Bellanca, held two public meetings on the application; the first was held on May 25, 2022, and the second on June 22, 2022.

Representatives of Planned Parenthood were present at both meetings to argue in favor of their application, answer questions from Board members, and respond to public comments. Discussions of the application lasted approximately ten hours over the course of the two meetings. Both meetings were conducted by Supervisor Shultz and followed the same format. Representatives of Planned Parenthood spoke first, followed by questions and comments from members of the Board and public. Over the course of the meetings a total of 63 members of the public spoke, 55 of which opposed issuing the permit, mostly on the grounds that they personally objected to abortion. The Board also

received 177 pages of written comments on the application, the overwhelming majority of which opposed the facility.

At the second meeting a Board member asked Planned Parenthood CEO Michelle Casey if surgeries would be performed at the proposed facility. Ms. Casey said they would not. The following exchange took place:

Councilman Rick Page:	Is the performance of an abortion a surgical procedure?
Ms. Casey:	We do what we call in-clinic abortion services. At this site we do medication abortion to 11 weeks and in-clinic abortion to 13.6 weeks, which is in the first trimester, which 93% of abortion procedures happen in that time. It is not considered a surgical procedure by New York State Department of Health.
Supervisor Shultz:	I assume – sorry – just to follow up on that – that – you don't have an operating room at the facility?
Ms. Casey:	Oh no. Absolutely not.
Supervisor Shultz:	So anyone who required a surgical abortion would need to go to a hospital with –
Ms. Casey:	Right...that would happen in a hospital setting, not in an outpatient setting.”

During the Board's deliberations on the application following the second meeting each member of the Board spoke before voting. All of the Board members, including the Supervisor, addressed the land use issue and expressed their personal beliefs on abortion in general. By a vote of 3-2, the Board rejected Planned Parenthood's special use permit application (Board Members Lisa Bolzner, Rick Page, and Joseph Bellanca voted to deny

the permit, while Board Member Millie Sefranek and Supervisor Stephen Shultz voted to grant it). The denial was officially issued as Resolution #14-221/2022, which contained an attachment entitled “Special Use Permit Factors Narrative for Denial of Planned Parenthood.”² That document set forth the Board majority’s analysis of the nine factors they were required to consider in deciding the application pursuant to Town Code Section 295-54.

The Board wrote most expansively on factor “A”, which is, “Whether the proposed use is substantially consistent in its scale and character with those uses permitted and the existing built permitted uses in the subject zoning district and neighborhood or will otherwise impair such uses due to inconsistency.” They noted that, “[t]he inclusion of a medical facility which performs surgical procedures is not consistent with the character of those retail uses now existing in the plaza,” in that none of the current businesses in the plaza “are similar in character to that of a surgical medical facility.” They further found that “a medical surgical facility is not a business that services the ‘local day-to-day shopping and service needs’ of patrons [which is the principal purpose of B-1 Commercial Districts] – indeed, a core component of the facility involves surgeries – significant events which are typically scheduled in advance and which cannot reasonably said [sic] to be ‘day to day shopping needs.’”

For factors B and C, the Board refers the reader to their findings under Factor A. Under Factor D, the Board stated that they “are not aware of any nuisance in law or in fact in the proposed use regarding use specifically referenced here, except as otherwise

² The Court will refer to this as the Board’s “written decision.”

described herein.” Under Factor E, the Board refers the reader to their findings under Factor I. For Factor F, the Board noted that the proposal was not subject to the State Environmental Quality Review Act, “[h]owever, materially adverse impacts are described elsewhere herein.” Under Factor G, the Board refers the reader to “the discussion elsewhere herein.” For Factor H, the Board states that “there do not appear to be any inadequacies” regarding utilities, but expresses concern over traffic patterns and refers the reader to Factor I for further elaboration.

Under Factor I, the Board expressed concern over the impact the facility could have on traffic in the plaza given that it would be located in a corner building on a ninety-degree turn. They elaborated as follows:

“Being a surgical medical facility, the proposal is likely to result in increased use of emergency services. Should surgical patients require emergency services, the drive lane fronting/accessing the space proposed for the medical facility leaves inadequate space for emergency service vehicles to traverse the area due to the lack of shoulders and due to traffic and the extreme curve fronting the space. Moreover, the proposed facility lacks any sufficient drop off/pick up area typical of surgical facilities where vehicles can stop, wait and pick up surgical patients at the door to the facility. Without such an area, post-surgical patients (perhaps wheelchair bound) may be forced to traverse the busy/narrow drive lane, and/or pickups and transfers of patients will be conducted within the drive lane at the door of the facility, resulting in traffic situations which not only present an issue for traffic circulation, but present a direct safety issue for surgical patients.”

The Board concluded its discussion under Factor I by noting that New York State had recently announced that it was a “safe harbor for abortion providers” and that as a result the Board was concerned there could be heavier than anticipated traffic at the proposed facility.

Planned Parenthood urges the Court to find that the Board’s decision was arbitrary.

and capricious and an abuse of discretion because their denial was “filled with false statements, unsupported speculation, and against the Town Board’s own precedent,” and that it was based on “personal opinions and public objections surrounding abortion services, which are not only legal but expressly protected under New York State law.” The Board, on the other hand, argues that they did not base their decision on their personal opinions regarding abortion or because of political pressure, but rather, they “thoughtfully examin[ed] a unique proposal to place a medical facility in a small commercial plaza and [found], with support in the record and its Comprehensive Plan, that the proposed site was not consistent with the character of the neighborhood.”

Discussion

In an Article 78 proceeding a court may annul a decision of a government body only if that determination was “arbitrary and capricious or an abuse of discretion” (CPLR 7803[3]; *see also Diocese of Rochester v. Planning Bd.*, 1 NY2d 508, 520 [1952]). “An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts” (*Matter of Peckham v. Calogero*, 12 NY3d 424, 431 [2009]).

“The inclusion in a zoning ordinance of a use permitted by special permit” – in this case a medical facility – “is tantamount to a legislative finding that the use is in harmony with the general zoning plan and that it will not adversely affect the area” (*Dan Gernatt Gravel Prods. v. Town of Collins*, 105 AD2d 1057, 1059 [4th Dept. 1984]). Therefore, a municipality must grant a special use permit if the application satisfies the criteria set forth in the zoning law and there are no reasonable grounds in the record before the municipality for denying it (*Matter of Juda Constr., Ltd. v. Spencer*, 21 AD3d 898, 900 [2nd Dept. 2005][internal quotations and citations omitted]; *see also Matter of*

Tanana Oil Corp. V. Town Bd. Of Town of Irondequoit, 204 AD2d 1049, 1049 [4th Dept. 1994]; see also *Edwards v. Zoning Board of Appeals of Town of Amherst*, 163 AD3d 1511, 1512 [4th Dept. 2018]). Moreover, a determination denying a special use permit must be annulled when there is evidence, despite the reasons set forth by the Town Board, that it was denied because of community pressure despite being in accord with Town's zoning laws (*Matter of Pleasant Val. Home Constr. v. Van Wagner*, 41 NY2d 1028, 1029 [1977]; see also *Matter of Brighton Residents Against Violence to Children v. MW Props.*, 304 AD2d 53, 58 [4th Dept. 2003][Finding that "opposition to abortion cannot serve as a lawful basis for challenging zoning decisions"]).

According to the Town Board's written decision, they denied the special use permit for two primary reasons. First, they determined that the proposed medical facility would be performing "surgical procedures" and that such a facility "is not consistent with the character of those retail uses now existing in the plaza." The board relied heavily on their conclusion that Planned Parenthood would be conducting surgical procedures, in fact, their decision mentions the "surgical" nature of the facility nineteen times. However, there is no support in the record for this conclusion. To the contrary, CEO Michelle Casey's statements that surgical procedures would not be performed on site and that the abortions they would perform do not constitute surgical procedures under New York State Law went unchallenged and uncontradicted.

Second, the Board determined that the proposed location of the facility could not accommodate the anticipated traffic it would draw. With regard to this finding the Board again relied heavily on their determination that the facility would be conducting surgical procedures. They opined that surgical patients could require transportation from the

facility by emergency services, and that ambulances would face difficulty accessing the building given its layout. They also determined that surgical patients could not be easily dropped off or picked up in front of the facility, but would instead be required to traverse the parking lot, possibly in wheelchairs. Finally, they expressed concern over the fact that New York's Governor had declared New York State to be a "safe harbor for abortion providers," which could result in more people using the Henrietta facility than Planned Parenthood anticipated.

The Board's concern with traffic at the facility as it relates to "surgical" patients is unsupported by the record. As to whether the facility would draw so many patients that it would negatively impact the "safe and efficient vehicular traffic patterns, non-motorized travel, and pedestrian circulation" (Town Code 295-54[I]), the only evidence before the Board was that the facility would draw approximately two to five cars per hour. The Board's concern regarding the facility in Henrietta becoming a magnet for out-of-state travelers seeking an abortion is not convincing given that the proof at the hearing established that there are other Planned Parenthood facilities located in close proximity to the State border would be more convenient destinations for those coming from another state. Thus, the Board's concerns regarding the traffic issue are likewise without support in the record and therefore not a sufficient reason to deny the permit (*see Matter of Pluto's Retreat v. Granito*, 80 AD2d 899, 900 [2nd Dept. 1981][When it comes to considering the potential traffic impact, such "findings cannot rationally be made in the absence of any proof as to the same. Mere speculation and conjecture are not enough"]).

In their papers before the Court the Board has further elaborated on its decision and offered additional arguments in favor of their determination which are compelling.

However, the Court is limited in its review to the facts, arguments, and record adduced before the Town Board, and proof outside that record may not be considered (*Yarbough v. Franco*, 95 NY2d 342, 347 [2000]; *Kahn v. Planning Bd. of City of Buffalo*, 60 AD3d 1451, 1452 [4th Dept. 2009]; *Matter of Dolan v. New York State Dept. of Civ. Serv.*, 304 AD2d 1037, 1039 [3rd Dept. 2003]).

It is also important to note that other medical facilities and doctors offices are allowed to operate in the B-1 Commercial Zone, including an urgent care facility that was granted a special use permit to operate in an anchor store location in the Marketplace Mall, which, like Jefferson Plaza, contains retail stores, restaurants, and personal service establishments. It thus appears that the Board did not adhere to its prior precedent when it denied Planned Parenthood's application (see *Matter of Lantry v. State of New York*, 6 NY3d 49, 58 [2005][“It is well settled that a decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reasons for reaching a different result on essentially the same facts is arbitrary and capricious”]; *Matter of Charles A. Field Delivery Serv.*, 66 NY2d 516, 517 [1985][Absent such an explanation for treating two nearly identical situations differently, “failure to conform to agency precedent will...require reversal on the law as arbitrary, even though there is in the record substantial evidence to support the determination made”]).

It is therefore the decision of this Court that the Board acted arbitrarily and capriciously when it denied Planned Parenthood a special use permit.³ Having made this

³ The terms “arbitrary and capricious” have a legal meaning in the context of an Article 78 proceeding as explained herein. This decision does not mean the Court finds the objections to abortion themselves to be arbitrary or capricious, or that the Town Board Members did not act in a manner they sincerely believed was correct and in the Town's interest.

determination, the appropriate remedy is for the Court to direct the Board to issue the permit (see e.g. *Matter of North Shore Steak House v. Board of Appeals of Inc. Vil. of Thomaston*, 30 NY2d 238 [1972]).

Accordingly, it is hereby

ORDERED, that the Town Board's denial of Planned Parenthood's special use permit is annulled in its entirety; and it is further

ORDERED, that the matter is remitted to the Henrietta Town Board; and it is further

ORDERED, that the Henrietta Town Board issue Planned Parenthood of Central and Western New York a special use permit for the proposed facility.

This constitutes the Decision, Order, and Judgment of the Court.

Dated this 19th day of October, 2022.



HON. VICTORIA M. ARGENTO
SUPREME COURT JUSTICE