Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D17887
C/kmg

_____AD3d_____ Submitted - December 18, 2007

REINALDO E. RIVERA, J.P.
DAVID S. RITTER
MARK C. DILLON
EDWARD D. CARNI, JJ.

2006-11510 DECISION & ORDER

In the Matter of Jul-Bet Enterprises, LLC, appellant,
v Town Board of Town of Riverhead, et al.,
respondents.

(Index No. 02071/06)

Rosenberg Feldman Smith, LLP, New York, N.Y. (Richard B. Feldman of counsel), for appellant.

Jaspan Schlesinger Hoffman LLP, Garden City, N.Y. (Laurel R. Kretzing and John C. Farrell of counsel), for respondents.

In a proceeding pursuant to CPLR article 78 to review a determination of the respondents dated December 21, 2005, which rejected a draft environmental impact statement submitted by the petitioner in connection with an application to develop a commercial center, the petitioner appeals from a judgment of the Supreme Court, Suffolk County (Pitts, J.), entered October 20, 2006, which denied the petition and dismissed the proceeding.

ORDERED that the judgment is affirmed, with costs.

In a proceeding pursuant to CPLR article 78 to review the determination of a municipality, "'a court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion'" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 232, quoting *Matter of Diocese of Rochester v*

Planning Bd. of Town of Brighton, 1 NY2d 508, 520). Here, the respondents' determination to reject the draft environmental impact statement (hereinafter the DEIS) submitted by the petitioner in connection with an application to develop a commercial center on a 43-acre parcel of land had a rational basis, and was not arbitrary and capricious (*see* CPLR 7803[3]).

When a zoning law has been amended following submission of an application, but before a decision is rendered thereon by the reviewing agency, the courts are bound to apply the law as amended (*see Matter of Cleary v Bibbo*, 241 AD2d 887, 888; *Matter of Bibeau v Village Clerk of Vil. of Tuxedo Park*, 145 AD2d 478, 479). In this case, there are no special facts which would warrant an exception to this rule (*see Town of Orangetown v Magee*, 88 NY2d 41, 48; *Matter of Paintball Sports v Pierpont*, 284 AD2d 537, 539). Moreover, contrary to the petitioner's contention, it does not have vested rights in the planned development (*see Matter of Calverton Indus. v Town of Riverhead*, 278 AD2d 319, 320; *Matter of Berman v Warshavsky*, 256 AD2d 334).

In addition, in the absence of an "approval-by-default" provision in 6 NYCRR 617.9(a)(2), the respondents' failure to render a determination within 45 days of the DEIS submission did not result in its automatic acceptance (*see Matter of Tinker St. Cinema v Town of Woodstock Planning Bd.*, 256 AD2d 970, 972; *AHEPA 91 v Town of Lancaster*, 237 AD2d 978, 979; *Nyack Hosp. v Village of Nyack Planning Bd.*, 231 AD2d 617; *cf. Matter of King v Chmielewski*, 76 NY2d 182, 187-188; *Matter of Biondi v Rocco*, 173 AD2d 700).

RIVERA, J.P., RITTER, DILLON and CARNI, JJ., concur.

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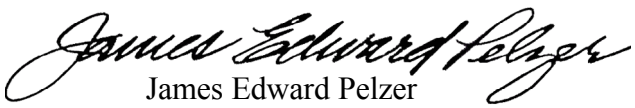

James Edward Pelzer
Clerk of the Court