Bonacker Prop., LLC v Village of E. Hampton Bd. of Trustees
2016 NY Slip Op 32172(U)
September 2, 2016
Supreme Court, Suffolk County
Docket Number: 15-12506
Judge: Joseph Farneti
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MEMORANDUM **COPY**

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 37

By: Hon. JOSEPH FARNETI

BONACKER PROPERTY, LLC, 40 COOPER LANE LLC, JOSEPH ROSE, and RAJESWH ALVA,

Petitioners,

- against -

VILLAGE OF EAST HAMPTON BOARD OF TRUSTEES, PAUL F. RICKENBACH, JR., in his official capacity as Mayor of the Village of East Hampton, VILLAGE OF EAST HAMPTON PLANNING AND ZONING COMMITTEE and THE INCORPORATED VILLAGE OF EAST HAMPTON,

Respondents.

Index No. 15-12506
Mot. Seq. #001- MD; CASEDISP

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In this hybrid article 78 proceeding/declaratory action, the petitioners/plaintiffs (hereinafter "petitioners") seek, among other things, judgment declaring that certain amendments to the Village Zoning Code ("Zoning Code") adopted on June 19, 2015, by respondent Village of East Hampton Board of Trustees ("Board of Trustees"), by means of a series of local laws, are invalid on their face and/or as applied to the petitioners and their properties. Petitioners also seek a judgment that the local laws at issue were adopted in violation of lawful procedure.

The amended verified petition sets forth eight alleged causes of action. The first alleges that the amendments to the Zoning Code violate the Village's Comprehensive Plan. The second cause of action alleges that the amendments were adopted in violation of the New York State Environmental Quality Review Act ("SEQRA"). The third cause of action alleges that the Board of Trustees formulated and adopted the amendments in violation of Village Law §§ 7-706 and 70-708, and that such amendments are contrary to the comprehensive plan. The fourth cause of action alleges that the Village Planning and Zoning Committee is illegally constituted and acting in violation of Public Officers Law §§ 100-111.

The fifth cause of action seeks equitable estoppel against the Board of Trustees. The sixth and seventh causes of action allege that the amendments constitute an impermissible regulatory taking without compensation in violation of the United States Constitution and the New York State Constitution, respectively. The eighth cause of action alleges that the amendments violate due process.

On February 15, 2002, the Village of East Hampton Comprehensive Plan ("Plan") was adopted. The introduction to the Plan sets forth the "Vision for the Future," the principal theme of which is "that the Village of East Hampton is and shall remain a residential community with extraordinary natural beauty, historic integrity and special charm." A number of concerns are mentioned therein, including that "[s]ome neighborhoods have experienced a pattern of residential teardowns with replacement by much larger and more elaborate homes. There are examples where a renovation to an older home includes expansion that exceeds the original size of the house. There is also a pattern of intensification in the number and size of certain accessory structures." To better preserve the character of the Village, the Plan recommended that the Village revise limitations on GFA to accomplish more compatible residential development and redevelopment, and that the Village consider additional limits on accessory structures and buildings.

On March 15, 2002 the Board of Trustees, in response to some of the issues raised in the Plan, enacted three local laws. The first, Local Law No. Five-2002, amended Section 57-3 (Area and height regulations) of the Zoning Code to establish a maximum coverage of residential lots equal to 20 percent of the lot area plus 55 square feet for one and two-family detached dwellings, a maximum gross floor area equal to 10 percent of the lot size, plus 1,000 square feet, and a gross floor area for accessory structures on residential lots to 2 percent of the lot area plus 200 square feet. The second, Local Law No. Six-2002, amended Section 57-3 (Area and height regulations) of the Zoning Code to add regulations governing accessory buildings on residential lot. The third, Local Law No. Nineteen-2002 amended Section 572A(3) (Dimensional Tables) and Section 57-3 (Area and height regulations) of the Zoning Code with respect to dimensional setback and height requirements for all structures in all residential districts.

In February of 2015, respondent Village of East Hampton Planning and Zoning Committee ("Committee") issued a report on the subjects of lot coverage and GFA. The Committee is comprised of one representative each from the Board of Trustees, the Zoning Board of Appeals, the Planning Board, Design Review Board, the Village Administrator, the Village Attorney, a Code Enforcement Officer, the Director of Historic Services, and the Village Planning Consultant. The Committee serves solely as an advisory committee whose members are appointed annually by the Board of Trustees. The Committee holds regular monthly meetings that are open to the public and publishes minutes of its meetings, which are available to the public. The report described the data the Committee had gathered with regard to lot coverage and GFA and offered recommendations based on that data. The Committee had examined existing improvements on a sampling of 173 properties in eight neighborhoods to "understand the effect of the current Village formulas on the future development of neighborhoods characterized by lots of one acre or greater." The report further set forth that "ultimate development to the present maximums for house size, size of accessory buildings and coverage would result in buildings and structures of a size, scale and aggregate mass that would significantly alter the character and integrity of these

neighborhoods." The Committee concluded that the present formulas are not consistent with the goals of the 2002 Comprehensive Plan. The report recommended graduated formulas for the Village, retaining the present formulas for lots up to 40,000 square feet, adopting a reduced formula for lots 40,000 square feet to 80,000 square feet, and adopting a further reduced formula for lots greater than 80,000 square feet. The Committee report was presented to the Board of Trustees at its regular meeting on April 2, 2015, at which time the report was incorporated into the minutes of the meeting, and made available for public inspection.

At a public hearing of the Board of Trustees held on April 17, 2015, a number of proposed local laws were introduced to the public. These included Introductory #9-2015, proposing a graduated formula for the calculation of GFA for residences, Introductory #10-2015, proposing a graduated formula for the calculation of maximum permitted coverage for residential lots, Introductory #11-2015, proposing a graduated formula for the calculation of maximum combined GFA for all accessory structures on residential lots, Introductory #13-2015, proposing the addition to the Zoning Code of a definition of "story," and Introductory #14-2015, proposing a modification of the definition of "cellar."

Public notices were duly published and posted, and a public hearing was held on the proposed local laws at the Board of Trustees regular meeting on May 15, 2015. Numerous submissions, both for and against the proposed local laws, were made both orally and in writing. At the conclusion of the hearing, the Board of Trustees reserved decision on the proposed local laws and gave interested members of the public until June 15, 2015 to submit additional written comments. Due to an error in the notice of public hearing, Introductory #14-2015 (amending the definition of cellar) was re-noticed for the Board's regular meeting on June 19, 2015.

On June 19, 2015, following the public hearing on the "cellar" amendment, the Board of Trustees, based upon the Environmental Assessment forms prepared by the Village Planning Consultant at the Board's direction, unanimously adopted negative declarations pursuant to SEQRA with respect to each of the proposed local laws both individually and collectively. The same day, the Board of Trustees unanimously adopted each of the local laws.

By Local Law No. 13-2015, the Board of Trustees retained the maximum GFA previously in effect for one and two-family residences on lots of less than 40,000 square feet. However, for lots of 40,000 square feet but less than 80,000 square feet, the Board fixed the maximum GFA for residences at 7 percent of the lot area plus 2,200 square feet. For lots over 80,000 square feet, the GFA was fixed at 3 percent of the lot area plus 6,500 square feet. By Local Law No. 14-2015, the Board of Trustees retained the maximum lot coverage previously in effect for one and two-family residences on lots of less than 40,000 square feet. However, for lots of 40,000 square feet but less than 80,000 square feet, the Board fixed the maximum lot coverage for residences at 15 percent of the lot area plus 2,500 square feet. For lots over 80,000 square feet, the maximum lot coverage was fixed at 10 percent of the lot area plus 6,500 square feet. By Local Law No. 15-2015, the Board of Trustees retained the maximum combined GFA for all accessory buildings on lot in residential districts of less than 40,000 square feet. However, for lots of 40,000 square feet but less than 80,000 square feet, the Board of Trustees fixed the maximum GFA for accessory buildings at 1 percent of the lot area plus 600 square feet. For lots over 80,000

square feet, the maximum GFA was fixed at 0.5 percent plus 1,000 square feet. By Local Law No. 16-2015, the term "story" was added to the Zoning Code, and defined as "[t]hat portion of a building which is between one floor level and the next higher level or roof." By Local Law No. 17-2015, the definition of the word "cellar" was amended to add language that "[n]o part of a cellar shall be permitted to extend beyond the exterior wall of the first story of the building in which it is located, and no cellar shall extend more than twelve (12) feet below natural grade."

Petitioners' first and third causes of action allege that the amendments to the Zoning Code are contrary to the Comprehensive Plan and were enacted with inadequate public notice and opportunity to comment. Petitioners' claim that the amendments were enacted with inadequate public notice and opportunity to comment, however, is without support in the record. The report of the advisory Committee was presented to the Board of Trustees at a regular work session, notice of which was published in local newspapers, on April 2, 2015, at which time the report was incorporated into the minutes of the meeting, and made available for public inspection. At a public hearing of the Board of Trustees held on April 17, 2015, the subject proposed local laws were introduced to the public. Public notices were duly published and posted and a public hearing was held on the proposed local laws at the Board of Trustees regular meeting on May 15, 2015, with the exception of the proposed local law amending the definition of "cellar," which, because of a flaw in the public notice, was rescheduled, duly noticed and held on June 19, 2015. The first letter opposing the amendments, from an attorney representing a number of property owners in the Village, was received on May 1, 2015. Numerous submissions, both for and against the proposed local laws, were made both orally and in writing. Petitioners Rose and Alva both spoke at the public hearing. At the conclusion of the hearing, the Board of Trustees reserved decision on the proposed local laws and gave interested members of the public until June 15, 2015 to submit additional written comments. In light of these facts, petitioners' claims of inadequate public notice and opportunity to comment on the proposed local laws are without merit and must be dismissed.

Turning next to the amendments of the Zoning Code, the petitioners allege that they are contrary to the Comprehensive Plan. A well-considered land-use plan can be shown by "evidence, from wherever derived," that serves to "establish a total planning strategy for rational allocation of land use, reflecting consideration of the needs of the community as a whole" (***Taylor v Incorporated Vil. of Head of Harbor***, 104 AD2d 642, 644, 480 NYS2d 21 [2d Dept 1984]), ensuring that the public good will not be undetermined by "special interest, irrational ad hocery" (*id.*, quoting ***Matter of Town of Bedford v Village of Mount Kisco***, 33 NY2d 178, 188, 351 NYS2d 129 [1973]; *see* ***Nicholson v Incorporated Vil. of Garden City***, 112 AD3d 894, 978 NYS2d 288 [2d Dept 2013]; ***Peck Slip Assoc., LLC v City Council of City of N.Y.***, 26 AD3d at 210, 809 NYS2d 56 [1st Dept 2006]). Zoning legislation is tested not by whether it defines a comprehensive plan but by whether it accords with a comprehensive plan for the development of the community. When a zoning ordinance is amended, the court decides whether it accords with a comprehensive plan in much the same way, by determining whether the original plan required amendment because of the community's change and growth and whether the amendment is calculated to benefit the community as a whole as opposed to benefiting individuals or a group of individuals" (***Asian Americans for Equality v Koch***, 72 NY2d 121, 131, 531 NYS2d 782 [1982]; *see* ***Matter of Stone v Scarpato***, 285 AD2d 467, 728 NYS2d 61 [2d Dept 2001]).

Legislative enactments are entitled to an "exceedingly strong presumption of constitutionality" (***Lighthouse Shores v Town of Islip***, 41 NY2d 7, 11, 390 NYS2d 827 [1976]; *see* ***ATM One, LLC v Incorporated Vil. of Hempstead***, 91 AD3d 585, 936 NYS2d 263 [2d Dept 2012]; ***American Ind. Paper Mills Supply Co., Inc. v County of Westchester***, 65 AD3d 1173, 886 NYS2d 178 [2d Dept 2009]). In the face of the strong presumption of validity, a plaintiff has a heavy burden of demonstrating, beyond a reasonable doubt, that the ordinance has no substantial relationship to public health, safety, or general welfare (*see* ***Town of N. Hempstead v Exxon Corp.***, 53 NY2d 747, 439 NYS2d 342 [1981]; ***Tilcon New York, Inc. v Town of Poughkeepsie***, 125 AD3d 782, 5 NYS3d 102 [2d Dept. 2015]; ***Peconic Ave. Businessmens' Assn. v Town of Brookhaven***, 98 AD2d 772, 469 NYS2d 483 [2d Dept 1983]). A party challenging the determination of a local governmental board bears the heavy burden of showing that the target regulation "is not justified under the police power of the state by any reasonable interpretation of the facts' " (***Matter of Town of Bedford v Village of Mount Kisco***, 33 NY2d 178, 186, 351 NYS2d 129 [1973], quoting ***Shepard v Village of Skaneateles***, 300 NY 115, 118 [1949]). If the validity of the legislative classification for zoning purposes is even fairly debatable, it must be sustained upon judicial review (***Hart v Town Bd. of Town of Huntington***, 114 AD3d 680, 980 NYS2d 128 [2d Dept 2014]). "Thus, when a plaintiff fails to establish a clear conflict with the comprehensive plan, the zoning classification must be upheld" (***Infinity Consulting Group, Inc. v Town of Huntington***, 49 AD3d 813, 814, 854 NYS2d 524 [2d Dept 2008]; *see* ***Nicholson v Incorporated Vil. of Garden City***, 112 AD3d 894, 978 NYS2d 288 [2d Dept 2013]; ***Taylor v Incorporated Vil. of Head of Harbor***, 104 AD2d 642, 644, 480 NYS2d 21 [2d Dept 1984]). While this heavy presumption is rebuttable, unconstitutionality on due process grounds "must be demonstrated beyond a reasonable doubt and only as a last resort should courts strike down legislation on the ground of unconstitutionality" (***Lighthouse Shores Inc. v Town of Islip***, *supra*, 41 NY2d 7 at 11; *see* ***Kravetz v Plenge***, 84 AD2d 422, 446 NYS2d 807 [4th Dept 1982]).

Petitioners allege that the 2015 amendments to the Village Zoning Code with regard to to the calculation of maximum coverage of residential lots, GFA for residential lots, and GFA for accessory structures on residential lots violate the Village's Comprehensive Plan. Petitioners further allege that these local laws were adopted in violation of lawful procedure. The Municipal Home Rule Law allows incorporated villages to amend or supersede provisions of the Village Law as they relate to zoning matters. Thus, a village has the power to amend or supersede "any provision of the village law relating to the property, affairs or government of the village unless the legislature expressly shall have prohibited the adoption of such a local law" (*see* Municipal Home Rule Law § 10 [1] [ii] [e] [3]; ***Cohen v Board of Appeals of Village of Saddle Rock***, 100 NY2d 395, 764 NYS2d 64 [2003]). Municipal zoning ordinance enacted in conformity with Municipal Home Rule Law are valid despite failure to comply with requirements of Village Law and despite municipality's failure to enunciate its intent to supersede Village Law (Municipal Home Rule Law §§ 10, 20, 27; Village Law § 7-706; ***Matter of Schilling v Dunne***, 119 AD2d 179, 506 NYS2d 179 [2d Dept 1986]; *see* ***Gabrielli v Town of New Paltz***, 116 AD3d 1315, 984 NYS2d 468 [3d Dept 2014]; ***Matter of Village of Chestnut Ridge v Town of Ramapo***, 45 AD3d 74, 841 NYS2d 321 [2d Dept 2007]; ***Village of Savona v Soles***, 84 AD2d 683, 446 NYS2d 639 [4th Dept 1981]).

The amendments to the Village Zoning Code with regard to the calculation of maximum coverage of residential lots, GFA for residential lots, and GFA for accessory structures were enacted by

the Board of Trustees in 2002 as local laws, pursuant to the Municipal Home Rule Law. The legislative equivalency doctrine dictates that existing legislation be repealed or modified only by a legislative act equal to the procedure used to enact it (***Matter of Brunswick Smart Growth, Inc. v Town Bd. of Town of Bruswick***, 51 AD3d 1119, 856 NYS2d 308 [3d Dept 2008]; ***JEM Realty Company v Town Bd. of Town of Southold***, 297 AD2d 278, 746 NYS2d 41[2d Dept 2002]; ***Paradis v Town of Schroeppel***, 289 AD2d 1027, 735NYS2d 278 [4th Dept 2001]; ***Naftal Assoc. v Town of Brookhaven***, 221 AD2d 423, 633 NYS2d 798 [2d Dept 1995]). Therefore, any amendment of these Zoning Code sections was required to be enacted as local laws, pursuant to the Municipal Home Rule Law. The record establishes that the challenged amendments to the Zoning Code were, likewise, properly enacted pursuant to the requirements of Municipal Home Rule Law.

The three amendments of the Zoning Code which the Board of Trustees enacted in 2002 sought to address certain concerns set forth in the Village's Comprehensive Plan. In order to better preserve the character of the Village, the Plan recommended that the Village should consider further limitations on GFA and lot coverage "so that new residential is more responsive to and compatible with the scale of of existing development in the neighborhood in which it occurs." The Plan further recommended that the Village consider additional limits on the GFA of accessory structures and buildings. The 2002 zoning amendments set forth formulas for calculating GFA, lot coverage and GFA for accessory buildings in residential zones. The Board of Trustees found, based upon the study by the Committee of the manner in which the residential land in the Village has actually developed over more than a decade, the formulas which were initially adopted did not go far to protect the character of the Village's residential communities. The Committee report found that the "ultimate development to the present maximums for house size, size of accessory buildings and lot coverage would result in buildings and structures of a size, scale and aggregate mass that would significantly alter the character and integrity of these neighborhoods."

It is noted that the petitioners in their papers conflate the 2002 amendments to the Zoning Code with the Comprehensive Plan as if they are a single entity, which they are not. The 2002 zoning amendments were enacted to implement the Comprehensive Plan. Petitioners also appear to take the position that the 2002 zoning amendments are immutable and, once enacted, cannot be amended. Petitioners provide no precedent or other support for this position. The question before the Court, having already established that the 2015 zoning amendments were properly enacted, is whether these amendments are in accordance with the Comprehensive Plan. The record establishes the 2015 amendments to the Zoning Code with regard to GFA and lot coverage and the GFA of accessory structures and buildings are in accord with the Village's Comprehensive Plan. The 2002 amendments to the Zoning Code were enacted to better preserve the character of the Village, and "so that new residential is more responsive to and compatible with the scale of existing development in the neighborhood in which it occurs." The Board of Trustees, based upon the advisory report, concluded that these amendments were not accomplishing the intent of the Comprehensive Plan with regard to lots over 40,00 square feet. The 2015 amendments are, in fact, aimed at bringing the Zoning Code into line with the intent and goals of the Comprehensive Plan, in light of the original amendments' failure to fully succeed in reaching these goals. The alleged proof submitted by petitioners in support of their claims is conclusory and speculative, and insufficient to meet petitioners heavy burden of proof with regard to the

2015 zoning amendments or the addition of the of the definition of "story" and the amendment of the meaning of "cellar" to the Zoning Code (*see* ***Lighthouse Shores v Town of Islip***, *supra*; ***Tilcon New York, Inc. v Town of Poughkeepsie***, supra). Thus, when, as here, petitioners have failed to establish a "clear conflict" with a formal comprehensive plan, a zoning classification may not be annulled for incompatibility with the comprehensive plan (***Infinity Consulting Group, Inc. v Town of Huntington***, 49 AD3d 813, 814, 854 NYS2d 524; see ***Taylor v Incorporated Vil. of Head of Harbor***, 104 AD2d 642, 644-645, 480 NYS2d 21; ***Nicholson v Incorporated Vil. of Garden City***, 112 AD3d 894, 978 NYS2d 288 [2d Dept 2013]). Accordingly, petitioners' first and third causes of action must be denied.

Petitioners' second cause of action alleges that the zoning amendments were adopted in violation of SEQRA. Judicial review of an agency determination under SEQRA is limited to whether the agency identified the relevant areas of environmental concern, took a hard look at them and made a reasoned elaboration of the basis of its determination (***Matter of Highview Estates of Orange County, Inc. v Town Bd of Town of Montgomery***, 101 AD3d 716, 955 NYS2d 175 [2d Dept 2012]; ***Matter of Riverkeeper, Inc. v Town of Southeast***, 9 NY3d 219, 851 NYS2d 76 [2007]). An agency decision should be annulled only if it is arbitrary and capricious, or unsupported by evidence (***Matter of Save Open Space v Planning Bd. of the Town of Newburgh***, 74 AD3d 1350, 904 NYS2d 188 [2d Dept 2010]; ***Matter of East End Prop. Co. # 1, LLC v Kessel***, 46 AD3d 817, 851 NYS2d 565 [2d Dept 2007]; ***Matter of Riverkeeper, Inc. v Town of Southeast***, *supra*). When reviewing a SEQRA determination, it is not the role of the courts to weigh the desirability of any SEQRA action or choose among alternatives, but to assure that the agency has satisfied SEQRA procedurally and substantively (***Red Wing Properties, Inc. v Town of Milan***, 71 AD3d 1109, 898 NYS2d 593 [2d Dept 2010]; ***Matter of East End Prop. Co. #1, LLC v Kessel***, 46 AD3d 817, 851 NYS2d 565 [2d Dept 2007]; ***Matter of Basha Kill Area Assn. v Planning Bd. of the Town of Mamakating***, 46 AD3d 1309, 849 NYS2d 112 [3d Dept 2007]; *see also* ***Matter of Jackson v New York State Urban Dev. Corp,*** 67 NY2d 400, 503 NYS2d 298 [1986]). Upon judicial review, the Court may not substitute its judgment for that of the Board, and may annul its decision "only if it is arbitrary, capricious or unsupported by the evidence" (***Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast***, *supra* at 76).

The short Environmental Assessment Forms (EAF) which were prepared by the Village for each of the proposed local laws individually and for all of the laws collectively makes it clear that the local laws would have no negative environmental impacts. The EAF which reviewed all of the proposed local laws collectively contains a "Determination of Significance," which states:

> "[t]he proposed action will have no moderate to large impact upon the environment, as reflected in Part 2 of the EAF. To the extent that the proposed action may have any impact at all, the impact will be beneficial, in that it will further serve to further preserve the existing character of the Village's residential neighborhoods and properties, and it will place further restrictions upon the disturbance and coverage of land."

Petitioners allege that the Board of Trustees violated SEQRA by erroneously issuing a negative declaration that an Environmental Impact Statement was not required prior to enacting the zoning

amendments. They allege that the enactment of the zoning amendments is a Type I action and reject respondents' argument that this is not a Type I action because they do not effectuate "changes in allowable uses within any zoning district, affecting 25 or more acres of the district" (6 NYCRR § 617.4 [b] [2]), which SEQRA's implementing regulations designate as a Type I action. The petitioners set forth two case in support of their argument. The first is ***Plattsburgh Boat Basin, Inc. v City of Plattsburgh***, 50 Misc 3d 271, 21 NYS3d 529 (Sup Ct, Clinton County 2015). In that case, the court found that a new local law governing mooring of boats in a local lake should have been designated a Type I action on the grounds that the new law, for the first time, required permits and a site plan. The second case is ***Centerville's Concerned Citizens v Town Bd. of Town of Centerville***, 56 AD3d 1129, 867 NYS2d 626 (4th Dept 2008). The local law therein was aimed at changing allowable zoning uses within the entire town, and the Fourth Department determined that it was a Type I action and a full EAF was required. Petitioners reliance on these cases is misplaced. More germane to this proceeding is ***Sullivan Farms IV, LLC v Village of Wurtsboro***, 134 AD3d 127, 521 NYS3d 450 (3d Dept 2015). Therein, the Village board of trustees was found to have correctly designated the adoption of local laws amending village's subdivision regulations and zoning laws to alter methodology for calculating the number of allowable building lots or dwelling units for a residential cluster subdivision within village as "unlisted" actions. The court found that instead of changing allowable uses within a zoning district, the laws only amended the procedures to be employed in assessing proposed subdivisions and cluster developments. Likewise, the local law amendments herein do not change any allowable use, but only change the calculation of GFA, lot coverage, and the GFA of accessory structures and buildings within a number of allowable uses within the Village. The adoption of such local laws were properly designated as an unlisted action under SEQRA.

Furthermore, while Type I actions, such as amendments of zoning ordinances, are presumed "likely to have a significant adverse impact on the environment and may require an" environmental impact statement (6 NYCRR § 617.4 [a] [1]), the preparation of such a statement is not a *per se* requirement for a Type I action (*see* ***Matter of Mombaccus Excavating, Inc. v Town of Rochester N.Y.***, 89 AD3d 1209, 932 NYS2d 551 [3d Dept 2011]; ***Matter of Citizens for Responsible Zoning v Common Council of City of Albany***, 56 AD3d 1060, 868 NYS2d 800 [3d Dept 2008]). A lead agency may issue a negative declaration, thereby obviating the need to prepare an environmental impact statement, if the agency has determined that the action will result in "no adverse environmental impacts or that the identified adverse environmental impacts will not be significant" (6 NYCRR § 617.7 [a] [2]; *see* ***Gabrielli v Town of New Paltz***, 93 AD3d 923, 924, 939 NYS2d 641 [3d Dept 2012]; ***Matter of Troy Sand & Gravel Co., Inc. v Town of Nassau***, 82 AD3d 1377, 1378, 918 NYS2d 667 [3d Dept 2011]; *see also* ***Matter of Frigault v Town of Richfield Planning Bd.***, 107 AD3d 1347, 968 NYS2d 673 [3d Dept 2013]). A court may only annul an agency's determination to issue a negative declaration where it is "arbitrary, capricious or unsupported by the evidence" (***Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast***, *supra*). "[I]n reviewing the substantive issues raised in a SEQRA proceeding, [a] court will not substitute its judgment for that of the agency if the agency reached its determination in some reasonable fashion" (***Matter of Kaufmann's Carousel v City of Syracuse Indus. Dev. Agency***, 301 AD2d 292, 304, 750 NYS2d 212 [4th Dept 2002]).

Petitioners also allege the respondents engaged in improper segmentation in their SEQRA review. "Segmentation" is defined under SEQRA as "the division of the environmental review of an action such that various activities or stages are addressed under [SEQRA] as though they were independent, unrelated activities, needing individual determinations of significance" (6 NYCRR § 617.2 [a]; *see* 6 NYCRR § 617.3 [g] [1]). "Considering only a part or segment of an action is contrary to the intent of" SEQRA (6 NYCRR § 617.3 [g] [1]; *see* ***Matter of J. Owens Bldg. Co., Inc. v Town of Clarkstown***, 128 AD3d 1067, 10 NYS3d 293 [2d Dept 2015]). This claim is easily disposed of, as the record establishes that respondents reviewed the proposed zoning amendments both individually and collectively and, thus, no improper segmentation occurred.

Thus, the record reflects that the Board of Trustees "identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for their determination," and properly issued a negative declaration herein (***Matter of Jackson v New York State Urban Dev. Corp.***, 67 NY2d 400, 417, 503 NYS2d 298 [1986]; *see* ***Matter of Riverkeeper, Inc. v Town of Southeast***, *supra*; ***Matter of Highview Estates of Orange County, Inc. v Town Board of Town of Montgomery***, 101 AD3d 716, 955 NYS2d 175 [2d Dept 2012]).
Therefore, the second cause of action must be denied.

Petitioners' fourth cause of action alleges that the Village Planning and Zoning Committee is illegally constituted and acting in violation of Public Officers Law §§ 100-111. However, contrary to the petitioners' contention, the record supports the respondents' position that the Planning and Zoning Committee is advisory in nature, does not perform governmental functions, and it is not a public body subject to the Open Meetings provisions of the Public Officers Law even though the subject committee contained at least one member of the Board (*see* Public Officers Law §§ 102 [2], 103; ***Jae v Board of Education of Pelham Union Free Schl. Dist.***, 22 AD3d 581, 802 NYS2d 228 [2d Dept 2005]; ***Goodson Todman Enter., Ltd. v Town Board of Milan***, 151 AD2d 642, 542 NYS2d 373 [2d Dept 1989]; ***Matter of Snyder v Third Dept. Jud. Screening Comm.***, 18 AD3d 1100, 795 NYS2d 398 [3d Dept 2005]; *see also* ***Matter of Poughkeepsie Newspaper Div. of Gannett Satellite Information Network v Mayor's Intergovernmental Task Force on N.Y. City Water Supply Needs***, 145 AD2d 65, 67, 537 NYS2d 582 [2d Dept 1989] ["[i]t has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function"]). It is clear from the record that the Board of Trustees are not bound by the recommendations of the Committee. Nor can petitioners point to anything in the record which suggests the de facto exercise of governmental functions by the Committee (*see* ***Matter of Syracuse United Neighbors v City of Syracuse***, 80 AD2d 984, 437 NYS2d 466 [4th Dept 1981], *app. dism.* 55 NY2d 995, 449 NYS2d 201 [1982]). It is further noted that the Committee's meetings are open to the public and the minutes of their meetings are available for public inspection. Therefore, this cause of action must be denied.

Petitioners' fifth cause of action seeks equitable estoppel against the Board of Trustees. "Municipalities have been estopped from applying zoning amendments to property owners only in those instances where vested rights have been acquired or where some form of misconduct or extraordinary delay on the part of the municipality has prevented the acquisition of such right" (***Matter of Lawrence School Corp. v Morris***, 167 AD2d 467, 467-468, 562 NYS2d 707 [2d Dept 1990]; *see* ***Matter of***

Golden Horizon Terryville Corp. v Prusinowski, 63 AD3d 930, 882 NYS2d 174 [2d Dept 2009]). In New York, a vested right can be acquired when, pursuant to a legally issued permit, the landowner demonstrates a commitment to the purpose for which the permit was granted by effecting substantial changes and incurring substantial expenses to further the development" (***Town of Orangetown v Magee***, 88 NY2d 41, 47, 643 NYS2d 21 [1996]; *see* ***Matter of RC Enters. v Town of Patterson***, 42 AD3d 542, 840 NYS2d 116 [2d Dept 2007]; ***Matter of Sterngass v Town Bd. of Town of Clarkstown***, 10 AD3d 402, 405, 781 NYS2d 131 [2d Dept 2004]). "Neither the issuance of a permit ... nor the landowner's substantial improvements and expenditures, standing alone, will establish the right. The landowner's actions relying on a valid permit must be so substantial that the municipal action results in serious loss rendering the improvements essentially valueless" (***Town of Orangetown v Magee***, *supra*, at 47–48; *see* ***Matter of Perlbinder Holdings, LLC v Srinivasan***, 27 NY3d 1, 29 NYS3d 230 [2016]; ***Matter of Exeter Bldg. Corp. v Town of Newburgh***, 26 NY3d 1129, 26 NYS3d 743 [2016]; ***Glacial Aggregates LLC v Town of Yorkshire***, 14 NY3d at 136, 897 NYS2d 677 [2010]; ***Matter of RC Enters. v Town of Patterson***, *supra* at 544). The record contains no evidence supporting this cause of action. There is no evidence that any named petitioner expended any large amounts of money or made any substantial improvements in furtherance of development of any property. Accordingly, this cause of action must be denied.

Petitioners' sixth and seventh causes of action allege that the amendments constitute an impermissible regulatory taking without compensation pursuant to the United States Constitution and the New York State Constitution, respectively. The eighth cause of action alleges that the amendments violate due process. The takings clause of the Fifth Amendment, made applicable to the states through the Fourteenth Amendment, provides that private property shall not be taken for public use without just compensation. "Governmental regulation of private property effects a taking if it is 'so onerous that its effect is tantamount to a direct appropriation or ouster' " (***Consumers Union of U.S., Inc. v State of New York***, 5 NY3d 327, 357, 806 NYS2d 99 [2005], quoting ***Lingle v Chevron U.S.A. Inc.***, 544 US 528, 537, 125 S Ct 2074 [2005]). To state a substantive due process claim in the land-use context, a petitioner must allege: "(1) the deprivation of a protectable property interest and (2) that 'the governmental action was wholly without legal justification' " (***Matter of Ken Mar Dev., Inc. v Department of Pub. Works of City of Saratoga Springs***, 53 AD3d 1020, 1024–1025, 862 NYS2d 202 [3d Dept 2008], quoting ***Bower Assoc. v Town of Pleasant Val.***, 2 NY3d 617, 781 NYS2d 240 [2003]; *see* ***Town of Orangetown v Magee***, 88 NY2d 41, 643 NYS2d 21). "Only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense' " (***County of Sacramento v Lewis***, 523 US 833, 846, 118 SCt 1708 [1998]). Governmental regulation effects a per se regulatory taking only where the owner of real property has been called upon to sacrifice all economically beneficial uses for the common good, leaving the property economically idle (***Matter of Rent Stabilization Ass'n of New York City, Inc. v Higgins***, 83 NY2d 156, 608 NYS2d 930 [1993]). To show that a non-possessory governmental regulation of property has gone so far as to constitute a taking, the property owner must show by dollars and cents evidence that under no use permitted by the regulation under attack would the properties be capable of producing a reasonable return; the economic value, or all but a bare residue of the economic value, of the parcels must have been destroyed by the regulations at issue (***Matter of New Cr. Bluebelt, Phase 4***, 122 AD3d 859, 997 NYS2d 447 [2d Dept 2014]; *see also* ***Kransteuber v Scheyer***, 80 NY2d 783, 587 NYS2d 272 [1992]; ***de St. Aubin v Flacke***, 68 NY2d 66, 77, 505 NYS2d

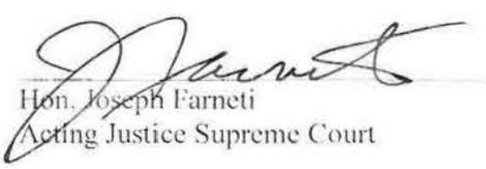
859 [1986]; ***Linzenberg v Town of Ramapo***, 1 AD3d 321, 766 NYS2d 217 [2d Dept 2003]). Petitioners have failed to present with regard to any of their properties any "dollars and cents" proof that under no use permitted by the regulation under attack would the properties be capable of producing a reasonable return. The only evidence they have submitted is generalized and speculative claims of some overall reduction in value of lots affected by the zoning amendments which is far short of the requisite standard of proof. Finally, it is noted the zoning amendments are rationally designed to accomplish a legitimate purpose related to the public health safety and/or welfare, namely protecting the character and integrity of the Villages residential neighborhoods (*see* ***Big Apple Food Vendors' Assn. v City of New York***, 228 AD2d 282, 644 NYS2d 216 [1st Dept 1996]). Accordingly, these causes of action are denied.

Petitioners request for discovery is denied as moot.

In light of the foregoing, the petition is dismissed in all respects. Furthermore, it is declared that Local Law No. 13-2015, Local Law No. 14-2015, Local Law No. 15-2015, Local Law No. 16-2015 and Local Law No. 17-2015, which are the subject of this action, are each a legal, constitutional and valid exercise of the police and zoning powers of respondent Village of East Hampton.

Settle judgment.

Dated: September 2, 2016



Hon. Joseph Farneti
Acting Justice Supreme Court