

**Matter of William Kollmer Contr., Ltd. v Town of
Huntington**

2001 NY Slip Op 30080(U)

December 19, 2001

Sup Ct, Suffolk County

Docket Number: 00-30862

Judge: Peter Fox Cohalan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

P R E S E N T :

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 7-2-01
ADJ. DATE 9-5-01
Mot. Seq. # 002 - MG; CASEDISP

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In the matter of the application of
WILLIAM KOLLMER CONTRACTING, LTD., :
Petitioner, :

RIEGER, WALSH & McGINITY
Attorneys for the Petitioner
199 Main Street
Northport, New York 11768

For a Judgment pursuant to Article 78 of the
CPLR and for certain other relief

ESSEKS, HEFTER & ANGEL
Of Counsel Attorneys for Petitioner
108 East Main Street
Riverhead, New York 11901

- against -

THE TOWN OF HUNTINGTON and THE TOWN :
OF HUNTINGTON TOWN BOARD,

THELMA NEIRA, ESQ.
Huntington Town Attorney
By: James F. Matthews, Esq.
100 Main Street
Huntington, New York 11743

Respondents. :
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Upon the following papers numbered 1 to 26 read on this petition to renew and reargue; Notice of Petition/
Order to Show Cause and supporting papers 1 - 17 ; Notice of Cross Motion and supporting papers _____,
Answering Affidavits and supporting papers 18 - 26 ; Replying Affidavits and supporting papers _____,
Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by petitioner, William Kollmer Contracting, Ltd., for leave to
renew and reargue the Order of this court, dated April 25, 2001, which dismissed petitioner's Article
78 proceeding, without prejudice to the commencement of a declaratory judgment action joining
necessary parties, is granted as follows, and it is further

ORDERED that upon reconsideration leave to join Madeline Hogan as an additional
petitioner is granted, thereby conferring jurisdiction over all indispensable parties, and it is further

ORDERED that the petition is converted to a plenary action seeking a declaratory judgment
and is determined as set forth herein.

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The underlying Article 78 proceeding sought a judgment to annul and void Local Law No. 29, enacted by the Huntington Town Board and dated October 10, 2000, as unconstitutional, illegal and ultra vires. Petitioner is the contract vendee of a 24 acre subdivision located with the area rezoned.. This Court's prior determination acknowledged that a declaratory judgment action, not an Article 78 proceeding was the proper vehicle to challenge legislative acts of a governmental entity (*see, Bryant Ave. Tenants' Assn. v Koch*, 71 NY2d 856, 527 NYS2d 743 [1988]; *Merrick Park Home Owners Assoc. v Hempstead*, 143 NY2d 636 [Sup Ct Nassau Co 1955]) and also found that the Court was unable to convert the action, pursuant to CPLR 103 (c), because it did not have jurisdiction over all the necessary parties. Specifically the petitioner had not joined the property owner of the subject property or the other two property owners whose property was also rezoned. Because the three property owner's rights "might be inequitably affected by a judgment in [this] action" they were deemed necessary parties (*see, CPLR 1001(a); Wood v City of Salamanca*, 289 NY 279; *Sloane v Weber*, 42 AD2d 1036, 384 NYS2d 614 [4th Dept 1973]; *Matter of J-T Assoc. v Hudson River-Black River Regulating Dist.*, 175 AD2d 438, 572 NYS2d 122 [3d Dept 1993]).

In support of the instant motion petitioner has submitted an affidavit of the property owner, Madeline Hogan, in which she avers that her interests are the same as that of the petitioner, is bound by the court's decision, and asks to join the proceeding as an additional petitioner, or leave to intervene. The court deems the affidavit as one to join the proceeding as an additional petitioner and leave to so join and to amend the pleadings and caption is granted. The primary reason for compulsory joinder of parties is to avoid multiplicity of actions and to protect non-parties whose rights should not be jeopardized if they have a material interest in the subject matter (*see, Joanne S. v Carey*, 115 AD2d 4, 498 NYS2d 817 [1st 1986]). As to the other abutting landowners', the court concurs with petitioner that, although interested and affected parties who "ought" to be joined, they are not indispensable parties (*see, CPLR 1001(a); Glenwood Head-Glenwood Landing Civic Council v Oyster Bay*, 88 AD2d 484, 453 NYS2d 732 [2d Dept 1982]). Accordingly, so much of the prior Order which found the other property owners indispensable parties is hereby modified to the extent that the Court deems jurisdiction complete with the joinder of the property owner as granted above, for purposes of CPLR 103(c).

Leave to reargue and renew having been granted, and the petition thereby reinstated and converted, the court decides the action as follows.

Petitioner avers at paragraph #31 of the petition that the owner of the five-acre parcel to the north of the subject land instituted an Article 78 proceeding entitled *Matter of Michael Lawlor v Town of Huntington Planning Board*, Index No. 20389-2000, which allegedly seeks to annul the preliminary subdivision approval. Examination of the Court's computer records reveals that the matter is still pending. Petitioner states that it was not made a party to that proceeding.

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Property in Dispute

As previously stated, petitioner is the contract vendee of a parcel of property owned by Madeline Hogan, also referred to as the “Hogan property” or “Old Orchard Woods,” consisting of 24.21 acres identified on the Suffolk County Tax Map as 0400-001-02-004.001, in an area of Huntington known as Eaton’s Neck. Eaton’s Neck is connected to Huntington by a narrow strip of land which permits only one lane of traffic in each direction. The largely undeveloped property presents a rare and beautiful biologically and geologically sensitive area. It is undisputed that located on the Hogan property is a native tulip and oak tree forest, with some of the trees thirty inches in diameter, and that this type of mature native forest is unique to Eaton’s Neck, if not the whole of Long Island. Some of the other species present include beech, cherry, red maple, black birch and sassafras; and part of the property is home to deciduous shrubs, including bracken and Christmas ferns and, in the more dense areas, green briar, multiflora rose, grape vine, and poison ivy. It is considered an environmentally sensitive area also due to its proximity to fresh water and tidal wetlands. The western border of the property consists of eighty foot bluffs overlooking Long Island Sound, presents the erosion and contamination problems discussed at length in the Conservation Board’s report and the SEQRA statements, and is home to a colony of bank swallows. The eastern border along North Creek Road is adjacent to two properties; north is the former Morgan Estate, zoned R-80 by the Village of Asharoken, and south is **part** of the Hogan plat sold in 1988. The northern border abuts a property which is included in the rezoning. The southern border also abuts additional property included in the rezoning, as well as property developed under the R-20 zoning, and further south of this, even higher-density residential lots.

History

Since, at least 1964, the Hogan property in dispute was within an area zoned R-20, limited to one family homes on a minimum of one-half acre. In September of 1998 petitioner made application to the Huntington Town Planning Board for subdivision of the parcel. The Town Planning Board, as “lead agency,” after extensive review and preparation of an Environmental Assessment Form (“EAF”), issued a Positive Environmental Declaration pursuant to the State Environmental Quality Review Act (“SEQRA”), on March 10, 1999. Thereafter, a Draft Environmental Impact Statement (“DEIS”) was prepared and commented on by the Planning Board and the Town Conservation Board, wherein various revisions were requested. A joint public hearing on the DEIS and preliminary subdivision approval was duly noticed and held on November 17, 1999. On November 3, 1999, the voters of Huntington approved establishment of the Environmental Open Space and Park Fund (“EOSP”), and the Town Board, by resolution dated November 23, 1999, authorized the Town Attorney and the EOSP Advisory Counsel to ascertain whether the contract vendee (petitioner) or owner of the Hogan property was willing to sell the land, or a portion thereof,

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for public preservation, and further authorized the Director of Planning to initiate discussions between the Town and public and private agencies (The Nature Conservancy, Trust for Public Land, National Audubon Society, as well as County, State, and Federal agencies) to identify any potential for shared finding. The resolution directed the Planning Director to advise the contacted agencies of the Board's commitment to protect the property in dispute and to utilize Town funds. Apparently, these efforts continue.

A Notice of Final Environmental Impact Statement ("FEIS"), under SEQRA, issued on April 27, 2000, and, at its July 12, 2000 meeting, the Planning Board resolved to approve and adopt the Findings Statement under SEQRA and to grant preliminary approval for the subdivision application. Thereafter, on July 25, 2000 the Town Board resolved to more fully consider a potential rezoning of the Hogan property, as well as an additional eight acres, from R-20, permitting a single family home on one-half acre, to R-80, permitting a single family home on two acres. The Board quoted the Comprehensive Plan Summary, which states at page 6 that "the overall environmental planning goal for the town is to assure that additional growth and development are compatible with or enhance the town's natural resources" and in furtherance of this goal the Plan recommends that certain strategies be pursued, including: "update zoning, design guidelines and other land use controls as a means of regulating the intensity and type of development in critical resource areas"; quoted the Environmental Conditions Section in the Comprehensive Plan, at pages 3-13, relative to the constraints to development imposed by natural resources, and severe constraints posed by development of areas which would create unavoidable adverse impacts; and quoted the Open Space and Historic Resources Section of the Comprehensive Plan which identifies lands in need of planned protection to include "(1) parcels with significant environmental qualities, particularly those needed for the protections and maintenance of groundwater recharge areas, wetland, sensitive coastal areas, and wildlife habitats and (2) parcels with unique aesthetic, image and /or scenic qualities"; and concludes that the proposed rezoning met these criteria. The resolution went on to, *inter alia*, acknowledge that an EAF was needed prior to any action by the Town Board; listed the Town Board as lead agency for purposes of SEQRA; scheduled a public hearing on the matter; and acknowledged that a public hearing, pursuant to 6 NYCRR 617.2(b), in no way committed the Town Board to an approval of the rezoning and that such determination would follow the completion of the SEQRA review.

By letter dated August 25, 2000, the Suffolk County Department of Planning acknowledged receipt of the Town's application relative to the rezoning and opined that the matter was one for local determination in that there was no apparent significant county-wide or inter-community impact. A Public Hearing was noticed and held August 29, 2000, on the proposed rezoning. Among those speaking at the Public Hearing was the Mayor of The Village of Asharoken, who expressed the Village's support for the rezoning. The Full Environmental Assessment Form, in compliance with SEQRA, for the proposed rezoning was completed October 4, 2000 and Local Law No. 29 was enacted, rezoning the petitioner's subject property, and eight abutting acres, on October 10, 2000.

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The petition contains three arguments in favor of finding the law unconstitutional, illegal and ultra vires:

(1) that the Town Board's referral of the proposed zoning change to the Suffolk County Planning Commission prior to preparation of the Environmental Assessment Form was violative of General Municipal Law §239-m(4)(b);

(2) that the Board's failure to refer the proposed rezoning to the Planning Board prior to the public hearing of August 29, 2000 was violative of Hunting Town Code §198-127; and

(3) that the Board violated 6 NYCRR 617.3 (a), in failing to comply with SEQRA by, *inter alia*, failing to take a "hard look" at the rezoning, by instituting the action on its own motion in response to public opposition, by finding that the rezoning would be compatible with the Town's Comprehensive Plan, by initiating the rezoning without first receiving recommendations of the Planning Board or Department, and by failing to consider the contrary findings of petitioner's expert.

General Municipal Law §239-m

General Municipal Law §239-1 provides, at subsection 2., labeled "Intent" that "[t]he purpose of this section, sections two hundred thirty-nine-m and two hundred thirty-nine-n of this article shall be to bring pertinent inter-community and county-wide planning, zoning, site plan, and subdivision considerations to the attention of neighboring municipalities and agencies having jurisdiction." Since the rezoning abuts the Village of Asharoken, it falls under GML §239-m subsection 3.(b), which lists proposed actions that are subject to referral to the Suffolk County Planning Department. The gravamen of petitioner's argument is that, pursuant to GML §239-m (1)(C), the term "full statement of such proposed action" shall mean all materials required by and submitted to the referring body as an application on a proposed action, including a "completed environmental assessment form" and all other materials required by such referring body in order to make its determination. Since the July 25, 2000 Board resolution states that the EAF was needed to be completed before final action, petitioner argues that the Board violated §239-m(1)(c) by referring the rezoning to the Suffolk County Planning Department prior to completion of the EAF. While a failure to refer the rezoning to the County Planning Department would have been jurisdictional in nature (*see, Ernalex Construction v City of Glen Cove*, 256 AD2d 336, 681 NYS2d 296 [2d Dept 1998]), that is not the instant scenario. The matter was referred to the County, and the County Planning Department responded that the matter was one for local determination, in that there was no apparent significant county-wide or inter-community impact. Moreover, GML §239-m(1)(c) also states that "[n]otwithstanding the foregoing provisions of this paragraph, any referring body may agree with the county planning agency or regional planning council as to what shall constitute

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a "full statement" for any or all of those proposed actions which said referring body is authorized to act upon." Here, the Village of Asharoken, abutting the proposed rezoning, which already zoned the abutting property R-80, was strongly in favor of the upzoning, as evinced by its statement at the Public Hearing and its Planning Board's recommendation. Further, the referral was not for a subdivision which would increase the inter-community traffic, land use, institutional use, populations density, etc. as contemplated by GML §239-1 but changed the zoned density from one-half acre to two acres, thereby lessening those concerns (*see, Ferrari v Town of Penfield*, 181 AD2d 149, 582 NYS2d 925 [4th Dept 19921]). Moreover, petitioner offers no support for its position that absent a clear record of what the referring body and County agreed was sufficient for the County's response, the referral is violative of §239-m(1)(c) and the Local Law must be annulled.

Huntington Town Code

Petitioner argues that the Town Board violated provisions of the Town Code by failing to refer the rezoning to the Town Planning Board prior to the public hearing. The Huntington Town Code provides at §198-126:

The Town Board may from time to time amend, supplement, modify, repeal or change this chapter or the Zoning Map on its own motion, on petition or application or on recommendation of the Planning Board but only after a public hearing has been held before the Town Board to consider said change of zone; and

at §198-127:

The Town Board shall refer changes of zone change proposals to the Planning Board for recommendation and written report thereon, unless specifically determined otherwise, as provided in § 198-128 herein. The Town Board may specify a reasonable time within which such report shall be submitted, and no public hearing shall be held until such report has been received or the specified time has elapsed.

When a statute is reasonably free from ambiguity, a court must construe it so as to give effect to its plain meaning (*see, Doctors Council v New York City Employees' Retirement Sys.*, 71 NY2d 669, 529 NYS2d 732 [1988]; McKinney's Cons Laws of NY, Book 1, Statutes §§ 76, 94). The "plain and obvious meaning of a statute is always preferred to any curious, narrow or hidden sense that nothing but a strained interpretation of legislative intent would discern." Courts "may only look behind the words of a statute when the law itself is doubtful or ambiguous" (*see, Finger Lakes Racing Assn. v New York State Racing & Wagering Bd.*, 45 NY2d 471, 410 NYS2d 268 [1978]). Here, respondent argues that since the zoning change was instituted by its own motion, the mandatory referral need not have been made before the public hearing, as opposed to §198-128

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applications for change of zone by property owners, which mandates referral to the Town attorney and Director of Planning and sets a thirty (30) day limitation for the forwarding of a synopsis of the application to the Town Board. The Court agrees that the referral made after the public hearing does not violate the Town Code. A reading of §198-126 indicates that the Town Board is empowered to amend, supplement, modify, repeal or change the Zoning Map and lists three ways such these changes are instituted: by the Town Board's own motion, on recommendation of the Planning Board, or on petition or application by other than the Town Board or Planning Board. If the court accepts petitioner's reading of §198-127, the Town Board would need to refer to the Planning Board changes to the Zoning Map instituted by the Planning Board itself before the public hearing could be held. The court is unable to conclude that petitioner's interpretation is supported by the plain language of §198-127 (*see, Yong-Myun Rho v Ambach*, 74 NY2d 318, 546 NYS2d 1005 [1989]); *Doctors Council v New York City Employees' Retirement Sys.*, *supra*). Moreover, §198-127 states that the Town Board shall refer changes of zone change proposals (emphasis added) to the Planning Board, which would mean that if the Town Board's or Planning Board's own recommendation was then changed, the changed recommendation would then be referred to the Planning Board before any public hearing on the change.

SEQRA

The fundamental policy of the State Environmental Quality Review Act (SEQRA; ECL At 8) "is to inject environmental considerations directly into governmental decision making" (*see, Matter of Coca-Cola Bottling Co. v Board of Estimate*, 72 NY2d 674, 536 NYS2d 33 [1988]). This policy is effectuated, in part, through strict compliance with the review procedures outlined in the environmental laws and regulations (*see, Matter of King v Saratoga County Bd. of Supervisors*, 89 NY2d 341, 653 NYS2d 233 [1996]). Initially, a determination must be made as to whether the action qualifies as a Type I, Type II or an unlisted action for purposes of SEQRA review (6 NYCRR 617.5 (a) (4)). 6 NYCRR 617.2(b) defines a "Type I" action (*see also*, 617.4), a "Type II" action (*see also*, 617.5), as well as an "Unlisted action." An "unlisted action" is one "not identified as a Type I or Type II action" in this Part, or, in the case of a particular agency action, not identified as a Type I or Type II action in the agency's own SEQRA procedures." An unlisted action must also contain a "Negative declaration," which means a written determination by a lead agency that the implementation of the action as proposed will not result in any significant adverse environmental impacts (617.2 (b)(y)).

The respondent submitted a Full Environmental Assessment Form (FEAF), dated October 4, 2000, which found the SEQRA recommendation for the proposed rezoning to be a "negative declaration" and based its recommendation on the SEQRA classification "Unlisted," in that it did not meet or exceed any of the action listed on the Type I list (6 NYCRR 617.4(b)); cited the SEQRA history of the property in dispute; established the Town Board as lead agency for the purposes of complying with SEQRA (617.6(b)(1)), in that the action did not involve another agency; and stated

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that rezoning the property to a lower density appeared to be the most prudent land use measure that could be implemented on a local level to diminish the potential adverse impact related to development, while preserving the economic value. Included in the FEAF were findings that the proposed rezoning would not impact on the land, would not impact on the surface and groundwater, would not impact on the air quality, would not impact on any threatened and/or endangered species, would not affect agricultural resources, would not impact on historic and archaeological resources, and had the potential to reduce future impacts to open space, groundwater, coastal bluffs, wetlands, and marine resources. It further found no impact on critical environmental areas, transportation, energy, noise and odor, public health, and found the reduction in density consistent with the 1993 Comprehensive Plan. The FEAF also acknowledged that, although the rezoning would lessen the adverse impact of any future development of the property, additional review, pursuant to SEQRA, would be needed at the time any site-specific development applications were made.

It is well settled that "strict" as opposed to "substantial" compliance with SEQRA, and the regulations promulgated thereunder, is required (*see, Matter of Rye Town/King Civic Assn. v Town of Rye*, 82 AD2d 474, 422 NYS2d 67 [2d Dept 1981], *app dismiss* 55 NY2d 747, *lv dismiss* 56 NY2d 985 [1982]; *Matter of Martin v Koppelman*, 124 AD2d 24, 510 NYS2d 881 [2d Dept 1987]). In reviewing determinations concerning environmental matters courts are limited to determining whether the authorities involved have complied with the procedural requirements of SEQRA (*see, Matter of Martin v Koppelman, supra*). Pursuant to 617.2 (m), an Environmental Assessment Form (EAF) means a form used by an agency to assist it in determining the environmental significance or nonsignificance of actions, and states that a properly completed EAF must contain enough information to describe the proposed action, its location, its purpose and its potential impacts on the environment. The court is unable to find that the FEAF submitted by respondent deviated from that standard or that it violated the statute (*see, Burczetta v Town Board of the Town of Carmel*, 140 Misc2d 1050, 532 NYS2d 620 [Sup Ct. Putnam Co. 1988], *aff* 167 AD2d 339, 561 NYS2d 305 [2d Dept 1990]). The court is also unable to find that the classification of the action as "unlisted" violated the statute. The court is unpersuaded by petitioner's argument that, by the Town Board's contemplation that another examination of any future proposed subdivision would be needed, the Board did not take a "hard look" (*see H.O.M.E.S. v New York State Urban Dev. Corp.*, 69 AD2d 222, 418 NYS2d 827 [4th Dept 1979]) at the instant rezoning for the purposes of SEQRA.

As to petitioner's remaining arguments, it is an elementary but significant principal of law that a legislative enactment will be presumed constitutional (*see, Wiggins v Town of Somers*, 4 NY2d 215, 173 NYS2d 579 [1957]). "The exceedingly strong presumption of constitutionality applies not only to enactments of the Legislature but to ordinances of municipalities as well. While this presumption is rebuttable, unconstitutionality must be demonstrated beyond a reasonable doubt and only as a last resort should courts strike down legislation on the ground of unconstitutionality" (*see, Lighthouse Shores v Town of Islip*, 41 NY2d 7, 390 NYS2d 827 [1976]). To withstand judicial scrutiny, a municipality's exercise of its zoning power "must be founded upon a legislative delegation to so proceed" (*see, Matter of Golden v Planning Bd. of Town of Ramapo*, 30 NY2d

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359,334 NYS2d 138 [1972]). Such a legislative delegation is found in section 261 of the Town Law which empowers the town board, “[for] the purpose of promoting the health, safety, morals, or the general welfare of the community, . . . to regulate and restrict”, *inter alia*, the density of population and preservation of open space (see, *Daniels v Van Voris*, 241 AD2d 796, 660 NYS2d 758 [3rd Dept 1997]; *Marcus v Town of Huntington*, 45 NY2d 501, 410 NYS2d 546 [1978]). The rezoning enacted by Local Law No. 29 is well within the ambit of this broad grant (see, *Maldini v Ambro*, 36 NY2d 481, 369 NYS2d 385 [1975]). Nor has petitioner alleged that “no reasonable return may be had from any permitted use” (see, *McGowan v Cohalan*, 41 NY2d 434, 393 NYS2d 376 [1977]). Further, the Town has established a reasonable nexus between the Town’s legitimate objectives and the rezoning, even if “triggered” by petitioner’s initial subdivision application (see, *Thomas v Town of Bedford*, 11 NY2d 428, 230 NYS2d 684 [1962]; *Marcus v Town of Huntington*, *supra*). Lastly, the Town may change its zoning to promote the general welfare and to respond to changed conditions in the community, in accordance with its Comprehensive Plan (see, *Bonnie Briar Syndicate v Town of Mamaroneck*, 94 NY2d 96, 699 NYS2d 721 [1991]; *Gernatt Asphalt v Town of Sardina*, 87 NY2d 668, 642 NYS2d 164 [1996]; *Rodgers v Village of Tarrytown*, 302 NY 115 [1951]).

In light of the affidavit of Madeline Hogan consenting to and joining in the requested relief, the petition is deemed amended to add her as an additional petitioner. The court having deemed jurisdiction complete, and acting within its power to treat an CPLR Article 78 proceeding as an action for a declaratory judgment (CPLR 103(c)), issues the following declaration: Local Law No. 29, enacted by the Huntington Town Board is not unconstitutional, illegal or ultra vires as enacted.

Dated: DEC 19 2001



J.S.C.

X FINAL DISPOSITION NON-FINAL DISPOSITION