

Manglaviti v Kozakiewicz

2002 NY Slip Op 30159(U)

November 29, 2002

Supreme Court, Suffolk County

Docket Number: 24124-2002

Judge: Eugene Oliver

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 18 - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. OLIVER
Justice of the Supreme Court

MOTION DATE 7/31/02
ADJ. DATE 9/12/02
Mot. Seq. # 001 - MD
Mot. Seq. # 002 - MD
Mot. Seq. # 003 - XMG
Mot. Seq. # 004 - XMG; CASEDISP
Final Disposition

..... X
PETER MANGLAVITI, KATHLEEN MANGLAVITI,
JOHN SAIVES, CLARK McCOMB, ADAM GATZ. :
NEAL GATZ AND HENRY SILVERMAN, :
Petitioners, :

CIARELLI & DEMPSEY
Attorneys for Petitioners
737 Roanoke Avenue, P.O. Box 488
Riverhead, New York 11901

For a Judgment Under Article 78 of
the Civil Practice Law and Rules,

- against -

ROBERT KOZAKIEWICZ, SUPERVISOR,
EDWARD DENSIESKI, JAMES LULL,
BARBARA BLASS and ROSE SANDERS,
constituting the Town Board of the Town of
Riverhead, New York, and the RIVERHEAD
FIRE DISTRICT,

: SMITH, FINKELSTEIN, LUNDBERG,
: ISLER and YAKABOSKI, LLP
: Attorneys for Resp. Riverhead Town Board
: 456 Griffing Avenue, P.O. Box 389
: Riverhead, New York 11901-0203

Respondents. :
..... X

: SMITH MAZURE DIRECTOR WILKINS
: YOUNG YAGERMAN & TARALLO, P.C.
: Attorneys for Resp. Riverhead Fire District
: 111 John Street, 20th Floor
: New York, New York 10038-3198

Upon the following papers numbered 1 to 33 read on this petition pursuant to CPLR Article 78: Notice of Motion/ Order to Show Cause and supporting papers 1 - 6; Notice of Motion, Cross Motions, and supporting papers 7-13: 14-22: 23-25; Answering Affidavits and supporting papers 26-27: 28-29; Replying Affidavits and supporting papers 30-31: 32-33; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the petition (#001) and the motion (#002) for injunctive relief are denied, and it is further

ORDERED that the cross motions by respondents (#003 and #004) to dismiss the petition are granted.

Manglaviti v Kozakiewicz

Index No. 02-16824

Page 2

In this article 78 proceeding, the petitioners seek a judgment annulling respondent Town Board's Resolution No. 573 dated May 21, 2002, granting injunctive relief to preclude respondents from proceeding with the development and construction of the subject parcel, and declaring the site plan approval null and void. Petitioners, by separate motion (#002), seek to preliminarily and permanently enjoin respondents from proceeding with construction of a burn building.

The resolution in dispute here rescinded a portion of a prior resolution, to wit: No. 1009 dated September 18, 2001. Resolution 1009-2001 granted an exemption from the requirements of Agriculture A zoning requested by the Riverhead Fire District for the purpose of constructing a training facility for the Fire District known as a "burn building." The construction proposed was to be placed upon a thirteen and one-half acre undeveloped parcel, owned by the Fire District and zoned Agriculture A, located at the northwest corner of Northville Turnpike (CR 43) and Cross River Drive (CR 105). Such resolution limited the approval to the "burn building," which is a metal building used for the purpose of conducting drills and training of the member volunteer firefighters. The subject resolution, No. 574-2002, rescinded the prior exemption in that the fire training facility is a municipal building which, pursuant to Town Zoning Code § 108-54, is a permitted land use in all zoning districts. Therefore, no exemption was necessary. All other portions of the 1009-2001 resolution, as to site plan requirements and covenants, were ratified and continued.

The Riverhead Town Code provides, at §108-21 (A), a list of permitted uses in an Agricultural A District, where the undeveloped thirteen acre parcel is located. Among the permitted uses are: agriculture, cemetery, churches, elementary and high schools, cold storage plant, colleges and universities, golf courses, green houses, libraries, philanthropic organizations, one-family dwelling, golf driving range, parks, playground, museum and community center. Admittedly, a fire training facility is absent from the list. However, Article XIII, Section 108-54 of the Code, entitled Supplementary Use Regulations provides that "Municipal buildings and hospitals shall be permitted in all districts, provided that such buildings shall conform to all other provisions of this chapter for the district in which located." There is no allegation of any such non-conformance.

Petitioners argue that the Town Board was without the authority to construe the "municipal building" permitted in all zones pursuant § 108-54 to include a fire training facility. They argue that interpretation of the town's zoning code is the sole province of the Zoning Board of Appeals, not the Town Board. However, pursuant to Town Law § 276-a (4) the jurisdiction of the ZBA is appellate only and is limited to hearing and deciding appeals from and reviewing any order, requirement, decision, interpretation, or determination made by the administrative official charoed with the enforcement of any ordinance or local law adopted pursuant to this article (emphasis added). Likewise, the Riverhead Town Code, at §108-76 (A), limits the power of the Board of Appeals to hear and decide appeals from and review any order, requirement, decision or determination made by the Zoning Officer (emphasis added). Therefore, it was the ZBA which was without jurisdiction to make the determination. The Court finds unpersuasive petitioners' argument that the Town Board's resolution, stating that the burn building is a municipal building pursuant to § 108-54 (A) permitted in all zones and rescinding the previously granted exemption, was *ultra vires*. The Court also finds unpersuasive petitioners' argument that the Town Board's designation of the proposal as an "unlisted action" pursuant to SEQRA and the Board's covenants relative to the site plan approval, to be contradictory. The "unlisted action" designation was correctly determined under the applicable statute, 6 NYCRR 617.5©(7), (*see also*, concurrent decision

Manglaviti v Kozakiewicz
 Indes No. 02-16824
 Page 3

for article 78 at *Index No. 25957-2001*), as was the site plan approval as mandated by Town Code § 108-130.

Petitioners also argue that the Town Board's determination that the burn building was a municipal building, was arbitrary and capricious. Fire Districts are established for the purpose of providing fire protection and responding to certain other types of emergencies (*see*, TL §176[I], [22]; General Municipal Law §209, 209-b; Volunteer Firefighters' Benefit Law §5[1]; 1992 Opns St Comp No. 92-41). A fire district established by the town board under Town Law § 170. is a political subdivision of the State of New York, and members of the local fire department within the district are employees of the fire district (Town Law § 174; *Nanuet Fire Engine Co. No.1 v Amster*, 177 Misc2d 296, 298, 676 NYS2d S90 [1998]). Further, pursuant to Town Law § 176(14), real property required by a fire district for any purpose authorized by the article is "deemed to be required for public use." Training of the volunteer firemen is an activity within the functions of a fire district and funds may be expended for training which "will contribute to the efficiency and skills of the volunteer firemen" (Opinion of the State Comp. 81-117; Town Law § 176[9][21]; *see also*, 1993 Opns St Comp No. 93-24 which supports expenditures for training of firemen while excluding those for 'competitive sporting events'). Therefore, the Court finds that the classification of the burn building as a municipal building was a rational decision. Moreover, the Town is granted great deference in construing its own ordinances and a reviewing Court may not substitute its own judgment for that of the Town Board where, as here, it is supported by statute and opinion (*see. Matter of P.M.S. Assets v ZBA of Village of Pleasantville*, 98 NY2d 683, 746 NYS2d 440 [2002]; *Matter of Retail Property Trust v ZBA of Town of Hempstead*, 98 NY2d 190, 746 NYS2d 662 [2002]; *Matter of Infrac v Utschig*, 98 NY2d 304, 746 NYS2d 667 [2002]).

Petitioners' remaining argument is that there are alternate sites for the burn building and that neighboring districts have training facilities which the respondents could share. While Town Law §209-s permits contracts between municipal governing bodies of fire districts to jointly construct, operate and maintain and jointly use fire training centers, it does not mandate such joint operations. Likewise, petitioners' assertion that the increase in traffic and noise which will accompany the facility equates to an incompatible use of the property, is unpersuasive. Because the property is located in an Agricultural A district, it is surrounded by farm lands. Petitioners' desire to preserve the rural ambiance of the location is understandable. However, an examination of permitted uses in such districts reveals that schools, colleges, universities, golf courses and community centers are among the uses contemplated. Therefore, the court cannot find that the municipal building would be incompatible with other permitted uses. Lastly, petitioners reliance on *Matter of County of Monroe*, 72 NYS2d 338, 533 NYS2d 702 [1998] and *Nanuet Fire Engine Co. No.1 v Amster*, *supra*, is misplaced in that, here, there is no dispute between the zoning ordinance of one political unit and the statutory authority of another, and here, there is site plan approval. The Court finds petitioners' remaining arguments to be without merit.

Accordingly, the cross motions to dismiss the petition are granted. Since the petition is dismissed, there is no basis to issue an injunction and petitioners' motion (#002) for this relief is denied.

Dated

29-02

J.S.C.

**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 18 - SUFFOLK COUNTY**

PRESENT:

Hon. ROBERT WEBSTER OLIVER
Justice of the Supreme Court

Motion R/D: 10-14-02
Adj. Date: 10-17-02
Mot. Seq. #: 001 - MG
Non-Final Disposition
Preliminary Conference: 1-23-03

----- X
G-IV WASH, CLEAN & DRY, INC., :
 :
 Plaintiff, :
 :
 - against - :
 :
 ALFRED C. TISCH, Sheriff of the County of Suffolk, :
 :
 Defendant. :
 :
----- X

Kramer & Shapiro
Attorneys for Plaintiff
80-02 Kew Gardens Road
Kew Gardens, New York 11415


Robert J. Cimino, Esq.
Suffolk County Attorney
Attorney for Defendant
H. Lee Dennison Building
Hauppauge, New York 11788

Upon the following papers numbered 1 to 7 read on this motion for a preliminary injunction; Notice of Motion/Order to Show Cause and supporting papers 1 to 7; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers _____; Replying Affidavits and supporting papers _____; Other _____; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion by the plaintiff to stay the defendant from levying on the assets of the plaintiff is granted without opposition. The plaintiff is directed to file an undertaking in the amount of \$1,000 within thirty (30) days of the date of this order or the undertaking shall terminate the stay without further order of the Court.

A preliminary conference is ordered held in this matter on January 23, 2003 at 9:30 a.m. in the Courtroom of the undersigned, 400 Carleton Avenue, Central Islip, New York.

Dated: 11-29-02


ROBERT WEBSTER OLIVER, J.S.C.