

Bolton v Town of South Bristol Planning Board

2006 NY Slip Op 30431(U)

March 22, 2006

Supreme Court, Ontario County

Docket Number: 97120

Judge: John J. Ark

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SUPREME COURT STATE OF NEW YORK
COUNTY OF ONTARIO

RICHARD H. BOLTON,

Petitioner,

vs.

Index No. 97120
DECISION

TOWN OF SOUTH BRISTOL PLANNING BOARD,

Respondent,

BRISTOL HARBOR DEVELOPMENT, LLC,

Respondent-Intervener.

Petitioner seeks a judgment rescinding the SEQR Negative Declaration made by the Town of South Bristol Planning Board for the proposed Bristol Harbor Resorts expansion. By Order to Show Cause, Bristol Harbor Development, LLC sought leave to intervene in this action. At the time of oral argument, this Court granted Bristol Harbor Development’s request.

Intervener-Respondent Bristol Harbor Development is the owner of the subject property, Bristol Harbor Village. Bristol Harbor Development seeks to construct a 63 unit expansion to Bristol Harbor Resorts. The expansion will be bordered on the east by five, five story condominium buildings, and on the west by Seneca Point road and further west, 123 single family homes. Bristol Harbor Resorts is an approved Planned Unit Development of 875 homes at 200 hotel units. The original master plan for Bristol Harbor Village was approved by the Town of South Bristol in 1970.

On February 25, 2005, Bristol Harbor Management submitted preliminary information to the Town regarding their plan to seek site plan review for the construction of 70 units on 16.9 acres. Formal application for site plan review was submitted on May 2, 2005. Notice was provided to the public regarding a May 18, 2005 hearing. A revised site plan was submitted on June 13, 2005 which addressed the concerns raised at the May 18, 2005 hearing, including the reduction of the total number of proposed units to 63. At a meeting in June 2005, the plan was unanimously approved by the Ontario County Planning Board. On June 15, 2005, the Town Planning Board also approved the plan.

Initially, the Town Planning Board considered this project as an Unlisted Action under SEQRA. Thereafter the Department of Health directed reconsideration of the project as a Type I and the Planning Board complied. In November 2005, the Town Planning declared themselves to be lead agency. All involved agencies consented to the Town Planning Board acting as lead agency.

At a public meeting held December 21, 2005, the Town Planning Board reviewed Part 1 of the project's Full Environmental Assessment Form and completed Part 2. At the conclusion of the discussion, The Town Planning Board unanimously approved a resolution issuing a negative declaration as to the environmental significance under SEQR for the project. The Negative Declaration was filed on January 3, 2006.

As a preliminary matter, Bristol Harbor Development argues that petitioner does not have standing because there is no claim that the project will impact or harm the petitioner.

“Generally, standing to challenge an administrative action turns on a showing that the action will have a harmful effect on the challenger and that the interest to be asserted is within

the zone of interest to be protected by the statute [citation omitted]” (*Gernatt Asphalt Products, Inc. v Town of Sardinia*, 87 NY2d 668, 687). “In land use matters especially, we have long imposed the limitation that the plaintiff, for standing purposes, must show that it would suffer direct harm, injury that is in some way different from that of the public at large [citations omitted]” (*Society of Plastics Industry, Inc. v County of Suffolk*, 77 NY2d 761,774).

Petitioner’s statement that his property is “in the vicinity of the subject property but opposite, on the east side of the lake” (Verified Petition ¶ 3) “is insufficient, without more, to confer standing” (*Matter of Many v Village of Sharon Springs Bd. of Trustees*, 218 AD2d 845).

Petitioner further states, “I have standing to bring this action because of the direct and significant harm to the Canandaigua Lake environment likely to be caused by completion of this project without adequate review and mitigation measures. My, and many other’s enjoyment of the peace, tranquility and scenic beauty of this internationally significant recreational resource may be permanently altered” (Verified Petition ¶ 5). In his Reply to Answer, petitioner states that the project will affect his view from the lake and his drinking water supply (Reply to Answer ¶ 15). Petitioner further states that he and his wife are the only full-time residents within 1½ miles to the north or south. As a full time resident, he will be affected by the increase in noise and light pollution to a greater degree than other lake residents. He also states that unlike most lake residents, he receives all his drinking water from the lake, untreated.

“Although the conclusory allegations of the [] verified petition concerning increased traffic and pollution ‘are sufficient to state petitioners’ claim of standing, they are lacking in probative value and [do] not of themselves suffice to establish it’” (*Noslen Corp. v Ontario*

County Board of Supervisors, 295 AD2d 924, 925, citing (*Matter of Piela v Van Voris*, 229 AD2d 94, 96). Petitioner lacks standing to bring this Article 78 action.

In any event, this Court will address petitioner's claim that there were substantial errors in Part 1 and Part 2 of the full Environmental Assessment Form which resulted in the issuance of a Negative Declaration.

"A court's authority to examine a SEQRA review conducted by an entity that was required to do so is limited to reviewing whether the determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (*Gernatt Asphalt Products, Inc. v Town of Sardinia*, 87 NY2d 668, 688). "Courts may, first, review the agency procedures to determine whether they were lawful. Second, [they] may review the record to determine whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination [citations omitted]" (*Jackson v New York State Urban Development Corp.*, 67 NY2d 400, 417).

Petitioner contends that Bristol Harbor incorrectly answered questions on Part I of the EAF. Specifically, he argues that they mis-characterized the property as not being used for recreation and not contributing to the landscape. In her affidavit submitted in this case, Johanna Zonneyville, Chairperson of the Town of South Bristol Planning Department, states that the Town Planning Board did not consider the vacant land upon which the project is to be constructed to be part of the scenic landscape as the property is between two existing developments, as viewed from the lake.

Petitioner also contends that Bristol Harbor incorrectly stated that no mature forest vegetation would be removed. Petitioner argues that the site is part of a rare old growth forest. Ms. Zonneyville responds that the trees are “second growth, not rare, old growth” (Zonneyville Aff. ¶ 18).

The Court’s review of the Town Planning Board’s decision is limited to the record made before the agency (see, *Matter of Montalbano v Silva*, 204 AD2d 457). In determining “whether the agency’s decision was arbitrary and capricious, the court cannot take proof or consider facts which were not brought before the administrative agency” (*Matter of Welch v New York State Division of Housing and Community Renewal*, 287 AD2d 725, 726). Here there is no evidence that the petitioner or anyone else appeared at the December 21, 2005 hearing and presented evidence to counter the information provided in Part 1 of the EAF.

With respect to Part 2 of the EAF, petitioner contends that The Town Planning Board erred in several respects. He argues that the Town Planning Board incorrectly indicated that the project would not: impact any unique and unusual land forms, alter drainage patterns, impact waterfowl and migratory birds, impact scenic views and open spaces, increase noise pollution, and change the character of the neighborhood.

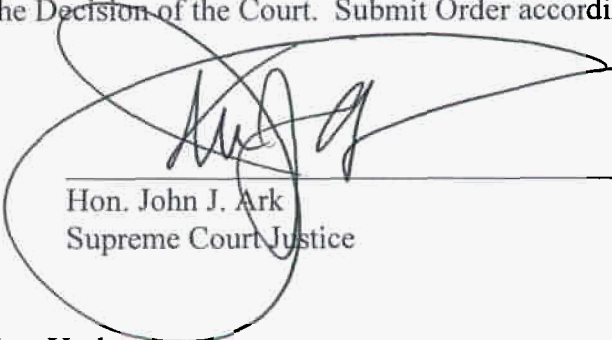
A review of Part 2 of the EAF as well as the minutes of the December 21, 2005 Town Planning Board Meeting reveals that the Planning Board carefully and thoroughly considered all of the environmental impacts the proposed development will have on the community. The Board found three potential large impacts that were mitigated and deemed not significant. It is clear that the Board took a “hard look” at the areas of environmental concern “and made a ‘reasoned

elaboration' of the basis for its determination [citations omitted]" (*Jackson v New York State Urban Development Corp.*, 67 NY2d 400, supra at 417)

Petitioner's also contends that there was a conflict of interest in that Dale Stocker is a member of the Town of South Bristol Town Board as well as an executive officer of Bristol Harbor Resorts and other involved companies. The Town responds that "Dale Stocker was at no time relevant to this action a member of the Town of South Bristol Planning Board" and he had no authority to vote for or against any resolution by the Town Planning Board.

The Town Planning Board's decision to issue a Negative Declaration was not made in violation of lawful procedure, was not affected by an error of law, and or was not arbitrary and capricious or an abuse of discretion (*Gernatt Asphalt Products, Inc. v Town of Sardinia*, 87 NY2d 668, supra at 688). The petition is dismissed in its entirety.

This constitutes the Decision of the Court. Submit Order accordingly.



Hon. John J. Ark
Supreme Court Justice

Dated at Canandaigua, New York

this 2nd day of March 2006.