

**Matter of Weinman v Planning Bd. of Town of E.
Hampton**

2007 NY Slip Op 30398(U)

March 15, 2007

Supreme Court, Suffolk County

Docket Number: 0025298

Judge: Gary J. Weber

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

P R E S E N T:

Hon. Gary J. Weber MOTION DATE October 27, 2006
Acting Justice of the Supreme Court Motion Seq. # 001 - MD
002 - MD

In the Matter of the Application of BARBARA
WEINMAN and BENJAMIN KRAMER,

JANET M. INSARDI, ESQ.
666 OLD COUNTRY RD-STE 412
GARDEN CITY, NY 11530

Petitioners

CAHN & CAHN, LLP
445 BROADHOLLOW ROAD
MELVILLE, NEW YORK 11747

For a Judgment Pursuant to CPLR Article 78

-against-

PLANNING BOARD OF THE TOWN OF EAST
HAMPTON, TOWN BOARD OF THE TOWN OF EAST
HAMPTON and TOWN OF EAST HAMPTON,

Respondents

The Petitioners, by Notice of Petition and Verified Petition dated September 1, 2006, have made application, pursuant to CPLR Article 78, to this Court for an Order reversing, and annulling Respondent Planning Board's decision to grant preliminary subdivision approval insofar as the Board determined that the requirements of SEQRA and the East Hampton Town Code had been satisfied. The Petitioner has also submitted an Affidavit in Support by Paul W. Grosser, Ph.D., and P.E. dated January 7, 2007. The Grosser affidavit was never submitted to the East Hampton Town Planning Board and is, thus, not part of the record on review in connection with the Board's determination. The Petitioner has also submitted a Memorandum of Law dated January 8, 2007. The Respondents have submitted a Verified Answer dated September 27, 2006, a Memorandum of Law dated February 1, 2007; an Affidavit of Lis Liquori, dated February 2, 2007; and a Return consisting of Volumes I to IV together with Exhibits. The Respondents have also, by Notice of Motion dated February 2, 2007, moved to strike from consideration the affidavit of Paul W. Grosser. The Petitioner has submitted An Affidavit In Opposition and in Further Support of the Petition dated February 20, 2007 together with a Reply Memorandum of Law dated February 19, 2007. There is also a Reply Affidavit by Richard Cahn, Esq. dated February 26, 2007.

DECISION

The Petitioners are residents of the Town of East Hampton and are owners of property that abuts the 20.28 acre parcel of land owned by the Town of East Hampton which is proposed to be subdivided into 26 lots to provide affordable housing. This proposed subdivision is a greatly scaled back version of an earlier plan by the Respondent-Town which would have subdivided 32.11 acres into 51 lots. Respondents had previously reviewed this larger subdivision and approved it, acting then, as now, as the lead agency on its own project. This prior approval was

nullified by the Appellate Division, Second Department based upon the Respondent's failure to follow the requirements of SEQRA with respect to Type I actions, and to take a hard look at the environmental impacts. *Munash v. Town of East Hampton, 297 AD2d 345 (2nd Dept. 2003).*

After the *Munash* decision the Respondent-Town reduced the scope of the project and eliminated, among other things, that portion of the plan that had included the use of its eminent domain authority to acquire property for the project. The Town then held a scoping session on this trimmed down project and submitted the subdivision application to the Planning Board. On February 14, 2006 a Draft Environmental Impact Statement (DEIS) was submitted to the Planning Board.

On February 21, 2006, the Planning Board determined that the now scaled down version of the project was no longer a Type I Action, but was an Unlisted Action in accordance with the SEQRA regulations. The Petitioner does not contend that this was in error, in so far as the SEQRA regulations were concerned, but argues that the Respondent Town had locally adopted a more restrictive list of Type I actions, and that the proposed action fell within the ambit of the Respondent-Town's own list of Type I actions, even though the SEQRA regulations had not been violated.

East Hampton Town Code 128-3-20 includes within its description of Type I actions, any subdivision which directly or indirectly may degrade, despoil or eliminate water bodies, unique plant or wildlife habitat and trails. An extraordinarily broad interpretation of this provision of the Respondent's code might theoretically support the Petitioners' contentions, because all upland property ultimately drains to sea level. However, the Court can not mandate, as Petitioner's suggest, that the Respondents interpret their own code in a manner which would require that all subdivisions be classified as Type I actions. Accordingly, the Court can not conclude that the Planning Board's determination that this action was an Unlisted Action was an error of law, an abuse of discretion, or unsupported by substantial evidence.

Any issue as to whether proper notices were sent to other potentially involved agencies when the Respondent became the lead agency is not an issue which may be raised, under the circumstances, by the Petitioners, but rather, any agency which may have been offended (if there be any) by this Respondents' determination in these proceedings. Petitioners simply lack standing to complain concerning the Respondent Board's treatment of other agencies with regard to the issue of notice.

As to whether there was adequate public notice, the subject determination was the continued review of a project that has long been subject to public scrutiny, as well as judicial proceedings up to an including appellate review. The Petitioners were represented at the public hearings, they submitted written materials for consideration, and have not demonstrated that they were unable to present their concerns to the Respondent. To the contrary, the Respondent clearly had to have been on notice of Petitioner's claims and concerns since the same and similar issues had been raised in connection with the earlier application to the Respondent Board, as well as the litigation which then ensued resulting in the abandonment of the earlier and far more ambitious project. In these circumstances, the Petitioner's concerns could scarcely have escaped the notice of the Board members. The approval to which the petitioners now object is in itself an acknowledgment of due consideration for Petitioners' concerns and is manifest by the greatly downsized project which has now been approved, even though this apparently leaves the Petitioners still unsatisfied.

There is a very great deal of difference between listening to and considering the concerns of interested parties and totally adopting such concerns as policy. Petitioner's real grievance is not that their concerns were unheard or considered, but that the Respondent Board did not consider these sufficient to scrap this affordable housing project altogether, which is clearly the only acceptable outcome in so far as the Petitioners are concerned.

In practical effect, the Respondent Planning Board was not writing on a clean slate with respect to this application. Having been directed to take a "hard look" at the original proposal, the Board reacted by reducing the scope and density of the project by over 50%. If this is not a "hard look" it is difficult to imagine what else the Respondent's could do to pass muster on this criteria without giving up the project entirely.

The review the Respondents gave to this subdivision application was reasoned meaningful, substantive, and well considered. The Court does not find that the decision to approve the subdivision was infected by an error of law, or was arbitrary or capricious. The Respondents' determinations made throughout this process were supported by substantial evidence.

The technical, procedural, requirements of SEQRA are not unimportant or without significant purpose, however, every defect, however slight, should not result in a nullification of the work previously put into a project unless the Petitioners can demonstrate that they were prevented from fully participating in the process, and that the result of the process was so flawed or unreliable that it was wrong as a matter of law and resulted in a decision that was either arbitrary or capricious or that was unsupported by substantial evidence. The Petitioner has failed to make such a showing and, accordingly, the Petition is in all respects denied.

ORDER

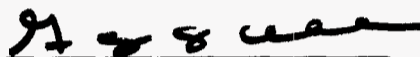
ORDERED that the Petition is denied in its entirety and dismissed (Mot. #001); and it is further

ORDERED that the Respondent's motion to strike from consideration the affidavit of Paul W. Grosser is denied as moot;

ORDERED that the Respondents are directed to serve a copy of this decision and order together with a notice of entry on the Petitioner as soon as is practicable.

This shall constitute the decision and order of the court.

Dated: March 15, 2007



Gary J. Weber, Acting J.S.C.

Final Disposition
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