SHORT FORM ORDER

INDEX No. 19019-2005

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

PRESENT:
Hon. MELVYN TANENBAUM
Justice

MOTION #001-CASE DISP
R/D: 091805
S/D 120106

NORTH SHORE FARMS

PLTF'S/PET'S ATTY:
ARTHUR V. GRASECK, JR.
1870 Spur Drive South
Islip Terrace, New York 11752

Petitioner

against -

THE TOWN OF RIVERHEAD, NY AND RIVERHEAD TOWN BOARD

DEFT'S/RESP'S ATTY:
JASPAN, SCHLESINGER, HOFFMAN
300 Garden City Plaza
Garden City, New York 11530

DAWN C. THOMAS, ESQ.
200 Howell Avenue
Riverhead, New York 11901

Respondents.

Upon the following papers numbered 1 to 62 read on this motion for an order pursuant to CPLR Article 78 Notice of Motion/Order to Show Cause and supporting papers 1-3; Notice of Cross Motion and supporting papers ____ Answering Affidavits and supporting papers 4-5 Replying Affidavits and supporting papers 6-54 Other 55-62; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this CPLR Article 78 petition by petitioner North Shore Farms ("NSF") seeking a judgment in the nature of mandamus compelling the respondents The Town of Riverhead ("TR") and Riverhead Town Board ("Town Board") to issue a special permit allowing a mulching business is determined as follows:

Petitioner "NSF" owns a 12.93 acre parcel of land in Riverhead. On November 8, 2001, it filed an application with the respondent "TOWN BOARD" for a special permit to use the premises to process land clearing debris into mulch. The parcel was then located in an Industrial A zone in which the processing of such debris was a permitted use.

On June 22, 2004, while petitioner's application was pending, the "TOWN BOARD" adopted a town wide rezoning plan which rezoned petitioner's parcel from Industrial Zone A to an Agricultural Protection Zone ("APZ"). The new zoning classification "APZ" does not permit the processing of mulch. "NSF's" petition seeks a writ of mandamus to compel respondents to grant its application for a special use permit claiming respondents intentionally delayed the permit application process until the new zoning plan was adopted to prevent petitioner from continuing its mulching business.

"NSF" claims it has operated a composting facility on the parcel since 1999 after having received an exemption from the New York State Department of Environmental Conservation. In November, 2001 "NSF" filed a special permit application with the "TOWN BOARD" seeking to continue operations in accordance with Riverhead Town zoning regulations.

On March 19, 2002 by Resolution #265, the "TOWN BOARD" referred petitioners application to the Town Planning Board. A public hearing was held on April 4, 2002. On May 16, 2002 the Planning Board referred the application to the "TOWN BOARD" for the purpose of determining the environmental impact of the proposed use. On July 16, 2002 the "TOWN BOARD" issued a positive declaration determining that a draft environmental impact statement ("DEIS") was required. The "TOWN BOARD" conducted a scoping hearing on September 23, 2002 and petitioner submitted its final scope document on October 7, 2002.

On April 1, 2003 petitioner filed the "DEIS". Three months later on July 1, 2003 the "TOWN BOARD" adopted the "DEIS". A "DEIS" hearing was held on September 3, 2003 and "NFS" was directed to prepare a final environmental impact statement ("FEIS"). The "FEIS" was submitted to the "TOWN" on November 18, 2003. A memorandum dated March 10, 2004 was the review report by a Town environmental planner of "NFS's" "FEIS". In March, 2004 the Town requested revisions of the "FEIS" which were completed by May 13, 2004.

On June 22, 2004 respondent "BOARD" adopted the Riverhead Town rezoning Comprehensive Plan which changed the permitted use of petitioner's parcel from Industrial Zone A to Agricultural Protection Zone. The "APZ" zoning prohibits the use of petitioner's land as a composting facility. No decision with respect to petitioner's special permit application was rendered by respondent following such rezoning classification. This CPLR Article 78 petition seeks to compel respondents to issue the special permit.

In support of the application petitioner submits a verified petition together with affidavits from two environmental planners, an attorney's affirmation, an attorney's affidavit and an affidavit from "NFS's" principal. Petitioner claims that evidence reveals respondents were responsible for significantly delaying "NFS's" special permit application by requiring a protracted environmental review which resulted in the "TOWN's" adoption of its Comprehensive Plan prior to a determination of "NFS's" special permit request. It is petitioner's contention that under these circumstances respondents must be compelled to grant the special permit since the "TOWN" was responsible for the delay in processing the "NFS" application. Petitioner contends the environmental review process continued for nearly two years despite the efforts of "NFS's" attorney and environmental consultants. Petitioner's attorney claims that he wrote four letters to the Town Planning Director on June 8, 2003, December 11, 2003, December 17, 2003 and January 20, 2004 requesting that the Planning Board take appropriate action. "NFS's" principal claims that beginning in January, 2004 through April, 2004 she made repeated visits and phone calls to various Town officials seeking advice and guidance about the delay in processing the application. Petitioner's experts claims that the "TOWN's" 37 month failure to act on the "NFS" application raises serious questions concerning the "TOWN's" good faith and argue that the "TOWN" acted arbitrarily and improperly. It is petitioner's position that respondents must be compelled to issue the special permit since the delay in making a final determination is solely attributable to the "TOWN's" failure to diligently process the special use permit application.

In opposition respondents submit a verified answer and objections in point of law and a certified record of proceedings. Respondents claim that the "TOWN" processed petitioner's application in the ordinary course of business without unusual delay. Respondents contend that it was petitioner's failure to

provide complete and accurate information required by the "TOWN" which caused processing delays and argue that if petitioner exercised due diligence the environmental review process would have been completed prior to the zoning change. Respondents claims that no decision on petitioner's application is necessary since the use sought by "NFS" is no longer permitted pursuant to the Town's Comprehensive Plan. Respondents contend that petitioner's remedy was to commence a proceeding to challenge the rezoning of the "NFS" parcel but that "NFS" failed to seek such relief. It is respondents position that the "TOWN" is required to apply the zoning law in effect during the period when the application is pending and therefore the "TOWN" no longer has authority to grant a special exemption permit based upon the Agricultural Protection Zone re-zoning. Respondents also claim that there is insufficient evidence to establish a "special facts" exception for petitioner's benefit.. Respondents assert that the "special facts" exception which would permit the "BOARD" to apply the zoning ordinance in place prior to enactment of the Comprehensive Plan, does not apply since there is no proof submitted to show that the "BOARD" deliberately delayed rendering a determination and to show that the delay was the product of malice, oppression, manipulation or corruption. Respondent also claims that the "special facts" exception only applies where the applicant can show that "NFS" was entitled to the special exception permit as a matter of right and argues that under these circumstances the "BOARD" had broad discretion to grant or deny petitioner's application. Respondents also maintain that petitioners acquired no vested right simply because the composting facility was in use for two years, since no legally authorized permit was issued to "NFS". Respondents claim that a writ of mandamus may not be issued to compel the "TOWN" to issue a determination which is within the discretion of the "TOWN BOARD" and argue that "NFS" unreasonably delayed seeking this relief since it failed to make a demand for a decision for more than one year after the zoning change in June, 2004. Respondents contend such delay is inexcusable and beyond the four month limitations period for commencing a CPLR Article 78 proceeding (citing CPLR §217).

Courts have distinguished between the concept of variance and special exception. A variance authorizes a use prohibited by an ordinance whereas a special exception is something authorized by the ordinance but only upon proof of intrinsic facts to meet the standards imposed by the ordinance (2 Anderson, "New York Zoning Laws and Practice" (2nd Edition, Section 18.02); see Tandem Holding Corp. V. Hempstead Zoning Board, 43 NY2d 801, 402 NYS2d 388 (1977)). A special exception use provided for in a zoning ordinance is tantamount to a legislative that the specified use is in harmony with the general zoning plan and will not adversely affect the neighborhood (Penny Arcade v. Oyster Bay Board, 75 AD2d 620, 427 NYS2d 51 (2d Dept., 1980)). The burden of proof imposed upon an applicant for special exception use permit requires "only that the use is contemplated by the ordinance subject only to "conditions" attached to is use to minimize its impact on the surrounding area." (North Shore Steakhouse v. Thomaston Board of Appeals, 30 NY2d 238, 244, 331 NYS2d 645 (1972)). Entitlement to a special exception or special permit is not a matter of right and can only be issued upon fulfillment of the conditions mandated in the delegation of power contained in the zoning ordinance Tandem Holding Corp. v. Hempstead Zoning Board 43 NY2d 801, 402 NYS2d 388 (1977); Matter of Tri-State v. Churchill, 261 Ad2d 924, 689 NYS2d 832 (4th Dept., 1999); Wisoff v. Amelkin, 123 AD2d 623, 506 NYS2d 778 (2d Dept., 1986)).

Petitioner's special exception application had not been determined prior to respondent "TOWN's" rezoning of the "NFS" parcel from Industrial Zone A to Agricultural Protection Zone. The applicable law governing petitioner's application is therefore the June 22, 2004 rezoning known as the Riverhead Comprehensive Plan. Pursuant to Town Code §108-22 petitioner is no longer entitled to a special permit based upon the premises rezoning classification in the "APZ" zone. Respondents do not have authority to issue a special exception permit unless petitioner can establish that the "special facts" exception applies based upon an unwarranted delay in processing this application.

As a general rule when a zoning law has been amended after the submission of an application seeking a project's approval but before a decision is rendered by the reviewing agency, a court is bound to apply the law as amended unless "special facts" indicate that the Town Board acted in bad faith and unduly delayed acting upon the application while the zoning law was changed (Ronsvalle v. Town of Lansing, 303 AD2d 897, 757 NYS2d 134 (3rd Dept., 2003); Matter of Pokoik v. Silsdorf, 40 NY2d 769 390 NYS2d 49 (1976); Huntington Ready-Mix Concrete, Inc. v. Town of Southampton, 112 AD2d 161, 191 NYS2d 383 (2nd Dept., 1985)).

Although the "TOWN BOARD" announced its acceptance of a Plan on November 5, 2003, the Town-wide zoning change was not formally adopted until June 22, 2004. Prior to that date, petitioner's special permit application was a permitted use in the Industrial A Zone. As of June 22, 2004 the "TOWN" was without authority to issue the special permit based upon the location of "NSP's" mulching business in an Agricultural Protection Zone.

Mandamus may be granted only to enforce a clear legal right (Klosterman v. Cuomo, 61 NY2d 525, 539 475 NYS2d 247, 254 (1984)); Matter of Legal Aid Society v. Sheinman, 53 NY2d 12,16, 439 NYS2d 882 (1981)). It issues to compel the performance of official duty clearly imposed by law where there is no other adequate remedy (Hamptons Hospital & Medical Center v. Moore, 52 NY2d 88, 436 NYS2d 239 (1980)). The duty must be positive and not discretionary, since mandamus does not lie to review the determination of public officers in matter involving the exercise of discretion or judgment (N.Y. State Inspection, Security & Law Enforcement Employee v. Cuomo, 103 AD2d 312, 480 NYS2d 1(2nd Dept., 1984) aff'd 64 NY2d 233, 485 NYS2d 719 (1984)).

CPLR §217 provides that an action to challenge a determination of a body or officer must be commenced within four months of the final determination. The four month period begins to run from the time the determination to be reviewed becomes final and binding upon the petitioner (Smith v. City Univ. of New York, 92 NY2d 707, 685 NYS2d 910 (1999)). A determination becomes final and binding when the aggrieved party received notice of the determination NY State Ass'n of Countries v. Axelrod, 78 NY2d 158, 573 NYS2d 25 (1991):Saferstein v. Lawyer's Fund for Client Protection, 298 AD2d 726, 748 NYS2d 438 (3rd Dept., 2002)). In circumstances where the party would expect to receive notification of a determination but has not, the limitations period begins to run when the party knows or should have known that it was aggrieved by the determination (Kan v. NY City Environmental Control Board, 262 AD2d 135, 691 NYS2d 500 (1st Dept., 1999) appeal dismissed 94 NY2d 857, 904 NYS2d 530 (1999)). A CPLR Article 78 proceeding may be barred by a shorter statute of limitations than found in the CPLR (Kennedy v. Zoning Board of Appeals of Village of Croton-on-Hudson, 167 AD2d 542, 562 NYS 2d 210 (2d Dept., 1990)).

Final submission of petitioner's "FEIS" was made on May 13, 2004. Forty one days later on June 22, 2004, the "TOWN" rezoned the premises. No further action or decision was taken with respect to "NSF's" application by the "TOWN" once the Comprehensive Zone Plan was adopted. Although the renewal shows petitioner made inquiries, held meetings with Town officials and registered complaints about the Town Board's inaction, this CPLR Article 78 petition was not commenced until August, 2005 almost fourteen months after the rezoning change.

The four month statute of limitations period for commencing a CPLR Article 78 proceeding begins to run when the aggrieved party knows or should know that it was aggrieved by the respondent's determination. The Court of Appeals in City of New York v. Grad Lafayette Properties, LLC, 6NY3d 540, 814 NYS2d 592 (2006) set forth the two part test to resolve the issue of when a decision is final for purposes of commencing the four month statute of limitations:

> "First the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party (Id at 547-548 citing Matter of Best Payphones Inc. V. Department of Info. Tech & Telecom of City of N.Y., 5 NY3d 30, 34 (2005) rearg. den. 5NY3d 824 (2005)).

In this case the Comprehensive Zoning Plan which re-zoned petitioner's premisses from Industrial Zone A to Agricultural Protection Zone and prohibited "NSF" from continuing to use the land as a composting facility was adopted in June, 2004. Petitioner had four months from the date the premises were re-zoned to commence this CPLR Article 78 proceeding to compel the "Board" to either re-zone the premises or to act upon the special permit application based upon a "special facts" exception. Instead petitioner delayed making application for nearly fourteen months. Under such circumstances this CPLR Article 78 petition is time barred by the four month statute of limitations period. (City of NY v. Grad Lafayette, supra). Accordingly, it is

ORDERED that petitioner "NSF's" CPLR Article 78 petition seeking a judgment compelling respondents to issue a special permit allowing "NSF" to conduct a mulching business on its premises is denied. The petition is hereby dismissed.

Dated: April 5, 2007

MELVYN TANENBAUM

J.S.C.

FINAL DISPOSITION