

Matter of Sunken Pond Estates, Inc. v O'Dea

2007 NY Slip Op 32632(U)

July 31, 2007

Supreme Court, Suffolk County

Docket Number: 0030015/2007

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX NO. 30015/2004

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

In the Matter of the Application of
SUNKEN POND ESTATES, INC.,

Petitioner,

For a Judgment under Article 78 of the Civil
Practice Law and Rules in the Nature of
Certiorari

-against-

RICHARD O'DEA, chairman, JOSEPH H.
BAIER, LOUIS BOSCHETTI, JULIA
BOWMAN, and LYLE WELLS constituting the
TOWN OF RIVERHEAD PLANNING BOARD,

Respondents.

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Respondents.

ORIG. RETURN DATE: JANUARY 27, 2005
FINAL SUBMISSION DATE: FEBRUARY 22, 2007
MTN. SEQ. #: 002
MOTION: MOT D

Action No. 1 - Index No. 4260/2003

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Action No. 2 - Index No. 30015/2004

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Upon the following papers numbered 1 to 18 read on these petitions _____
FOR A JUDGMENT PURSUANT TO ARTICLE 78

Notice of Petition and supporting papers 1-3 ; Answer 4 ; Notice of Petition and supporting papers 5-7 ; Answer 8 ; Return 9 ; Affidavit and Petitioner's brief in support 10, 11 ; Affidavit in Opposition and Memorandum 12, 13 ; Reply Affidavit and Memorandum 14, 15 ; Other Short Form Order dated August 25, 2003 - 16; Appellate Division Decision and Order dated October 4, 2004 - 17; Short Form Order dated April 1, 2005 - 18 ; it is,

ORDERED that this petition for a judgment, pursuant to Article 78 of the CPLR, in the nature of certiorari to review a condition set forth in the final resolution of the respondents constituting the TOWN OF RIVERHEAD PLANNING BOARD, adopted on January 16, 2003 and filed with the Town Clerk on January 17, 2003, to annul, reverse and vacate the determination of the Planning Board, is determined as provided herein; and it is further

ORDERED that this petition for a judgment, pursuant to Article 78 of the CPLR, in the nature of certiorari to review a condition set forth in the final resolution of the respondents constituting the TOWN OF RIVERHEAD PLANNING BOARD, adopted on December 2, 2004 and filed with the Town Clerk on December 3, 2004, to annul, reverse and vacate the determination of the Planning Board, is determined as provided herein.

Petitioner SUNKEN PONDS developed a condominium complex in the Town of Riverhead in three stages. The condominiums are limited to residents 55 years of age and older. Petitioner commenced these two Article 78 proceedings to challenge determinations of the respondent Board relative to site plan recreational fees for petitioner's condominium complex. Both proceedings relate to park and recreation fees assessed by the Town of Riverhead obligating petitioner to pay \$3,000.00 per condominium unit. The initial proceeding, pending under Index Number 4260-2003, seeks to void a resolution made on January 16, 2003, which required a payment of \$228,000.00 for recreational fees associated with "Section 2" of Sunken Ponds Condominium complex. Petitioner alleges that the determination was arbitrary and capricious and unsupported by findings required by Town Law § 277(4) and in violation of Town Code §§ 108-97(14)(e) and 108-146A. In the alternative, petitioner alleges that respondent also failed to consider granting a credit to petitioner for the construction of its clubhouse and other recreational facilities, which allegedly cost in excess of \$500,000.00. Petitioner alerts the Court that a nearby condominium complex, known as Saddle

Lakes and also located off Middle Road in Riverhead, was given a credit by respondent for its recreational facilities in the amount of \$392,000.00.

By judgment and order dated August 25, 2003 (Werner, J.), the Court denied respondent's motion to dismiss and granted the petition. On appeal, the Appellate Division, Second Department modified the judgment on the law, finding that the record was insufficient to determine whether respondent Board made the specific findings required by Town Law § 274-a(6) prior to conditioning approval of the condominium map on the payment of money for park, playground, and other recreational purposes, and remitted the matter for further findings, upon respondent's answer (*Sunken Pond Estates v O'Dea*, 11 AD3d 471 [2004], citing *Matter of Bayswater Realty & Capital Corp. v Planning Bd. of Town of Lewisboro*, 76 NY2d 460 [1990]; *Matter of Sepco Ventures v Planning Bd. of Town of Woodbury*, 230 AD2d 913 [1996]).

The second petition filed, pending under Index Number 30015-2004, seeks to void a resolution made on December 2, 2004, which required payment of \$252,000.00 for recreational fees connected to "Section 3" of the condominium complex. That petition alleges that the findings made by the respondent Board do not satisfy the requirements of Town Law § 274-a(6)(b) and violate petitioner's equal protection rights. In sum, the first petition seeks to void the resolution for Section 2 as it lacked findings, and the second petition seeks to void the resolution for Section 3 arguing that the findings were insufficient.

By Order dated April 1, 2005 (Werner, J.), the Court found, upon the motion of respondent Board to consolidate the aforementioned actions, that consolidation was appropriate to the extent that the matters should be joined for the purposes of a joint trial. The Court determined that the instant actions share common questions of law and fact, and that there was no showing that a substantial right of any party would be prejudiced by consolidation. Further, the Court directed that petitioner re-notice the matter pursuant to CPLR 7804(f), and noted that respondent's answer did not include a certified transcript of the record of the proceedings under consideration pursuant to CPLR 7804(e). The matter has now come before this Justice upon the retirement of Justice Werner.

Before a Planning Board may exercise its authority to impose a payment requirement in lieu of setting aside parkland or other property under Town Law § 274-a(6), it must make two determinations with respect to the

proposed plat: (1) that a “proper case” exists for requiring the developer to show on the plat “a park or parks suitably located for playground or other recreational purposes”; and (2) “that a suitable park or parks of adequate size cannot be properly located in any such plat or is otherwise not practical” (Town Law § 274-a[6]; *Matter of Bayswater Realty & Capital Corp. v Planning Bd. of Town of Lewisboro*, 76 NY2d 460, *supra*; *Matter of Sepco Ventures v Planning Bd. of Town of Woodbury*, 230 AD2d 913, *supra*). Where a conventional subdivision plat is submitted, “such a determination requires an evaluation of the present and anticipated future needs for park and recreational facilities in the town based on projected population growth to which, of course, the particular subdivision development will contribute” (*Matter of Bayswater Realty & Capital Corp. v Planning Bd. of Town of Lewisboro*, 76 NY2d 460, *supra*). In making such a determination, a planning board “shall assess the size and suitability of lands shown on the site plan which could be possible locations for park or recreational facilities, as well as practical factors including whether there is a need for additional facilities in the immediate neighborhood” (Town Law § 274-a[6][c]). The decision of the Appellate Division in the instant matter confirms that a planning board may not condition site plan approval (or subdivision approval) on payment of money-in-lieu of recreation land unless the requisite findings are made and supported by the record (Rice, Practice Commentaries, McKinney’s Cons Laws of NY, Book 61, Town Law § 274-a, 2007 Pocket Part, at 114).

Notwithstanding the mandates of CPLR 7804(e) and the Order of the Court dated April 1, 2005 (Werner, J.), as well as the Appellate Division finding that the underlying record was insufficient, respondent’s answer failed to include certified transcripts of the proceedings under consideration herein. Respondent has submitted an *uncertified* transcript of the minutes of the Planning Board meeting held on November 4, 2004 relative to Section 3, and has failed to include any transcript of the minutes of the Planning Board meeting held on January 16, 2003 relative to Section 2. In view of the foregoing, respondent shall determine if the minutes of January 16, 2003 are extant. If the minutes of January 16, 2003 exist, respondent shall serve and file a certified copy of the transcript of the minutes of January 16, 2003, as well as a certified copy of the minutes of November 4, 2004, within sixty (60) days of service of the within decision and Order with notice of entry. If the minutes of January 16, 2003 do not exist, then the determination made therein with respect to the recreational fees assessed in connection with Section 2 must be annulled and the matter remitted to respondent for a *de novo* hearing and determination (see *Matter of Costantino v*

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Goord, 38 AD3d 657 [2007]; *Parkinson v New York State Dep't of Correctional Servs.*, 191 AD2d 635 [1993]; *Gittens v Sullivan*, 151 AD2d 481 [1989]; *Matter of Crudo v Fogg*, 69 AD2d 902 [1979]). Any such annulment would be without prejudice to a *de novo* hearing and a new determination if respondent be so advised (*Matter of Costantino v Goord*, 38 AD3d 657, *supra*; *Parkinson v New York State Dep't of Correctional Servs.*, 191 AD2d 635, *supra*).

Finally, despite petitioner's contentions, a review of the assessment on February 8, 2002 by the Planning Board of recreational fees in the amount of \$96,000.00 in connection with the approval of petitioner's site plan for "Section 1" of the condominium complex is not currently before the Court, as petitioner did not seek that affirmative relief within either notice of petition (see CPLR 7804[c]).

The foregoing constitutes the decision and Order of the Court.

Dated: July 31, 2007



HON. JOSEPH FARNETI
Acting Justice Supreme Court