

R&K Precision Autoworks, Inc. v Town of Riverhead
2007 NY Slip Op 32947(U)
September 12, 2007
Supreme Court, Suffolk County
Docket Number: 0005243/2005
Judge: Edward D. Burke
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MEMORANDUM **COPY**

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 9

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R & K PRECISION AUTOWORKS, INC., :

EDWARD D. BURKE, A.J.S.C.

By: ~~Burke, J.S.C.~~

Dated: September 27, 2007

Petitioner, :

Index No. 05-5243

Mot. Seq. # 001 - CDISPSUBJ

- against -

TOWN OF RIVERHEAD and TOWN BOARD
OF THE TOWN OF RIVERHEAD, :

Return Date: 4-5-05

Adjourned: 4-11-07

Respondent. :

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This Court stated in its prior order: "This hybrid proceeding arises out of the Town of Riverhead's (Town) amendment of its zoning map following its adoption of a comprehensive zoning plan. Petitioner alleges that it purchased the subject property, which is located on the southerly side of Sound Avenue by deed dated April 8, 1986. On July 7th and July 21st, 2003 public hearings were held on the draft of the Town of Riverhead Comprehensive Plan (Comprehensive Plan) and the draft Generic Environmental Impact Statement (GEIS). On October 21, 2003, a final GEIS was prepared and accepted. On November 3, 2003 the respondent, the Town Board of Riverhead (Board), approved Resolution 1175 which adopted the Findings Statement required by the State Environmental Quality Review Act (SEQRA) and, upon the adoption of the Findings Statement, adopted the Comprehensive Plan.

Under the Comprehensive Plan the petitioner's property, which was located in a commercial 'node' near the intersection of Sound Avenue and Roanoke Avenue, was zoned as 'Business CR (Rural Neighborhood Business)' (Exhibit D, Comprehensive Plan, Section 2.2). On November 5, 2003 the Board approved Resolution 1217 entitled 'PROCESSING OF NON-RESIDENTIAL APPLICATIONS['] which stated, *inter alia*, that the Board had adopted a Comprehensive Plan which would re-zone certain properties within the Town as well as make changes within existing zoning districts and that it was the Board's intent to adopt zoning that was consistent with the Comprehensive Plan 'within the next several months' (Notice of Petition, Exhibit E). On June 22, 2004 the Board, by Resolution 491A, amended Chapter 108, the section of the Riverhead Town Code entitled 'Zoning'.

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This Resolution adopted the text for a new zoning use district entitled 'Agricultural Protection Zone (APZ)' which was stated in the Resolution to be in conformance with the terms of the GEIS and Findings Statement prepared for the Comprehensive Plan. The geographical area subject to this zone did not include the petitioner's property.

On November 16, 2004, the Board adopted Resolution 1089 to resolve conflicting statements in the Comprehensive Plan by changing the geographical area of the newly created APZ district to include the part of the Roanoke commercial 'node' in which the petitioner's property was located. Resolution 1089 further states that although the amendment therein of the zoning map is considered a Type 1 action pursuant to SEQRA, no further SEQRA compliance is required since the adoption of Resolution 1089 is in conformance with the conditions and thresholds for such a resolution in the GEIS prepared for the Comprehensive Plan with the Findings Statement of November 3, 2003.

The gravamen of the petitioner's claim in this proceeding is that the Board's adoption of Resolution 1089 has adversely affected its ability to develop and use the property. The petitioner seeks in this hybrid action/proceeding a declaratory judgment annulling Resolution No. 1089 and judgment annulling any local law adopted in conjunction with Resolution No. 1089. The petitioner contends that Resolution No. 1089 should be annulled on the grounds that the State Environmental Quality Review Act (SEQRA) was violated because an environmental impact statement [EIS] was not prepared, that the Board violated Section 239-m of the General Municipal Law in failing to refer Resolution 1089 to the Suffolk County Planning Commission (Commission), that the re-zoning of the petitioner's property pursuant to Resolution 1089... violated Section 263 of the Town Law and that Resolution 1089 does not conform to the Comprehensive Plan" (S.F.O., dated December 29, 2005, Hon. Edward D. Burke, J.S.C.[footnotes one and two omitted from quoted material; bracketed material added]).¹

With regard to the petitioner's contention that the enactment of Resolution 1089 violated SEQRA because an EIS was not prepared, the respondents, in their prior motion raised the defenses that Resolution 1089 was not a Type 1 action and that, in any event, further compliance with SEQRA was not required pursuant to Town Law 272-a [8].² This Court found that there was no merit to the first defense in that the provisions of Resolution 1089 stated that it was a Type 1 action (S.F.O., dated December 29, 2005, Hon. Edward D. Burke, J.S.C.). Moreover, respondents have not raised this defense in their answer.

¹ For the purpose of judicial brevity this Court incorporated that portion of its prior order of December 29, 2005 which described the events leading up to this hybrid proceeding and summarized the petitioner's claim. In that prior order this Court granted the Town and Board's (respondents') motion to the extent it dismissed the petitioner's contention that Resolution 1089 did not conform to the provisions of the Comprehensive Plan.

² "Respondents specifically contend that their documentary evidence demonstrates that they complied with the SEQRA regulations in that, since the adoption of Resolution 1089 was not a Type 1 action, the preparation of an EIS was not required. Respondents contend, alternatively, that the documentary evidence demonstrates that, even if Resolution 1089 was a Type I action, further compliance with SEQRA was not required pursuant to Town Law 272-a [8]" (S.F.O., dated December 29, 2005, Hon. Edward D. Burke, J.S.C.).

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With regard to the second defense this Court held in its prior order “Town Law [§]272-a provides in part ‘A town comprehensive plan, and any amendment thereto, is subject to the provisions of the state environmental quality review act under article eight of the environmental conservation law and its implementing regulations. A town comprehensive plan may be designed to also serve as, or be accompanied by, a generic environmental impact statement pursuant to the state environmental quality review act statute and regulations. No further compliance with such law is required for subsequent site specific actions *that are in conformance with the conditions and thresholds established for such actions in the generic environmental impact statement and its findings*’ (Town Law § 272-a [8], [emphasis added]). The SEQRA regulations provide that GEIS’s and Findings Statements prepared in connection with comprehensive plans ‘should set forth specific conditions or criteria under which future actions will be undertaken or approved, including requirements for any subsequent SEQR compliance’ (6 NYCRR 617.10[c]) and that ‘no further SEQR compliance is required if a subsequent proposed action will be carried out in conformance with the conditions and thresholds established for such actions in the generic EIS or its findings statement’ (6 NYCRR 617.10[d][1]). Respondents contend that since Resolution 1089 was adopted in conformance with the GEIS and Findings Statement prepared for the Comprehensive Plan, no further compliance with SEQRA was required.

Resolution 1089 was, by its own terms, adopted to resolve a conflict in the language of the previously adopted Comprehensive Plan. Respondents have submitted in support of their motion a portion of the draft GEIS prepared for the Comprehensive Plan and the Findings Statement. Although these documents refer to the general objectives and goals of the Comprehensive Plan, neither of these submitted documents contain the requisite ‘conditions and thresholds’ governing subsequent corrective zoning actions such as Resolution 1089. Since the documentary evidence submitted is not sufficient to conclusively establish that respondents were relieved of further compliance with SEQRA pursuant to . . . [§]272-a of the Town Law, their motion to dismiss the petition pursuant to CPLR 3211[a][1] is denied” (S.F.O., dated December 29, 2005, Hon. Edward D. Burke, J.S.C. [citation and footnotes 5 and 6 deleted from quoted material; bracketed material added]).

Respondents, pursuant to CPLR 7804[e], have now submitted complete copies of the draft and final GEIS³ and Findings Statement as part of the record of the proceeding under consideration. Both the draft GEIS and Findings Statement contain a list of criteria under which future site-specific actions may be taken following adoption of the Comprehensive Plan. The Findings Statement also contains four “SEQR Thresholds”⁴ under which “all future development actions within the Town of Riverhead shall be undertaken...” (Record, Exhibit 21, Findings Statement, page 8). Respondents contend in their answer that their submission of these criteria and thresholds establishes that they are relieved from further compliance with SEQRA pursuant to Town Law §272-a. It is also clear from the provisions of Resolution 1089 that the respondents chose to proceed pursuant to the first of the “SEQR Thresholds” which relieves them of compliance with SEQRA if the subsequent proposed action is made in conformance with the conditions and thresholds in the GEIS and Findings Statement.

³ The final GEIS consists of the draft GEIS which is incorporated by reference (Record, Exhibit 17, page 5). Reference will be made to the draft GEIS unless specifically revised by the final GEIS.

⁴ These “SEQR Thresholds” consist of the four options in 6 NYCRR 617.10[d][1-4].

“The law is well settled that judicial review of a SEQRA determination is limited to determining whether the challenged determination was affected by an error of law or was arbitrary and capricious, an abuse of discretion, or was the product of a violation of lawful procedure” (*Village of Tarrytown v. Planning Board of Village of Sleepy Hollow*, 292 A.D.2d 617, 619, 741 N.Y.S.2d 44, 48 [2002], lv. den. 98 NY2d 609, 746 NYS2d 693). There must also be a literal compliance with SEQRA environmental review procedures and regulations (*Aldrich v Pattison*, 107 AD2d 258, 486 NYS2d 23 [1985]). Where, as here, the SEQRA regulations require that future actions emanating from the Comprehensive Plan comply with the conditions and thresholds for future site-specific proposals set forth in the GEIS and Findings Statement, the record must support the proposing agency’s determination that the action conforms to such criteria (*see, Haberman v City of Long Beach*, 307 AD2d 313, 762 NYS2d 425 [2003], app. dis. 1NY3d 535, 775 NYS2d 232, lv. app. den. 3 NY3d 601, 782 NYS2d 404, cert. dis. *Haberman v City of Long Beach*, N.Y., 543 US 1086, 1255 S.Ct. 1239, 160 L.ED.2d 896; *O’Donnell v Town of Schoharie*, 291 AD2d 739, 738 NYS2d 459 [2002]). Mere conclusory assertions that the proposed action has been carried out in conformance with conditions and thresholds, which are not supported by specific factual findings, are not sufficient for judicial review (*Price v County of Westchester*, 225 AD2d 217, 650 NYS2d 839 [1996]).

According to the draft GEIS one of the goals of the Comprehensive Plan is to establish [a] greenbelt of farmland and open space with a prosperous agricultural industry, where housing is clustered and open space permanently preserved” (Record, Exhibit 9, page 13). The draft GEIS describes the Land Use Plan as the “centerpiece” and “most basic element” of the Comprehensive Plan (Record, Exhibit 9, pages 14 and 23). The Transfer of Development Rights (TDR) program is an integral part of the land use portion of the Comprehensive Plan (Ibid. page 29). The final GEIS refers to the APZ as a new proposed zoning use district which is intended to implement the TDR program (Record, Exhibit 17, pages 6 and 13) as a “sending area” (Record, Exhibit 16, pages 6 and 13). Once the Comprehensive Plan is adopted the first implementation step is to update the Town’s zoning regulations.

While the record establishes that the creation of an APZ through subsequent zoning code amendment was an integral part of implementing the Comprehensive Plan, it does not establish that the respondents were relieved from their responsibility to assess the significance of the environmental impact of Resolution 1089 in the context of the criteria and thresholds set forth in the draft GEIS and Findings Statement (*see, O’Donnell v Town of Schoharie*, supra [short environmental assessment form supported determination that proposed project met conditions imposed in GEIS and Findings Statement]; FINAL Generic Environmental Impact Statement on the Proposed Amendments to the State Environmental Quality Review Act (SEQRA) Regulations, 6 NYCRR - Part 617, prepared by the NYS Department of Environmental Conservation, Division of Regulatory Services, accepted September 6, 1995)⁵. The draft GEIS refers to the potential for nitrogen loading in golf courses and agricultural areas (Record, Exhibit 9, pages 45, 46, 100, 101) and the final GEIS and Findings Statement refer to the potential for traffic difficulties at farm stand locations in the APZ (Record, Exhibit 17, page 17; Exhibit

⁵ The New York State Department of Environmental Conservation in its response to substantive comment on the proposed revision of section 617.10 stated, inter alia, that “[a]ctions following completion of the comprehensive plan/generic EIS will require review to determine consistency with the plan/generic” (page 82 [bracketed material and emphasis added])

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21, page 4). Since three of the preferred land uses in the APZ are agricultural production, golf courses and farm stands (Record, Exhibit 22, page 2-21), at least two of the criteria⁶ in the draft GEIS and Findings Statement required further analysis by the respondents. Moreover, the classification in the draft GEIS and Findings Statement of these criteria as “determinant” factors requires a reasoned factual elaboration of the basis for the Town’s assertion that Resolution 1089 “is being carried out in conformance with the conditions and thresholds established for such action in the Generic Environmental Impact Statement...and its Finding Statement on November 3, 2003” (Record, Exhibit 51, page 2).

The respondents’ failure to make such a reasoned factual elaboration precludes meaningful judicial review as to whether Resolution 1089 conforms to the conditions and thresholds in the GEIS and Findings Statement. This failure is magnified by the omission in the text of Resolution 1089 of any reference to the APZ.⁷ Accordingly, the petition is granted to the extent⁸ it is adjudged and declared that the amendments to the Town’s zoning code and map regarding the APZ, as authorized by Resolution 1089, are annulled.

Settle judgment

EDWARD D. BURKEA, J.S.C.

⁶ The “Traffic” criterion refers to “the amount of traffic generation” and the “Regulatory Compliance” criterion refers to “compliance with...nitrogen loading related both to residential development, *farmland preservation*...”. The respondents also failed to analyze the impact on the criterion entitled “Compatibility With Other Plans” which refers to “how the project relates to the Central Pine Barrens Land Use Management Plan, the Peconic Estuary Study, the Long Island Sound Study [and] other plans adopted by the Town of Riverhead” (Record, Exhibits 9, pages 104, 105 and Exhibit 21, pages 7, 8 [bracketed material and emphasis added])

⁷ The only reference in Resolution 1089 to the APZ is on an attached map of the petitioner’s property entitled “Map Amendment-Agricultural Protection (APZ) Zoning Use District” (Record, Exhibit 51)

⁸ As this Court noted in its previous decision the subject property in this proceeding was re-zoned in Resolution 1089 to be in an APZ district while the properties involved in the proceedings captioned “EMB Enterprises, LLC v Town of Riverhead and Town Board of the Town of Riverhead” (Index no. 04-29010) and “Boom Development Corp. v the Town of Riverhead...The Town Board of the Town of Riverhead” (Index no. 04-29192) were re-zoned in Resolution 1089 to be in an RB-80 district (see, S.F.O., dated December 29, 2005, Hon. Edward D. Burke, J.S.C., footnotes 3 and 4).