

EMB Enters. v Town of Riverhead

2007 NY Slip Op 33962(U)

December 4, 2007

Supreme Court, Suffolk County

Docket Number: 0029010/2004

Judge: Edward D. Burke

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**SUPREME COURT - STATE OF NEW YORK
IAS/TRIAL PART 9 - SUFFOLK COUNTY**

PRESENT:

Hon. EDWARD D. BURKE
Acting Justice of Supreme Court

Motion R/D : 01/18/05
Adj. Date : 10/24/07
Mot Seq # : 001 MG
SETTLE JUDGMENT

MEMORANDUM DECISION

-----X
EMB ENTERPRISES, LLC,

Petitioner(s)/Plaintiff(s),

- against -

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

Respondent(s)/Defendant(s).
-----X

PETER S. DANOWSKI, JR., ESQ.
Attorney for the Petitioner/Plaintiff
616 Roanoke Avenue, P.O. Box 779
Riverhead, New York 11901

DAWN C. THOMAS, ESQ.
Town Attorney - Town of Riverhead
By: MARY C. HARTILL, ESQ.
200 Howell Avenue
Riverhead, New York 11901

Petitioner commenced this hybrid action pursuant to CPLR 3001 and CPLR 7801, *et. seq.*, for a judgment declaring that the purported re-zoning of the petitioner's premises in November of 2004 by Resolution #1089 was invalid, illegal and a nullity. Petitioner further demands a judgment reversing and annulling the resolutions and other actions undertaken by the respondents in connection with the purported re-zoning of the petitioner's premises and a judgment directing that the respondent Town Board approve the petitioner's previously submitted site plan for development of its premises. Prior to the joinder of issue, the respondents moved to dismiss (#002) the petition. That motion was denied in part and granted in part by order of this court dated December 29, 2005. Petitioner's subsequent motion (#003) to reargue was granted by order dated March 7, 2007 wherein the respondent's prior motion to dismiss (#002) was denied in its entirety. Pursuant to a so-ordered stipulation of the parties dated August 27, 2007, issue was joined by the respondents' service and filing of their answer and return in September of 2007 and the petition was restored to the September 19, 2007 motion calendar of this court. After one (1) adjournment, the petition, answering papers and reply were marked submitted on October 24, 2007.

Review of the record adduced on the instant application reveals that the following material facts are not in dispute.

In October of 2003, the petitioner proposed the development of a 4.1 acre parcel of real property located on the northeast corner of Sound Avenue and Park Road by the construction of retail shops and a restaurant. In connection therewith, the petitioner submitted to the Planning Department of the Town of Riverhead an application for site plan approval. At the time of such submission, the subject premises were situated in a district zoned "Business CR" (Rural Neighborhood Business). The petitioner's proposal for development of the premises by the construction of retail shops and restaurant was consistent with the Business CR classification of the premises.

Within a week of the petitioner's submission of its site plan application, the respondent Town Board, by resolution dated November 3, 2003, adopted a new Comprehensive Plan for the development and re-zoning of the Town of Riverhead. The respondent Board also issued Finding Statements predicated upon the final Generic Environmental Impact Statement (GEIS) which had been adopted on October 21, 2003 in connection with the development of the Comprehensive Plan as required by the State Environmental Quality Review Act (SEQRA). Under the terms of the Comprehensive Plan adopted on November 3, 2003, the petitioner's premises were to retain a zoning classification of consistent with the petitioner's proposed development plan.

Two (2) days after the adoption of the Comprehensive Plan, the respondent Town Board, by Resolution #1217 dated November 5, 2003, adopted an interim measure designed to provide for the continued processing of non-residential development plans pending the adoption of legislative amendments to the zoning code purportedly necessitated by the terms of the newly adopted Comprehensive Plan. Pursuant to Resolution #1217, development plans for non-residential property that were consistent with existing zoning classifications would be processed by the Town, notwithstanding that said development plans were likely to be inconsistent with anticipated amendments to the zoning code purportedly dictated by the terms of the newly adopted Comprehensive Plan.

Although the petitioner's October 30, 2003 site plan application was consistent with both the existing zoning classification of the parcel and with the zoning classification called for by the terms of the Comprehensive Plan, said application languished (due, in part, to modifications made by the petitioner) in the Planning Department from the date of its submission in October of 2003 until July 20, 2004. On that date, the respondent Town Board adopted a resolution (#674) declaring itself to be the lead agency under SEQRA for the petitioner's project and a related project on a separate parcel situated across the street from the petitioner's parcel. The respondent Town Board also issued a positive Declaration of Environmental Significance pursuant to 6 NYCRR Part 617 of the regulation promulgated pursuant to SEQRA and mandated by preparation of a Draft Generic Environmental Impact Statement in connection with the proposed development of both corners of the north side of Sound Avenue at its intersection with Park Road.

Prior to the issuance of the July 20, 2004 Positive Declaration by the respondent Town Board, said Board, by Resolution #496A dated June 22, 2004, enacted local law No. 18 which amended the existing zoning code so as to include a new zoning classification entitled Residence B-80. The geographical area subject to this new zone did not include the petitioner's property. However, by Resolution #1089, adopted on November 16, 2004, the respondent Town Board expanded the geographical area of the newly created Residence B-80 zoning district to include the petitioner's

property. No further SEQRA proceedings were undertaken by the respondent Town Board in connection with its adoption of Resolution #1089 as the respondent Town Board found that the expansion of zoning district Residence B-80 was consistent with the conditions and thresholds set forth in the GEIS that was prepared in connection with the Comprehensive Plan and the SEQRA findings statement issued on November 3, 2003.

Seeking, *inter alia*, a judicial declaration that Resolution #1089 adopted by the respondent Town Board on November 16, 2004 is invalid and a judicial directive compelling the respondent Board to approve its site plan application first filed in October of 2003, the petitioner commenced this hybrid declaratory judgment/Article 78 proceeding. Petitioner claims that the respondent Board unduly delayed determination of the petitioner's site plan in order to effect a change in the zoning classification of the petitioner's property from Business CR to Residence B-80, which change rendered the petitioner's previously conforming site development plan nonconforming. Additionally, the petitioner asserts that the respondent Board's adoption of Resolution #1089, which effected the zone change of petitioner's parcel from Business CR to Residence B-80, is invalid because: 1) it effected a change in the zoning classification of the petitioner's property that was inconsistent with the Comprehensive Plan adopted on November 3, 2003; 2) it was enacted without the environmental review mandated by SEQRA; and 3) that the respondents failed to refer same to the Suffolk County Planning Commission. To the extent set forth below, the petition is granted.

Town Law §263 and §272-a mandate that zoning ordinances be made in accordance with a comprehensive plan. Where, as here, a town adopts a Comprehensive Plan of the type contemplated by Town Law §272-a and thereafter re-zones parcels of land in a manner inconsistent with the previously adopted Comprehensive Plan, the re-zoning enactment is subject to nullification on the grounds that it violates the mandate of the above cited provisions of the Town Law (*Udell v Haas*, 21 NY2d 463, 288 NYS2d 888; *Osiecki v Town of Huntington*, 170 AD2d 490, 565 NYS2d 564; *Los-Green, Inc. v Weber*, 156 AD2d 994, 548 NYS2d 832; *Curtiss-Wright Corp. v Town of East Hampton*, 82 AD2d 551, 442 NYS2d 125; *Northeastern Environmental Developers v Town of Colonie*, 72 AD2d 881, 422 NYS2d 144; *DeSena v Gulde*, 24 AD2d 165, 265 NYS2d 239). While the courts have recognized that the zoning process, being dynamic rather than static, may reflect changing conditions in the community by the adoption of zoning amendments that appear to conflict with the Comprehensive Plan, said amendments will be subject to nullification unless some reasonable justification or planning rationale is established (*Town of Bedford v Village of Mount Kisco*, 233 NY2d 178, 351 NYS2d 129, *see, also, Lazore v Board of Trustees of Village of Massena*, 191 AD2d 764, 594 NYS2d 400; *see, also, Tilles Investment Co. v Town of Huntington*, 74 NY2d 885, 547 NYS2d 835). Zoning amendments which reflect defacto changes in development and growth patterns which deviate from a long-established, amorphous Comprehensive Plan will be sustained provided that such amendments are calculated to benefit the community as a whole (*Asian Americans for Equality v Koch*, 72 NY2d 121, 531 NYS2d 782; *Kravets v Plenge*, 84 AD2d 422, 430 NYS2d 807). Where, however, a municipality undertakes an exhaustive study of its current zoning requirements and adopts a cogent, Comprehensive Plan based thereon, legislative amendments that conflict with the recently enacted Comprehensive Plan will be annulled (*DeSena v Gulde, supra; see, also, Osiecki v Town of Huntington, supra; Reushenberg v Town of Huntington*, 143 AD2d 265, 532 NYS2d 148).

That the re-zoning of the petitioner's parcel by Resolution #1089 effected a change in the zoning classification of said parcel that was inconsistent with the Comprehensive Plan adopted in November of 2003 is clear beyond *per adventure*. Since no valid justification nor planning rationale on the part of the respondents is discernible from the record, Resolution #1089 is hereby declared null and void with respect to the petitioner's parcel as violative of §263 and §272-a (11) of the Town Code¹.

The court also finds that the challenged resolution (#1089) is invalid by reason of the respondents' failure to assess, in the manner required by SEQRA, the significance of the environmental impacts that said resolution would have upon the community at large. The regulatory framework of SEQRA requires that a GEIS and the Finding Statement prepared in connection with a Comprehensive Plan set forth specific conditions or criteria under which future action might be undertaken or approved, including requirements for any subsequent SEQRA compliance (6 NYCRR 617.10[c]). No further SEQRA compliance is required if a subsequent proposed action will be carried out in accordance with the conditions and thresholds established for such action in the GEIS or its Findings Statement (6 NYCRR 617.10[d][1]).

The respondent Town Board found that Resolution 1089 was a Type I action but that no further SEQRA compliance was required because said resolution was in conformity with the conditions and thresholds set forth in the October 21, 2003 final GEIS and the SEQRA Findings Statement adopted by the respondent Town Board in connection with its adoption of the Comprehensive Plan on November 3, 2003. However, this finding is unsupported by the record and is thus subject to nullification by this court as violative of SEQRA. Neither the draft GEIS (respondents' Exhibit 4), the final GEIS (respondents' Exhibit 14), nor the Findings Statement (respondents' Exhibit 21) contain the requisite conditions and thresholds concerning subsequent amendatory zoning actions necessary to support the respondent Board's finding that no further SEQRA compliance was necessary as contemplated by 6 NYCRR 617.10(d)(1). Indeed, the respondents' answer does not contain any citation to any condition, criteria or threshold set forth in either the final GEIS or the November 3, 2003 SEQRA Findings Statement attached as Exhibit 21 of the respondents' return that supports the respondents' claims that the Board properly concluded that no further SEQRA compliance was required for the adoption of Resolution #1089. The respondents' conclusory assertions that its November 3, 2004 SEQRA Findings Statement "specifically includes criteria under which future actions may be taken under the Town of Riverhead Comprehensive Plan" are without support in the record².

The petitioner's claim that the Resolution #1089 is null and void by reason of the respondents' failure to forward same to the Suffolk County Planning Commission prior to its adoption is also found to be meritorious. Such claims were not disputed by the respondents' in the

¹This court previously found that a similar resolution, numbered 1086 (also adopted on November 16, 2004), was inconsistent with the newly enacted Comprehensive Plan (see, *Zoumas v Town of Riverhead, et. al.*, Index No. 007155/2005, short form order dated 10/18/06 [Burke, J.]

²This court previously held that Resolution #1089 was invalid due to the petitioner's failure to comply with SEQRA and its regulatory framework (*R&K Precision v Town of Riverhead, et. ano.*, Index No. 005243/2005, decision dated 09/12/07 [Burke, J.]

answer served and filed in response to the petition/complaint and the submissions contained in the respondents' return do not establish the respondents' compliance with the referral requirements set forth in General Municipal Law §239-m.

In view of the foregoing, Resolution #1089 is hereby annulled as violative of Town Law §263 and §2729a)(11), violative of the mandate for environmental review imposed upon zoning amendments by SEQRA and its regulatory framework at 6 NYCRR Part 617 and violative of the referral requirements of General Municipal Law §239-m. The effect of this judicial annulment of said resolution, which is hereby limited in its application to the petitioner's premises, is to restore said premises to their pre-amendment status. This matter is remitted to the Town Board of the Town of Riverhead which shall, within one hundred twenty (120) days from the date of this decision, re-zone of record, the plaintiff's property, in its entirety, in a manner consistent with the Business CR zoning classification so as to permit development of said premises in accordance with the petitioner's final site plan application, which application, is hereby deemed approved subject to its filing by the petitioner and its recording by the respondents.

Settle Judgment.

Dated: December 4 , 2007.



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