MEMORANDUM

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 SUFFOLK COUNTY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

In the Matter of the Application of Pittelli Development, Inc. and Parsonage Road Properties, Ltd.,

Petitioner,

Pursuant to Article 78 of the Civil Practice Law and Rules

-against-

Brian X. Foley, Supervisor, Steve-Fiore Rosenfeld, Jane Bonner, Kathleen Walsh, Connie Kepert, Timothy Mazzei, Keith Romaine, constituting the Town Board of Town of Brookhaven, David W. Woods, Chairman of The Department of Planning, Environment and Land Management of The Town of Brookhaven and The Town of Brookhaven,

Respondents.

Motion Sequence No.: 002; MOT. D
Motion Date: 6/12/08
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Index No.: 14540/2008

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In this hybrid action/proceeding pursuant to CPLR Article 78, petitioners seek judgment, *inter alia*, setting aside the conditional negative declaration, which is dated April 10, 2008, made by the respondent The Town Board of The Town of Brookhaven (the "Town Board") and granting related relief. The respondents oppose the application.

The petitioner Parsonage Road Properties, Ltd. ("Parsonage") is the owner of and the petitioner Pittelli Development, Inc. ("Pittelli") the developer of a 4.75 acre parcel of real property at Parsonage Road 231 feet east of Peters Path in East Setauket, Town of Brookhaven, Suffolk County, New York ("the property"). Initially Pittelli owned the property then transferred it to Parsonage. At the time Pittelli acquired the property in 1996, the remains of a residence and barn were present on it. The property lies in the A-1 Residence District of the respondent Town of

Brookhaven ("Town") and is surrounded by lots improved by single family residences, which is a permitted use in the A-1 District.

In 1997 Pittelli filed an application for a four lot subdivision of the property. The 1997 application was considered by the Board of Zoning Appeals of the Town of Brookhaven (the "Zoning Board") which was designated as a lead agency pursuant to the New York State Environmental Quality Review Act ("SEQRA"). The 1997 application was identified as an "unlisted" SEQRA action (petition ¶27) and was heard on October 20, 1999 by the Zoning Board, which on that date issued a negative declaration pursuant to SEQRA (subject to certain requirements of the Town of Brookhaven's Department of Planning, Environment and Development ("PED")) and granted subdivision approval (subject to the filing of certain covenants and restrictions on the property). The Zoning Board's October 20, 1999 determination was reflected in its letter to Pittelli dated October 21, 1999. On August 14, 2000 Pittelli filed the covenants and restrictions. The one acre lots/parcels which would result from the 1999 subdivision approval would contrast with the surrounding residential parcels which are generally one half acre in size.

Pittelli applied for building permits for each of the four parcels resulting from the subdivision, each for a single family residence. Pursuant to the building permit applications and the requirements of PED, a hydrological study was made and submitted by Pittelli's consultant Reissig Land Surveying & Engineering, P.C. ("Reissig") which addressed the issues of perched water sources on the property and its suitability for development and construction of septic systems; in summary, Reissig concluded - in 2001 - that with implementation of its proposed design and construction techniques for sanitary systems, the four proposed parcels "can provide the necessary sanitary facilities . . ." (see petition ¶33). It is alleged in the petition that, several months after the building permit applications were filed, PED advised Pittelli its file had been removed by a Town employee and "lost" (petition ¶39), whereupon Pittelli refiled its entire application, and that its file was subsequently lost (in whole or part) by the PED two more times (that is, petitioner was required to submit the building applications four times); aside from generally denying knowledge or information as to such circumstances in their answer, respondents offer no evidence as to this alleged aspect of the history of the petitioners' "file" in its possession to explain the alleged repetitive loses thereof.

In 2005, approval of the four homes to be built on the four lots resulting from the subdivision was given by The Town of Brookhaven Historic District Advisory Committee, the Suffolk County Health Department, The Town of Brookhaven Building Department and The Town of Brookhaven Department of Environmental Protection, Planning and Development. Although denied, the petitioners allege (at ¶50 of the petition) that in the same year, 2005, The Town of Brookhaven "again approved Pittelli's (4) lot subdivision" (petition ¶50). Also in 2005 (in August), petitioner was issued a demolition permit.

In January, 2006 a stop work order was issued by the Town at a time when petitioners allegedly were clearing debris at the property. At the ensuing meeting between petitioners' representative and "numerous town department personnel" (petition ¶52), petitioner was told it was required to obtain a wetlands permit, which it applied for in September 2006 (apparently reserving all rights to contend that their application was in effect grandfathered out of the operation of the Wetlands Overlay District). The Town Board sought and was granted lead agency status pursuant to SEQRA (notwithstanding that the Zoning Board had been in that status upon the 1999 application) and insisted that Pittelli undergo a further SEQRA review "relating to the Wetlands Overlay District" (petition ¶54). In October, 2006, Pittelli filed an Environmental Assessment Form ("EAF"); notwithstanding its position that it was grandfathered by the earlier (1999) subdivision approval which preceded the 2003 enactment of the Town's Wetland Overlay District, Pittelli redesigned its subdivision - in the context of the Wetlands application - to provide a buffer zone between proposed structures and the wetlands and, on March 5, 2007, its wetlands application was deemed complete by the Town (petition ¶57, answer ¶s 1 - 3). Thereafter, the DEP requested change(s) to increase the buffer zone for one lot, whereupon Pittelli revised its plans. Public hearings on the application for a wetlands permit were held on May 2, 2007 and June 19, 2007; the application was held open upon the hearings' conclusion.

The Town Board issued a preliminary decision on February 5, 2008 indicating that a conditional negative declaration would be its determination. The February 5, 2008 resolution (return exhibit "HH") stated, in relevant part, as follows:

> **REASONS SUPPORTING THIS DETERMINATION**
>
> The Town Board of the Town of Brookhaven, upon reviewing the wetlands application in accordance with SEQR Part 617.3 & 617.6, using the information available and comparing it with the thresholds set forth in section 617.4, has determined that this project is a(n) **Unlisted Action** and a coordinated review for Unlisted Actions involving more than one agency has been completed as set forth in 617.6(b).
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> Studies such as but not limited to: the Long Island Regional Planning Board's 1978 Long Island Comprehensive Waste Treatment Management Plan (208Study), the Long Island Regional Planning Board's 1986 Special Groundwater Protection Area Project (205j Study), the Long Island Regional Planning Board's 1982 Long Island Segment of the Nationwide Urban Runoff Program (NURPS), the Town of Brookhaven's Brookhaven Open Space Study, and the Town of Brookhaven's 1987 Land Use Plan, were utilized to assess the project's potential site specific and cumulative groundwater and land use impacts.

The Town Board after review and analysis of the above, the EAF, the criteria contained in section 617.7 and any other supporting information identifying the relevant areas of environmental concern finds that this action is not anticipated to have a significant effect upon the environment provided that the project impacts are mitigated as specified by the attachment hereto.

This project will confirm to development regulations of the of the Town of Brookhaven, the Suffolk County Department of Health Services and any other involved agency. Site-specific impacts have been mitigated through a reduction in the number of lots, expansion of the buffer areas, proper grading and drainage practices and the design of sanitary facilities in conformance to the current rules and regulations.

Due to the project scope, design and surrounding area characteristics, no significant impacts are expected to occur as a result of the project on local air quality, agricultural land resources, aesthetic resources, historic and archaeological resources, endangered species, open space and recreation, transportation, energy, noise and/or odor impacts, public health or growth and character of the community.

A small to moderate impact upon the land and locally occurring plants and animal was identified in the review of this project. Clearing, grading and construction activities will have an impact upon the land and the local indigenous species. The construction activities and the associated landscaping around the residential structures will alter the existing indigenous vegetation. Past activities on the site have caused the removal of some of the proposed wetlands buffers. This area will be required to be replanted with both trees and shrubs. It is expected the local indigenous species that are tolerant of human activity and that were displaced by some of the past clearing activities will move back into the area after the construction activities are terminated.

A small to moderate impact upon surface water and groundwater was identified in the review of this project. Sanitary flow will be directed into on site sanitary systems constructed in conformance to the Suffolk County Department of Health Services.

The surface and subsurface geology in the western part (proposed parcels #3 and #4) of the subject property indicates the presence of a significant amount of silt and clay in the form of layers or lenses. These appear to serve as confining layers retarding the downward movement of water recharged at the surface. These surface

and subsurface conditions are reflected by visible standing water and the presence of water in three of the eleven soil borings contained in the applicants survey for the site.

MITIGATION MEASURES IMPOSED BY THE CONDITIONAL NEGATIVE DECLARATION:

In order to reduce the potential impacts of flooding to the adjacent wetlands and surrounding residential structures, caused by the unusual surface and subsurface geology, the total number of lots shall be reduced from four to two. Moreover, the two building lots will be constructed on the eastern portion of the subject property where soil borings indicate no standing water and a confining layer or lens will not impede that vertical percolation of stormwater and wastewater.

The Lead Agency shall accept comments on this Conditional Negative Declaration for a period of 30 days after the publication of this notice in the ENB.

Petitioners allege that this conditional negative declaration was in essence contrary to the Town Board's position at all times prior to the hearing, to wit, that the proposed action (four lot subdivision) would not have a significant effect on the environment and that the project should be issued a negative declaration, and that it was contrary to the Zoning Board's 1999 determination (when it was lead agency in the context of the 1997 subdivision application).

Paragraph 64 of the instant petition alleges and it is not controverted that the Town Board was required to evaluate the factors set forth in §81-11(E) and (F) of the Code of the Town of Brookhaven [governing wetlands permit applications] and that a review of these factors and the evidence submitted at the hearings "clearly demonstrats [sic] that any restriction upon development lacked sufficient basis in the evidence submitted at these hearings" (petition ¶64).

The final determination of the Board on the petitioners' wetlands application was issued in a resolution dated April 10, 2008 (see return exhibit "HH") which determined, in substance, that the project be issued a conditional negative declaration.

In their petition to this Court, petitioners allege in their four causes of action as follows: (1) that respondents' determination was arbitrary, capricious and contrary to law and ignores SEQRA requirements and that "an unconditional negative declaration permitting development of all four lots of the subdivision is warranted" (petition ¶78); (2) that they are entitled to a judgment declaring the conditional negative declaration null and void in that the determination of the Town Board, in declaring itself lead agency to review the Wetlands Permit application of Pittelli pursuant to SEQRA,

in place and instead of the Zoning Board which had previously been declared lead agency, and the subsequent determination of the Town Board to disregard the prior negative declaration and issue a conditional negative declaration prohibiting the development of two of the four lots (lots 3 and 4) is arbitrary and capricious and violates principles of administrative res judicata; (3) that by reason of vested rights acquired pursuant to the Zoning Board's 1999 decision granting approval for a four lot subdivision, Pittelli is not subject to the Wetlands Overlay Ordinance (petition ¶85); and (4) that the actions of the Town Board, in acting to declare itself lead agency and issuing a conditional negative declaration under SEQRA, are not consistent with the prior rulings of the Zoning Board, that the finding of the Zoning Board declaring the four home subdivision to have no significant environmental impacts constitutes a precedent upon the Town Board and its constituent agencies which participated in the SEQRA review process with the Zoning Board, and that, because the Wetlands Permit application is substantially similar to the prior application for subdivision approval, the finding of no significant environmental impact constitutes a precedent to which the respondent Town of Brookhaven is and should be held (petition ¶s 91-93). The respondents filed an answer and the return on July 22, 2008; on August 15, 2008, the petitioners filed a memorandum of law. This proceeding was deemed finally submitted on August 20, 2008.

In 2007, the Court of Appeals decided Riverkeeper, Inc. v. Planning Board of Southeast, 9 NY3d 219 [2007]. In discussing one of the two applications before it in Riverkeeper, to wit, Ingraham v. Planning Board of Town of Southeast, the Court observed, in relevant part, as follows:

> Judicial review of an agency determination under SEQRA is limited to "whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination" [citations omitted] . . . It is not the province of the courts to second-guess thoughtful agency decisionmaking and, accordingly, an agency decision should be annulled only if it is arbitrary, capricious or unsupported by the evidence. The lead agency, after all, has the responsibility to comb through reports, analyses and other documents before making a determination; it is not for a reviewing court to duplicate these efforts. As we have repeatedly stated, "[w]hile judicial review must be meaningful, the courts may not substitute their judgment for that of the agency for it is not their role to 'weight the desirability of any action or [to] choose among alternatives' [citations omitted]."

The determination under review by which the Board made a conditional negative declaration, including reduction from 4 lots to 2 of petitioners' proposed development (subdivision), is not supported by substantial evidence in the record and, in fact, there is substantial evidence that the environmental concerns and issues attendant to the proposed four lot subdivision and petitioners' wetlands application arising therefrom were eminently remediable by the alternative drainage and run off options identified by petitioners' experts Reissig and Soil Mechanics Drilling Corp. and acknowledged implicitly in the testimony of John Turner, Director of DEP. Moreover, the

determination under review dated April 10, 2008 is not rational and it is arbitrary and capricious in light of the fact that the proof before the Board clearly indicated that the water runoff and flooding concerns relating to, *inter alia*, certain perched water conditions identified in portions of the property (prior to the Zoning Board's 1999 negative declaration) were able to be addressed by measures far less onerous upon the petitioners' use of the property than the condition arbitrarily imposed by the Board in the form of the condition of 2 rather than 4 lots - in its conditional negative declaration of April 10, 2008. Additionally, the "reasoned elaboration" which is required to support a determination, such as that under review herein, by Riverkeeper and the cases cited therein (including Jackson v. New York State Urban Dev. Corp., 67 NY2d 400 [1986]) and by numerous decisions of the courts of this State is not contained in the Board's determination dated April 10, 2008; it is self evident that the proof in the record before the Board, the great weight of which warrants and compels a determination which would not so restrict petitioners' use of the property, accounts for the absence of the reasoned elaboration in the Board's April 10, 2008 determination. Moreover, as noted *supra*, the allegation in ¶64 of the instant petition that "[i]n considering Pittelli's application, the Town Board was required to evaluate the factors set forth in §81-11(E) and (F) of the Code of the Town of Brookhaven . . .[and that] . . . [a] review of these factors and the evidence submitted at the hearings clearly demonstrates that any restriction upon development lacked sufficient basis in the evidence submitted at these hearings" is not denied in respondents' answer.

Based on the foregoing, the petition is granted, the April 10, 2008 determination appealed from is annulled and the matter is remitted to the Board for issuance of a negative declaration consistent therewith.

Settle judgment (see, 22 NYCRR §202.48).

Dated: December 12, 2008

William B Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.