

**Coalition to Save Cedar Hill v Planning Bd. of
Inc. Vil. of Port Jefferson**

2009 NY Slip Op 30324(U)

January 22, 2009

Supreme Court, Suffolk County

Docket Number: 32344-2008

Judge: Emily Pines

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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 23, SUFFOLK COUNTY

Present:

HON. EMILY PINES
J. S. C.

Original Motion Date: 09-26-2008
Motion Submit Date: 11-13-2008
Motion Sequence No's.: 001 MD

CASEDISP

COALITION TO SAVE CEDAR HILL, LINDA M. WICKS, KATHLEEN MATTHEWS, TIMOTHY MORAN, JESSICA GIOVACHINO, and THOMAS SIMKO, as members and in their Individual Capacities,

Petitioners,

-against-

PLANNING BOARD OF THE INCORPORATED VILLAGE OF PORT JEFFERSON, and LIBERTY MEADOWS, LLC,

Respondents.

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BACKGROUND

This is an Article 78 proceeding challenging the resolution of the Planning Board of the Incorporated Village of Port Jefferson ("Planning Board") which approved the final clustered 43 unit residential subdivision of Respondent Liberty Meadows, LLC ("Liberty Meadows") known as Village Vistas. This is the third Article 78 proceeding arising out of actions taken by the Planning Board in conjunction with Liberty Meadows' application. Initially, petitioners commenced an Article 78 proceeding challenging the Planning Board's preliminary approval of the Village Vistas subdivision. The Court (PINES, J.) by Order dated September 29, 2006, dismissed the Petition based upon lack of jurisdiction over certain owners of the property where the proposed subdivision was located, and the time to obtain jurisdiction had expired. The Appellate Division has affirmed the Court's determination dismissing the Petition on the ground of lack of jurisdiction over a necessary party, and the Court of Appeals denied leave to appeal.

Thereafter, on or about December 14, 2006, the Planning Board granted Liberty Meadows final subdivision approval for the Village Vistas project and petitioners commenced the second Article 78 proceeding challenging the final approval. Although petitioners asserted numerous legal arguments in support of their challenge to the final subdivision approval, the Court (PINES, J.) rejected all of petitioners' claims, save one. Specifically, the Court, by Decision and

Judgment dated April 2, 2008, ruled that the Planning Board failed to comply with the provisions of the Village Code when it effectively waived the requirement of a recharge basin for the Village Vistas subject. The Court agreed with petitioners that the plain language of Village Code, §220-27(F)(1) required a storm water recharge basin because the tributary area for the project was eight acres or more and that if the Planning Board elected to waive this requirement and permit the use of a system of leaching pools instead, it could do so if it followed certain procedures. The Village Board, could, pursuant to Village Code §220-12, waive the requirement of a storm water recharge basin if it entered “upon its records the reason or reasons why the particular improvement is not necessary and attach appropriate conditions or require such guarantees as may be necessary to protect the public interest.” Therefore, the Court annulled the Planning Board’s determination and remanded the matter for further proceedings.

In reaching its determination, the Court found that the decisions of the Planning Board had a rational basis, with the exception of the waiver of the requirement of a recharge basin. Although the Court presumes the parties’ familiarity with its earlier decisions, in light of the instant Article 78 proceeding, certain of the Court’s earlier rulings must be mentioned herein. Specifically, with regard to drainage facilities, in the second Article 78 proceeding, the parties disagreed as to the requirements of the Village Code with regard to the required capacity for any drainage structures built on the subject project. Petitioners argued that the Village Code §220-27B requirement that any drainage structure must be large enough to accommodate anticipated run-off from a ten-year storm, mandated that such drainage structure had to have a 5" anticipated capacity. Respondents argued however, based upon the opinion of their engineer, that the leaching pools as proposed could handle run-off from a ten-year storm, taking into consideration that the leaching pools not only collect and store the rain, but also drain the water, so that the water that has already been collected is draining while other water is collected. On this issue, the Court accepted the interpretation of respondents’ engineer regarding the meaning of the drainage capacity capable to handle run-off from a ten-year storm and found that the Planning Board determination in this regard had a rational basis.

Additionally, in the second Article 78 proceeding, petitioners sought to compel the Planning Board to rescind the declaration issued under the State Environmental Quality Review Act (“SEQRA”) and adopted prior to the preliminary subdivision approval on March 29, 2006 and direct that the Planning Board prepare a Draft Environmental Impact Statement (“DEIS”) before any further action was taken on the application. The Court denied this application as well, agreeing with respondents’ expert that “no changes to the project, no changed circumstances and no new information” (between the time of the preliminary and final subdivision approval) required the Planning Board to rescind the negative declaration that preceded the preliminary subdivision approval. *Citing, 6 N.Y.C.R.R. §617.7(f); Matter of Cowan v. Kern*, 41 N.Y.2d 591, 394 N.Y.S.2d 579, 363 N.E.2d 305 (1977). Here, the Court found that the representations by respondents’ experts that Part II of the Environmental

Assessment Form addressed the storm water containment had a rational basis and thus, declined to annul the Planning Board determination based upon the failure to rescind the negative declaration.

THE SUBJECT PETITION

Subsequent to this Court's Decision and Judgment, by resolution dated July 24, 2008, the Planning Board once again voted unanimously to approve the Village Vistas subdivision. In that resolution, the Planning Board specifically waived the requirement for a recharge basin finding that "a system of localized leaching pools would not adversely impact public health, safety or the general welfare of the community and such system will be more desirable to the purpose of collecting stormwater runoff than a recharge basin would be." Moreover, the Planning Board stated that "a system of localized leaching pools is more in keeping with the design objectives of a cluster subdivision, which is to preserve open space and protect the hilly terrain." Thus, the Planning Board issued final subdivision approval, specifically waiving the requirements for a recharge basin and petitioners commenced the within Article 78 proceeding challenging said determination.

Petitioners now seek a declaration pursuant to CPLR §§7803(1) and 7803(3) that the July 24, 2008 resolution of the Planning Board approving the final clustered subdivision of Liberty Meadows is null and void because (1) the Planning Board failed to comply with Village Code §220-12 before it waived the Village Code requirements pertaining to the means of providing for storm water runoff collection, and the size of the rain storm said system must be designed to meet; (2) the Planning Board violated the Open Meetings Law, or in the alternative, failed to exercise any discretion although they were obligated to do so; and (3) the Planning Board failed to consider whether the previously adopted SEQRA negative declaration should have been rescinded. Petitioners seek an Order and Judgment remanding the matter to the Planning Board and requiring that Liberty Meadows submit revised drainage plans and requiring the Planning Board to consider whether the waiver of the drainage requirements of the Village Code will have a significant adverse impact on the environment.

STANDARD OF REVIEW

In a proceeding brought pursuant to CPLR Article 78, the Court's role is limited as proscribed by §7803. As relevant to this case, the question to be raised is "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion...". *CPLR §7803(3)*. Where the determination by the municipal agency has a rational basis, it should be sustained upon judicial review.

Greenfield v. Board of Appeals of Village of Massapequa Park, 21 A.D.3d 556, 800 N.Y.S.2d 728 (2d Dept. 2005); *Ram v. Town of Islip*, 21 A.D.3d 493, 801 N.Y.S.2d 40 (2d Dept.2005). The Court may not substitute its judgment for that of the board unless the determination is arbitrary and capricious or an abuse of discretion. *Gillen v. Smithtown Library Board of Trustees*, 254 A.D.2d 486, 679 N.Y.S.2d 634 (2d Dept. 1998).

DRAINAGE

In the first cause of action, Petitioners argue that the Planning Board failed to comply with the requirements of Village Code §220-12 when it waived certain drainage system requirements. Here, Petitioners mount a two-pronged attack; they challenge both the waiver of the requirement for a stormwater recharge basin and also the capacity of the system permitted by the Planning Board. Petitioners assert that the Planning Board failed to address the issue of the capacity of the drainage structures required to be constructed when it approved a plan permitting drainage facilities only capable of handling rain from a 3" storm. Petitioners argue that even if the Planning Board properly waived the requirement for a recharge basin (as it was directed to do in the Court's prior Judgment), it still failed to address the capacity of the alternative drainage structure. That is, pursuant to 220-27(F), according to Petitioners, the drainage system must be able to hold run-off from a ten-year storm. Here, Petitioners claim, that the Village Engineer merely required that the drainage system must be able to meet the capacity from a 3" storm, and not a 6" storm as required for a recharge basin or even a 5" storm. Petitioners state that they presented evidence to the Planning Board that more than 5" of rain fell during a 24-hour period while the application was under consideration, and the Planning Board ignored such information. Petitioners additionally assert that the Planning Board's conclusion that the use of leaching pools would not adversely impact public health, safety or the general welfare of the community and would be more desirable than a recharge basin, is without any support in the record, in that the Planning Board never considered whether a 3" capacity would be as protective of the public health, safety or general welfare as a larger capacity system.

Respondent Planning Board submits a Verified Answer an Affidavit of Village Engineer Kevin Koubek ("Koubek"), and an Affidavit from Robert Juliano ("Juliano"), Village Administrator, in opposition to the Petition. Respondent Liberty Meadows submits a Verified Answer with Objections in Point of Law and Memorandum of Law in opposition to the Petition. Liberty Meadows also submits the Affidavit from their engineer, Victor Bert ("Bert") which was submitted on the prior Article 78 proceeding. Koubek states that petitioners' claim that a 6" runoff capacity is required is erroneous because such is mandated only for a recharge basin pursuant to Village Code §220-F(2) and not for a system of leaching pools as approved in this case. Moreover, Bert stated in his Affidavit, which was part of the prior proceeding, that the drainage structures depicted on the sealed plans submitted to the Planning Board are capable of dealing with a 10-year storm rainfall of 5" over 24 hours and thus, complies with the Village

Code requirements of §220-27B.

Recharge Basin

In the July 24, 2008 resolution approving the subdivision, the Planning Board incorporated the memorandum, dated June 27, 2008, by Village Engineer Koubek, which was prepared by Koubek in response to a June 20, 2008 request by the Planning Board.¹ Koubek stated, in part, that pursuant to Village Code §220-27, the Planning Board must incorporate a recharge basin in a project whenever it is determined that a drainage problem exists; however, he opines that in this case, “storm water control and retention maybe obtained...through the use of localized storm water leaching pools.” Koubek further stated in his memorandum that “The village has had success in utilizing leaching pools for storm water control on projects such as Harborview where steep grades and difficult terrain raised questions about storm water runoff in the past. When these systems are designed properly, localized leaching pool systems are capable of providing the necessary control for storm water runoff.” The Planning Board adopted this memorandum into its resolution, which waived the requirement for a stormwater recharge basin, in accordance with this Court’s earlier determination and the provisions of Village Code §220-12. Although petitioners assert that the Planning Board failed to comply with the provisions of §220-12, the Court disagrees. It is not the role of the Court to substitute its judgment for that of the Village’s own experts regarding the desirability of a recharge basin. *Gillen, supra*. Rather, as set forth above, the Court is limited to an analysis as to whether the determination had a rational basis. Here, the Planning Board, in its July 24, 2008 resolution, set forth that it was waiving the provisions of §220-27 in that it was permitting the use of a system of leaching pools in lieu of a recharge basin and that such determination (1) was in keeping with the objectives of the cluster subdivision to preserve open space; (2) would not adversely impact public health, safety and welfare; and (3) would be more desirable to the purpose of collecting stormwater runoff. Thus, the Court finds that the Planning Board has complied with this Court’s prior Order and Judgment and with the provisions of §220-12, and the determination to waive the requirement of a stormwater recharge basin had a rational basis and will not be disturbed by this Court.

Capacity

As set forth above, petitioners also challenge the Planning Board’s resolution to the extent that they assert such only required drainage facilities capable of handling runoff from a 3" storm. Petitioners argue that such determination required a separate waiver of the requirements

¹Koubek’s June 27, 2008 memorandum in turn incorporated his comments and recommendations contained in his earlier memorandum dated December 12, 2006.

of the Village Code, specifically §220-27B. Respondents argue that the system of leaching pools, as designed, complies with the Village Code requirements.

Petitioners claims regarding the capacity of the drainage system were addressed by the Court in its April 2, 2008 Order and Judgment, where the Court found that the interpretation of Respondents' engineer had a rational basis and would not be disturbed by the Court. Such determination by the Court is law of the case and thus precludes relitigation of the issue in the instant proceeding. As stated aptly by Professor Siegel, the doctrine of law of the case is to "avoid re-injection of issues already determined" within the same action or proceeding. *New York Practice §448 (Siegel, 4th Ed. 2005)*. This principle is clearly applicable to the instant proceeding and therefore, reconsideration of this issue is barred by the doctrine of the law of the case. *See, e.g., Quinn v. Hillside Development Corp.*, 21 A.D.3d 406, 800 N.Y.S.2d 206 (2d Dept. 2005); *EIFS, Inc., v. Morie Co.*, 298 A.D.2d 551, 748 N.Y.S.2d 672 (2d Dept. 2002).

RECISSION OF NEGATIVE DECLARATION

Petitioners argue in their third cause of action that the Planning Board's refusal to rescind the SEQRA negative declaration that preceded the preliminary subdivision approval was arbitrary and capricious and an abuse of discretion. Petitioners' argue that pursuant to this Court's April 2, 2008 Order and Judgment, the Planning Board was required to examine the capacity of the proposed drainage system and determine whether or not to waive the capacity requirements of the Village Code. Such determinations, petitioners argue, would be a "change in circumstance related to the project" that was "not previously considered" and thus required a rescission of the negative declaration pursuant to 6 N.Y.C.R.R. §617.7(f).

Petitioners' argument regarding the rescission of the negative declaration also fails under the doctrine of law of the case. As set forth herein above, the Court is bound by its earlier determination holding that the interpretation of the respondents' expert regarding the required capacity of the proposed drainage structure had a rational basis. Thus, since the Planning Board was not required to revisit the issue of drainage capacity, but merely stated in its resolution the basis for its waiver of the requirement of a stormwater recharge basin, the Planning Board had a rational basis for declining to rescind the negative declaration. Therefore, the Court declines to annul the Planning Board determination based upon the failure to rescind the negative declaration.

OPEN MEETINGS LAW

Finally, petitioners claim that the Planning Board violated the Open Meetings Law (Public Officers Law §100, et. seq.) in that the Board members must have met or communicated privately to discuss the July 24, 2008 resolution prior to the meeting held on that date.

Petitioners argue that “Whether by e-mails, which the Coalition demand be preserved, or by actual meeting, the Planning Board could not have reached a determination on the complex issues presented without off the record meetings at which they made up their minds.” Petition at ¶33. Alternatively, Petitioners argue that if there was no such prior communication, then the Planning Board resolution still should be declared null and void because the Planning Board failed to exercise its discretion when it voted “without any presentation or independent analysis of the issues.” Petition at ¶34.

Notably, the record in this proceeding reflects as follows: Subsequent to this Court’s April 2, 2008 Order and Judgment, on or about April 21, 2008, Petitioners, via their counsel, communicated with the Mayor and Trustees of the Village of Port Jefferson and also the Planning Board. In the 20-page letter to the Planning Board, plus numerous exhibits, Petitioners’ counsel strenuously propounds his arguments, identical to those put forth to the Court, regarding why the drainage facilities are inadequate and the SEQRA negative declaration should be rescinded. Counsel for Liberty Meadows responded by letter dated April 29, 2008 and counsel for Petitioners submitted a further correspondence dated May 1, 2008. The minutes of the Planning Board reflect that the subdivision application was discussed at the meetings on May 22, 2008 and June 19, 2008. Thereafter, on June 27, 2008, the Village Engineer, Koubek, provided the Planning Board with the memorandum discussed at length above and the Planning Board, at its July 24, 2008 meeting, voted unanimously to approve the subdivision application. The minutes of the meeting reflect Petitioners attorney requested that a “public hearing” be scheduled but the Planning Board denied his request and adopted the aforementioned resolution approving the subdivision.

Public Officers Law §100, et. seq., the Open Meetings Law, requires that “Every meeting of a public body shall be open to the general public, except that an executive session of such body may be called and business transacted thereat in accordance with section ninety-five of this article. **Public Officers Law §103(a)**. The purpose of the Open Meetings Law is to ensure that the public be fully aware of and be able to “attend and listen to the deliberations and decisions that go into the making of public policy.” **Public Officers Law §100**. The Open Meetings Law is “silent with respect to the issue of public participation at meetings.” **2 N.Y. Jur.2d Administrative Law §89**. However, Courts have held that although the Open Meetings law requires that the proceedings of public bodies be open to *observation*, by the public, it does not require that the public be given the opportunity to engage in a debate. **DeSantis v. City of Jamestown**, 193 Misc.2d 197, 747 N.Y.S.2d 906 (Sup. Ct. Chautaugua Co. 2002)(emphasis added). Moreover, allegations that private meetings “must have taken place”, without specific factual allegations, are merely conclusory and speculative in nature and insufficient to demonstrate a violation of the Open Meetings Law. **Residents for a More Beautiful Port Washington, Inc., v. Town of North Hempstead**, 153 A.D.2d 727, 545 N.Y.S.2d 303 (2d Dept. 1989). *See also, Cablevision Systems v. Village of Massapequa Park*, 14 Misc.3d 1204(A), 831

N.Y.S.2d 358 (Sup. Ct. Nassau Co. 2006).

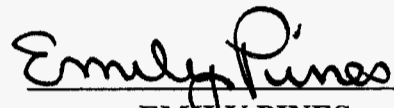
In the case *sub judice*, Petitioners' claim that the Planning Board "must have met" to discuss the resolution prior to the meeting is nothing more than conclusory and speculative allegations insufficient to sustain a cause of action for violation of the Open Meetings Law. The Planning Board had before it extensive submissions from Petitioners as well as the memorandum from Koubek, which merely reiterated his position regarding the drainage as contained in his earlier 2006 memorandum. The fact that Petitioners' counsel was not permitted to speak at the July 24, 2008 meeting is not a violation of the Open Meetings Law.

Petitioners' alternative theory, that the Board abused its discretion by failing to allow their counsel to speak at the July 24, 2008 is also without merit.

Based upon the foregoing, the Petition to annul the July 24, 2008 resolution of the Respondent Planning Board of the Village of Port Jefferson is denied in its entirety.

This constitutes the **ORDER** and **JUDGMENT** of the Court.

Dated: January 22, 2009
Riverhead, New York



EMILY PINES
J. S. C.