INDEX NO. 41341-2008

SUPREME COURT - STATE OF NEW YORK
SPECIAL TERM, PART 19 SUFFOLK COUNTY

Mot Seq: 001- MD
Mot Seq: 002- MotD

Present:
Hon. SANDRA L. SGROI

Adj'd Date: 9-17-09
Return Date: 1-16-09

EAST END RESOURCES, LLC,
Plaintiff/Petitioner,

-against-

THE TOWN OF SOUTHOLD PLANNING BOARD, THE TOWN OF SOUTHOLD TOWN BOARD, THE TOWN OF SOUTHOLD PLANNING DEPARTMENT and THE TOWN OF SOUTHOLD TOWN CLERK,

Defendants/Respondents.

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Upon the following papers numbered 1 to 164 read on this Proceeding: Notice of Petition, Petition and supporting papers 1-7, 8-9, 10-11, 12-14, 15-38; Notice of Motion to Dismiss and supporting papers 39-42, 43-48; Affirmations is opposition and supporting papers 49, 50-55; Reply and Supplemental affirmations and supporting papers 56-58, 59-60; Memoranda of Law 61-62, 63-64, 65-66; Return 67-154; Supplemental Affirmation and supporting papers 155-156; Supplemental Affirmation and supporting papers 157-164; it is,

ORDERED that the Article 78 Petition of Plaintiff/Petitioner, East End Resources, LLC, and the motion of the

Defendants/Respondents, the Town of Southold Planning Board, the Town of Southold Town Board, the Town of Southold Planning Department, and the Town of Southold Town Clerk, to dismiss the Petition having been converted to a motion for summary judgment are decided as follows:

1. The relief requested in the Article 78 proceeding and civil action is denied at this time;
2. The first, second, third, and fourth causes of action are dismissed; and
3. The motion of the Respondents is granted only to the extent provided in this order.

This is a combined civil action and Article 78 proceeding commenced by the Petitioner/ Plaintiff East End Resources, LLC (hereinafter "East End") wherein East End seeks (1) a declaratory judgment directing that the application for a site plan approval for an active adult planned retirement condominium community known as "Southwold Manor" be approved; (2) a judgment that the East End site plan be entitled to a "negative" declaration under the State Environmental Quality Review Act (hereinafter "SEQRA"); (3) a judgment compelling the Respondents to issue all necessary approvals and permits; (4) a judgment mandating the Respondents to complete any and all applicable administrative review, hold a hearing and issue a determination; (5) a declaratory judgment finding that the Planning Board has violated East End's right to substantive due process under 42 USC § 1983 and under the New York Constitution; (6) a declaratory judgment holding that the Planning Board's selective enforcement of the Code has violated East End's rights to equal protection under 42 USC 1983 and the New York Constitution; and (7) a judgment awarding compensatory, consequential and punitive damages, reasonable attorneys' fees, costs and disbursements to East End. The combined complaint and petition before the Court alleges a total of eight causes of action.

The Defendants/ Respondents, the Town of Southold Planning Board, the Town of Southold Town Board, the Town of Southold Planning Department, and the Town of Southold Town Clerk (hereinafter "Southold"), have moved for an order dismissing the first, second, third and fourth causes of action . These four causes of action comprise all of the claims wherein the Petitioner seeks relief available under ***CPLR*** Article 78.

Southold has moved for dismissal pursuant to ***CPLR*** 7804(f) which section states:

> The respondent may raise an objection in point of law by setting it forth in his answer or by a motion to dismiss the petition, made upon notice within the time allowed for answer.

On Southold's motion to dismiss the causes of action in the Article 78 proceeding pursuant to ***CPLR*** 7804(f) "only the petition is to be considered and all of its allegations are to be deemed true" (***Matter of Zaidins v. Hashmall,*** 288 A.D.2d 316, 316-317, 732 N.Y.S.2d 870). The Court will "liberally construe the petition, accept all of its allegations as true, accord the petitioner every favorable inference, and decide only whether the alleged facts fit within any recognized legal theory" (***Abele v. Dimitriadis***, 53 A.D.3d 969, 862 N.Y.S.2d 182). According to Professor Vincent Alexander writing in the Practice Commentaries:

> ***the Court, however, would seem to have the authority under ***CPLR*** 3211(c) to convert a motion to dismiss for failure to state a cause of action into a motion for summary judgment. (cites omitted). ***CPLR*** 3211(c) allows the court, after giving the parties sufficient notice to submit whatever additional evidence they feel is needed, to decide the motion to dismiss on the

> basis of the factual record rather than on the facial sufficiency of the petition. (Practice Commentaries C7804:7)

The papers that were before the Court contained factual allegations that were not in the Petition/Complaint and Answer. The three additional facts alleged by Southold not part of the petition before the Court are that a public meeting was held on January 20, 2009, a preliminary public hearing was noticed on the site plan application for February 23, 2009, and Jerilyn Woodhouse is no longer the Chair of the Planning Board and she is not a member of the Southold Planning Board. East End has submitted affidavits from a Southold homeowner and an engineer and affirmations that refer to evidence in the return but not in the petition or complaint.

East End alleges that while the Planning Board and the Planning Department of Southold did conduct an extensive review of the Petitioner's initial site plan application filed in late 2006, the review was not conducted within the time periods contained in the Town Code, the Town Law, and the SEQRA regulations. However, East End does concede that it accepted Southold's suggestions to amend the project and that East End filed a formal, amended site plan application on October 21, 2008.

After the filing of the formal application in October of 2008, Southold commenced a full administrative review of the proposed project. This review was completed by Southold and the Planning Department recommended to the Planning Board that a SEQRA review commence and that the amended application be accepted with the revisions. East End served the Petition/Complaint in this action and proceeding on or about December 23, 2008.

On January 20, 2009, the Planning Board adopted a resolution that accepted the Planning Department's recommendations (see Southold's Exhibit "2"). The Planning Board commenced the SEQRA process by preliminarily classifying the amended site plan application as an "unlisted action" and declared its intent to act as the lead agency. A preliminary public hearing was also scheduled for February 23, 2009 to review the substance of the application of East End.

East End submitted its initial application in 2006. Southold does not deny that it failed to address this first application in a timely manner but it is undisputed that East End never objected to the delays prior to October of 2008, and, further, East End accepted and modified their plans based upon Southold's suggestions and comments between 2006 and 2008. The record shows that East End chose to proceed informally in developing a final site plan. East End submitted that final site plan in October of 2008. Since October of 2008, the Town began its review of the final site plan even though East End commenced this action and proceeding.

The first cause of action seeks declaration of a default approval for the failure to timely address the construction proposal of East End. Here, neither the Southold Town Code nor the Town Law provides for "approval by default" (***AHEPA 91, Inc. v. Town of Lancaster***, 237 A.D.2d 978, 654 N.Y.S.2d 884 citing ***Nyack Hosp. v Village of Nyack Planning Bd.***, 167 Misc 2d 490, 491, *affd* 231 AD2d 617; see, ***Matter of Grossman v Rankin***, 43 NY2d 493, 501). The Appellate Division, Second Department has stated in ***Jul-Bet Enterprises, LLC v. Town Bd. of Town of Riverhead***, (48 A.D.3d 567, 852 N.Y.S.2d 242):

> ***in the absence of an "approval-by-default" provision in 6 NYCRR 617.9(a)(2), the respondents' failure to render a determination within 45 days of the DEIS submission did not

> result in its automatic acceptance (see, ***Matter of Tinker St. Cinema v. Town of Woodstock Planning Bd.***, 256 A.D.2d 970, 972, 681 N.Y.S.2d 907; ***AHEPA 91 v. Town of Lancaster***, 237 A.D.2d 978, 979, 654 N.Y.S.2d 884; ***Nyack Hosp. v. Village of Nyack Planning Bd.***, 231 A.D.2d 617, 647 N.Y.S.2d 799; *cf.* ***Matter of King v. Chmielewski***, 76 N.Y.2d 182, 187-188, 556 N.Y.S.2d 996, 556 N.E.2d 435; ***Matter of Biondi v. Rocco***, 173 A.D.2d 700, 570 N.Y.S.2d 349).

The first cause of action is dismissed.

The second cause of action in the petition and complaint seeks an approval by default based upon the failure to issue a negative declaration under SEQRA within 45 days. Southold's failure to make a timely declaration of environmental significance does not result in a default negative declaration under SEQRA (see, ***Matter of Seaboard Contr. & Material v. Department of Envtl. Conservation of State of N.Y.***, 132 A.D.2d 105, 522 N.Y.S.2d 679; ***Osborne v. Fernandez***, 2009 WL 884697, S.D.N.Y. March 31, 2009, NO. 06-CV-4127CSLMS). As the Appellate Court discussed in ***Tinker Street Cinema v. Town of Woodstock Planning Bd.***,(256 A.D.2d 970, 681 N.Y.S.2d 907) and the Federal District Court reiterated in ***Osborne v. Fernandez*** (supra)

> ***New York case law makes clear that an applicant does not have the right to the timely or expeditious completion of the SEQRA environmental review process (see, ***Tinker St. Cinema v. Town of Woodstock Planning Bd.***, 256 A.D.2d 970, 972 citing ***Seaboard Contr. & Material v. Dep't of Envtl. Conservation***, 132 A.D.2d 105-"an agency's failure to make a timely declaration of environmental significance does not result in a de facto negative declaration."). The rationale behind this construction of SEQRA's provisions makes eminent sense when considered in conjunction with the purpose of SEQRA, which is to ensure that proposed land development does not adversely impact the environment. (cites omitted). It would be anomalous to hold that an agency's failure to complete an environmental review in a timely manner should result in a default finding that the environment would not be impacted by the proposed project (cite omitted; see also ***Sun Beach Real Estate Dev. Corp. v. Anderson***, 98 A.D.2d 367, 375-76- "We have no difficulty in according priority to SEQRA because the legislative declaration of purpose in that statute makes it obvious that protection of 'the environment for the use and enjoyment of this and all future generations' far overshadows the rights of developers to obtain prompt action on their proposals.").

The Court further notes that this is not a situation where Southold failed to schedule a hearing on either the SEQRA issues or on the site review. Therefore, the motion of Southold to dismiss the second cause of action is granted.

The third cause of action alleges that the Planning Board failed to schedule and hold a timely hearing and make a determination on environmental significance, and therefore, that the Southold "Planning Board has failed to perform a duty enjoined upon it by law." (Petition and Complaint). The issues raised in this cause of action based upon ***Town Law*** § 274-a (8) and ***SEQRA*** have been addressed previously. While in an appropriate fact

situation a Court may issue an order of mandamus directing a Town to address a site plan application, here the Town has scheduled and held a hearing and is conducting an ongoing, comprehensive review of the site plan pursuant to SEQRA that has not been completed (see, ***Chase Partners, LLC v. Incorporated Village of Rockville Centre***, 43 A.D.3d 1049, 843 N.Y.S.2d 116). Therefore, the third cause of action is also dismissed.

In the fourth cause of action, East End seeks to have the Court declare that Jerilyn Woodhouse, now the former Chairperson of the Planning Board, be removed from consideration of this matter alleging that a conflict of interest exists. However, this cause of action is now moot because Ms. Woodhouse's term on the Planning Board has expired, a replacement has been appointed for her and Ms. Woodhouse is no longer a member of the Planning Board. While this Court has not dismissed any alleged civil rights violations by this decision, the cause of action for the removal of Ms. Woodhouse is now academic and this cause of action is dismissed.

The Fifth, Sixth, Seventh and Eighth causes of action allege civil rights violations under 42 USC § 1983, the United States Constitution and the New York State Constitution. At this time, the Defendants/Respondents have not moved to dismiss these claims and the sufficiency of those causes of action are not before the Court for consideration.

Dated: 10/8/09

SANDRA L. SCIROI, J. S. C.