

<b>Matter of Ferraro v Town Bd. of the Town of Amherst</b>
2009 NY Slip Op 33414(U)
August 24, 2009
Supreme Court, Erie County
Docket Number: 2008/7696
Judge: Rose H. Sconiers
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STATE OF NEW YORK  
SUPREME COURT: COUNTY OF ERIE

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In the matter of the application of

JERROLD & JUDITH FERRARO,  
WILLIAM FLEMING,  
LORETTA C. AQUILINA,  
KATHLEEN AQUILINA,  
JUDITH HYATT,  
GWEN RICHTHAMMER,  
MONICA C. WATERS,  
ARLENE MEROWITZ, and  
DANIEL WARD, individually and as a  
member of the Town Board of the Town of Amherst,

Petitioners-Plaintiffs,

vs.

Index No. 2008/7696

TOWN BOARD OF THE TOWN OF AMHERST,  
BENDERSON DEVELOPMENT COMPANY, LLC,  
BUFFALO-MAPLE ROAD LLC, AND  
BUFFALO-ANDERSON ASSOCIATES, LLC,

Respondents-Defendants.

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Buffalo-Maple Road LLC  
Buffalo-Anderson Associates, LLC

## AMENDED MEMORANDUM DECISION

Petitioners-plaintiffs bring this hybrid Article 78 proceeding and declaratory judgment action seeking to overturn the decision of the respondent Town Board of the Town of Amherst that rezoned portions of 218 and 330 Maple Road in the Town of Amherst (the "site") from Community Facilities (CF) and Single-Family Residential - Three (R-3) to General Business (GB) and Multi-Family Residential District - Six (MFR-6). These two parcels are approximately 33.3 acres in size, including the portions that were and were not rezoned. Daniel Ward, a member of the Town Board who was initially one of the petitioners in this proceeding, withdrew as a party in the early stages. The nine petitioners remaining are all residents of the Town who live in close proximity to the rezoned parcel. In addition to the Town Board, the other respondents are the developers, Benderson Development Company, LLC, Buffalo-Maple Road, LLC, and Buffalo-Anderson Associates, LLC (collectively "Benderson").

Petitioners seek a declaratory judgment that the majority vote that rezoned the site was ineffective because protest petitions were filed by owners of more than twenty percent of the lands directly opposite the parcel, thus triggering the super-majority requirement of Town Law § 265(1)(c). The petitioners also challenge the resolution to rezone on grounds that the rezoning is inconsistent with the Town's Comprehensive Plan, that the Town's effort to amend its comprehensive plan was not done properly, that the Town failed to approve the rezoning by a majority plus one vote of the Town Board pursuant to General Municipal Law, §239-m, that the Draft Environmental Impact Statement (DEIS) and the Final Environmental Impact Statement (FEIS) failed to satisfy

the requirements of the State Environmental Quality Review Act (SEQRA), (Environmental Conservation Law § 8-0101 *et seq.*), and that the Town Board violated the Open Meetings Law on several occasions.

The site is located on the north side of Maple Road, near the University at Buffalo campus and the Amherst Pepsi Center. The Buffalo Shooting Club was the prior owner of the property and, as the name would imply, it was used for many years as a private gun club. Given the site's prior use, it has been designated a brownfield due to the presence of lead and will require environmental cleanup. In February 2007, Benderson filed an application with the Town to rezone the site, which included submission of a DEIS. The proposed site is intended to be a mixed use facility with speciality retail stores, restaurants, offices, community space, a hotel and residential units. The Town Board sought to become the SEQRA lead agency with respect to this project and the DEIS was circulated among various Town officers and agencies for review and comment. The DEIS was also circulated to state agencies, including the Department of Environmental Conservation and the Department of Transportation as well as to various county agencies, including the Erie County Department of Environment and Planning, the Department of Public Works, and the Division of Highways.

The rezoning application was referred to the Amherst Planning Board and a public hearing was conducted on June 28, 2007. Following the hearing, the Planning Board recommended to the Town Board that the rezoning be approved and specifically found that the proposed project was consistent with the Town's Comprehensive Plan. On September 4, 2007, the Town Board conducted a public hearing to consider the

DEIS and the rezoning request. On December 17, 2007, the FEIS was accepted as complete by the Town Board. In reviewing the project proposal, the Town Board had before it a traffic study prepared by FRA Engineering, a consultant retained by Benderson. Given the importance of traffic issues to this project, the Town Board retained Urban Engineers of New York, P.C. to both review the FRA Engineering study and to examine the traffic impacts of the project. Various recommendations were made to mitigate the impact of the additional traffic resulting from this project and Benderson was required to post a bond in the amount of \$500,000 for improvements at the intersection of Maple Road and North Forest, which was later increased to \$650,000 to fund other traffic mitigation measures that may be deemed necessary in the future to deal with increased motor vehicle traffic.

At some point during the process, it was determined that the entire parcel would not be rezoned. Instead, a 101 foot wide strip of land running directly along Maple Road would remain under the same CF zoning and that this space would be used and maintained as a conservation area providing public space containing paths for walking, jogging and biking.

On June 2, 2008, the Town Board again took public comments regarding the rezoning. The Town Board thereafter voted to adopt the SEQRA Findings Statement that the identified environmental impacts have been avoided to the maximum degree practicable. The Town Board then voted to approve the rezoning of the site, as modified, with various conditions and limitations, including but not limited to traffic mitigation measures.

**TOWN LAW, § 265(1)**

Petitioners seek a declaratory judgment that the resolution rezoning the subject parcel was defeated because the change was not approved by a vote of at least three-fourths of the Town Board. Town Law § 265, Changes, subsection (1) provides, in relevant part:

Such regulations, restrictions and boundaries may from time to time be amended. Such amendment shall be effected by a simple majority vote of the town board, except that any such amendment shall require the approval of at least three-fourths of the members of the town board in the event such amendment is the subject of a written protest, presented to the town board and signed by . . . (c) the owners of twenty percent or more of the area of land directly opposite thereto, extending one hundred feet from the street frontage of such opposite land.

Petitioners contend that the written protests they filed satisfied the twenty percent requirement and that, therefore, it was necessary for three-fourths of the Town Board to vote in favor of the zoning change in order for it to be adopted. Since the vote on the zoning change was four votes in favor and three votes opposed, petitioners assert that the rezoning resolution did not pass. Respondents assert that this statute does not apply because none of the persons participating in the written protest are directly opposite the street frontage of the parcel that was rezoned. Specifically, respondents contend that because there is a one hundred and one foot wide strip of land along the north side of Maple Road that was not rezoned and that will be used as conservation space, the protesting property owners are not "the owners . . . of the area of land directly opposite thereto, extending one hundred feet from the street frontage of such opposite land." Town Law § 265(1)(c). Thus, the critical issue is whether the

creation of the conservation area or “buffer zone” means that the super-majority requirement of the statute was not triggered.<sup>1</sup>

Eadie v. Town Bd. of the Town of North Greenbush, 7 N.Y.3d 306 (2006), directly addressed the application of Town Law § 265(1)(b) dealing with the rights of “owners of . . . land immediately adjacent to the land included in such proposed change, extending one hundred feet therefrom” to file a written protest that would force a three-fourths majority vote of a town board. The parties that requested rezoning in Eadie sought to rezone a portion of their property, while maintaining a “buffer zone” of between 200 and 400 feet wide between the rezoned portion of their property and the property line with an adjoining property. In addressing whether Town Law § 265(1) applied under these circumstances, the court concluded “that the ‘one hundred feet’ must be measured from the boundary of the rezoned area, not the parcel of which the rezoned area is a part. The language of the statute, on its face, points to that result: ‘land included in such proposed change’ can hardly be read to refer to land to which the proposed zoning change is inapplicable.” Id. at 314.

The court’s holding created a bright line rule with the stated rationale being fairness and predictability. The court further observed that with respect to the creation of the buffer zone, “[w]hether that was their original intention or not . . . such a reconfiguration of property lines, whether done in good faith or bad faith, should have no impact on the Town Law § 265(1)(b) issue.” Id. at 315. In short, the court saw

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<sup>1</sup> If the protesting property owners qualify as owners who can file a protest pursuant to Town Law § 265(1), then the owners have satisfied the “twenty percent or more of the area of land” requirement of this statute.

nothing wrong with reconfiguring the property to be rezoned with the express intent of avoiding the requirements of Town Law § 265(1).

Petitioners argue that the holding of Eadie does not apply because their case involves paragraph (c) of Town Law § 265(1) whereas Eadie dealt with paragraph (b). Certainly, it is true that the area of the land in the street is not considered when calculating what constitutes the twenty percent of land owners. Biedermann v. Town of Orangetown, 125 A.D.2d 465 (2nd Dept. 1986). In order to trigger the super-majority requirement pursuant to Town Law § 265(1)(c), however, the protesting property owners must be among the owners "of the area of land directly opposite" the property to be rezoned.

In Webster Assoc. v. Town of Webster, 119 Misc.2d 533, 536 (Sup. Ct. Monroe Co.), the court concluded that "[d]irectly opposite means immediately across from without anything intervening." Given that the property owners entitled to object include any whose property "extend[s] one hundred feet from the street frontage of such opposite land," the rezoning proponent cannot avoid the statute's impact by excluding only a few feet from the parcel to be rezoned. See Herrington v. County of Peoria, 11 Ill.App.3d 7, 295 N.E.2d 729 (1973). Moreover, the width of the intervening roadway is not considered in calculating the one hundred foot distance.

Nevertheless, petitioners seem to urge an interpretation of the statute that would measure the 100 feet only from the protesting landowners side of the road. Based on petitioners' proposed interpretation of the statute, it would not matter whether the rezoned portion of a given parcel was one hundred feet or even a thousand or more feet from the side of the road. As long as there was no other road intervening, twenty

percent or more of the owners on the opposite side of that road would be able to invoke the three-fourths majority requirement of Town Law § 265(1). This is not a reasonable interpretation of the statute and would not be consistent with the principles enunciated by the Court of Appeals in Eadie v. Town Bd. of the Town of North Greenbush, *supra*, 7 N.Y.3d 306.

Under Town Law § 265(1), as interpreted in Eadie and other cases, it is clear that the existence or even the creation of a “buffer zone” in excess of 100 feet means that property owners will not be able to invoke the three-fourths majority requirement under circumstances where they, but for the “buffer zone,” would be either immediately adjacent property owners or owners of property on a street directly opposite thereto. The question remains, however, what constitutes an effective “buffer zone?” For example, if this buffer zone on the north side of Maple Road had no driveways running through it, meaning that all traffic would enter and exit the proposed project from other streets, then the owners of property on the south side of Maple Road would clearly be unable to invoke Town Law § 265(1) by filing written protests. Eadie, *supra*, 7 N.Y.3d at 314-315.

With respect to this so-called “buffer zone,” the proposed project will be set back more than 100 feet from the edge of the right-of-way for Maple Road, thereby mitigating such factors as noise and the exhaust from idling cars. The view from Maple Road will also be significantly altered. Given the project design, however, it is nevertheless clear that this “buffer zone,” by itself, would do absolutely nothing to mitigate the increase in traffic on Maple Road since all driveways running in and out of the project will intersect with Maple Road. While this factor is significant, the courts have strictly construed

Town Law § 265(1), in the interest of fairness and predictability, to require that any protesting property owners own “land immediately adjacent to that land included in such proposed change, extending one hundred feet therefrom” or own “land directly opposite thereto, extending one hundred feet from the street frontage of such opposite land.”

Town Law § 265(1) paras. (b) and (c).

In light of the one hundred and one foot wide “buffer zone” that was created between Maple Road and the rezoned parcel, the statute and the case law mandate a finding that the owners of property on the south side of Maple do not qualify as owners that can trigger the three-fourths majority requirement of Town Law § 265(1)(c) by filing a written protest. For these reasons, this Court declares that the four-to-three vote of the Amherst Town Board was an effective majority vote that changed the zoning of the site from Community Facilities (CF) and Single-Family Residential - Three (R-3) to General Business (GB) and Multi-Family Residential District - Six (MFR-6).

### **CONSERVATION AREA DRIVEWAYS**

With respect to the driveways running through the conservation area, petitioners assert that the Town was required to rezone these driveways and that the failure to do so should be overturned. A May 1, 2008 memorandum from Thomas C. Ketchum, P.E., Commissioner of Buildings for the Town of Amherst to the Town Board, noted that the rezoned “boundary (if approved) will be set back a minimum of 100 feet from the right-of-way line of Maple Road” and that “the area between the Maple Road right-of-way line and the proposed rezoning line will continue to be zoned Community Facilities (CF) and R3.” Mr. Ketchum observed that the driveways running between Maple Road and the rezoned area will have a dual purpose in that they will service the rezoned area

and the CF area that was not being rezoned. Given that the driveways will serve a dual use, he determined that the driveway areas will not have to be rezoned. Respondents argue that petitioners did not exhaust their administrative remedies by failing to appeal Mr. Ketchum's determination to the Zoning Board of Appeals (ZBA).

There can be no doubt that in order to obtain review pursuant to Article 78 of the CPLR, petitioners must exhaust their administrative remedies. C L & F Development, LLC v. v. Weiss, 50 A.D.3d 1574 (4th Dept. 2008); Camardo v. Michelman, 12 A.D.3d 1176 (4th Dept. 2004). The exhaustion requirement is based on sound public policy grounds, even though it can frequently be highly technical. Whether the Ketchum memorandum is deemed an opinion or a determination, it could not have been the final word with respect to whether the driveways had to be rezoned. However, when the Town Board voted to approve this project, they were doing more than simply rezoning the parcel where the project would be constructed.

When the Town Board enacted Local Law #8-2008, the original zoning request to change the zoning of 33.326 acres was reduced to 28.44 acres and that a conservation area of 4.5 acres was created, one hundred feet in depth fronting on Maple Road. By approving the project without changing the zoning classification of the driveways running through the conservation area, the Town Board thereby adopted the determination made by the Commissioner of Building that these driveway areas did not have to be rezoned.

In Hampton Hills Villas Condo. Bd. of Managers v. Town of Amherst Zoning Bd. of Appeals, 13 A.D.3d 1079 (4th Dept. 2004), a virtually identical determination by the Commissioner of Building of the Town of Amherst regarding a dual use driveway was

appealed to the ZBA, which upheld the commissioner's determination. Hampton Hills differs from the instant case in that there is no indication that the Town Board was involved with respect to rezoning property for a contiguous or other related project. If whether to rezone the driveways was the only issue, petitioners would have been required to appeal the commissioner's determination to the ZBA. However, here it was the Town Board that solicited the opinion from the commissioner and it was the Town Board that made the final determinations with respect to this project. Therefore, Local Law #8-2008 must have, by definition, involved a finding that the driveways in the conservation area did not have to be rezoned. As a result, petitioners did not fail to exhaust administrative remedies.

As the court wrote in Hampton Hills:

“Under a zoning ordinance which authorizes interpretation of its requirements by the board of appeals, specific application of a term of the ordinance to a particular property is . . . governed by the board's interpretation, unless unreasonable or irrational” (*Matter of Frishman v Schmidt*, 61 NY2d 823, 825 [1984]; see *Matter of J.H., Jr., & E.T., Sr. Wurz Realty Partnership v Zoning Bd. of Appeals of Vil. of N.Y. Mills*, 249 AD2d 984, 985 [1998], *lv denied* 92 NY2d 813 [1998]; *Matter of Saglibene v Baum*, 246 AD2d 599, 600 [1998]). Here, the ZBA's interpretation of the zoning ordinance is neither unreasonable nor irrational, and we therefore reverse the judgment and dismiss the petitions.

Id. at 1080.

Under the present circumstances, the decision made by the Town Board in enacting Local Law #8-2008, to the extent that it upheld the determination of the Commissioner of Building that the zoning ordinance did not require that the driveway areas be rezoned, was neither unreasonable nor irrational.

## THE TOWN'S COMPREHENSIVE PLAN

Petitioners contend that the zoning change for the site must be overturned because it is inconsistent with the Town's Comprehensive Plan. In recommending approval, the Town Planning Board determined the project was consistent with the Comprehensive Plan and in approving the rezoning the Town Board expressly acknowledged the findings of the Planning Board. Moreover, at the time of the approval, the Town Board amended "the Comprehensive Plan to the extent that the rezoning is inconsistent with the Plan." Petitioners contend that the Town Board did not properly amend the Comprehensive Plan and that the attempted amendment was ineffective.

"All town land use regulations must be in accordance with a comprehensive plan adopted pursuant to [Town Law § 272-a]" Town Law § 272-a[11]. "Compliance with the statutory requirement is measured, however, in light of the long-standing principle that one who challenges such a legislative act bears a heavy burden. . . . If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control. . . . Thus, where the [challenging party] fails to establish a clear conflict with the comprehensive plan, the zoning classification must be upheld." Meteor Enterprises, LLC v. Bylewski, 38 A.D.3d 1356 (4th Dept. 2007), quoting Bergstol v Town of Monroe, 15 A.D.3d 324, 325 (2nd Dept. 2005), *lv denied* 5 N.Y.3d 701 (2005) (internal quotation marks omitted).

In the instant case, petitioners have failed to establish a clear conflict with the Town's Comprehensive Plan that would satisfy the heavy burden a petitioner faces when challenging a legislative act. Moreover, the Town Board amended the

Comprehensive Plan to the extent that the rezoning of this parcel was inconsistent with the plan. Petitioners' contention that the plan was not properly amended is without merit. As explained by the Town, there are three ways in which the Comprehensive Plan can be amended, five-year review, annual review and opportunity review.

Petitioners also contend that the rezoning was required to pass by a majority plus one vote pursuant to General Municipal Law § 239-m. This position is also without merit. No matter what comments or suggestions may have been made in the May 2, 2008 letter from the Erie County Department of Environment and Planning, the county agency expressly made "no recommendation concerning the Project."

### **SEQRA**

Certainly, the importance of strict compliance with SEQRA has been repeatedly recognized by the courts. King v. Saratoga County Bd. of Supervisors, 89 N.Y.2d 341, 348 (1996). However, as the Court of Appeals also observed in Eadie v. Town Bd. of the Town of North Greenbush, *supra*, 7 N.Y.3d at 318-319:

Where an agency has followed the procedures required by SEQRA, a court's review of the substance of the agency's determination is limited. The question is "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" (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417 [1986]). The agency's "substantive obligations under SEQRA must be viewed in light of a rule of reason" and agencies have "considerable latitude in evaluating environmental effects and choosing among alternatives" (*id.*). Also, "[t]he degree of detail with which each alternative must be discussed will . . . vary with the circumstances and nature of each proposal" (*Webster Assoc. v Town of Webster*, 59 NY2d 220, 228 [1983]).

"In a statutory scheme whose purpose is that the agency decision-makers focus

attention on environmental concerns, it is not the role of the courts to weigh the desirability of any action or choose among alternatives, but to assure that the agency itself has satisfied SEQRA, procedurally and substantively." Jackson v New York State Urban Dev. Corp., 67 N.Y.2d 400, 416 (1986). "The role of a court is not 'to weigh the desirability of any proposed actions or choose among alternatives but only to insure that the agency has satisfied the substantive and procedural requirements of SEQRA and of the regulations implementing it.'" Advocates for Prattsburgh, Inc. v. Steuben County Indus. Dev. Agency, 48 A.D.3d 1157, 1160 (4th Dept. 2008), quoting, Village of Westbury v Department of Transp. of State of N.Y., 75 N.Y.2d 62, 66 (1989).

A DEIS prepared by Trowbridge & Wolf Landscape Architects was submitted on February 2, 2007 and accepted by the Town Board on June 4, 2007. The Town Planning Board held a public hearing on the DEIS and the rezoning request on June 28, 2007. Thereafter, on September 4, 2007, the Town Board held a public hearing on the DEIS and the rezoning request. The impact of increased traffic was a major consideration with respect to this project. As a result, numerous traffic mitigation measures were considered and either required as a condition of the Town's approval of the project or will be instituted as needed at a later time. As part of the project approval, Benderson was required to post a bond in the amount of \$650,000 for improvements to the intersection of Maple Road and North Forest and for implementing potential future mitigation alternatives.

This Court concludes, based on the administrative record, that the Town Board in approving the FEIS "identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its

determination.” Advocates for Prattsburgh, Inc. v. Steuben County Indus. Dev. Agency, supra, 48 A.D.3d at 1160, quoting Jackson v New York State Urban Dev. Corp., supra, 67 N.Y.2d at 417 (1986).

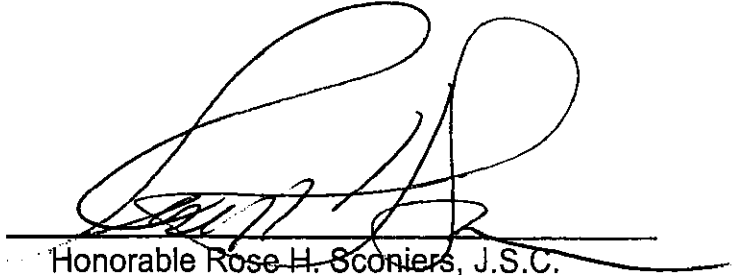
### **OPEN MEETINGS LAW**

Petitioners assert that there were several violations of the Open Meeting Law, Public Officers Law § 100, *et. seq.*, during the course of the proceedings leading to the approval of this project. This claim is based on generalized allegations that meetings were held that included the Town Supervisor and other Town Board members and that on one or more occasions members of the Town Board were asked to leave a meeting so there would not be a quorum of the Board. The petition does not allege any dates or times that these meetings took place, it does not allege who was at these meetings, other than Supervisor Satish Mohan, and it does not allege who was asked to leave one or more of these meetings. Based on the lack of specificity, petitioners have failed to state a valid claim that the Open Meeting Law was violated.

For the foregoing reasons, the petition is dismissed, except as to the cause of action for declaratory relief and, as to that cause of action, this Court declares that the resolution to rezone the subject parcel passed based on a majority vote of four-to-three and that neither a three-fourths majority vote nor a majority plus one vote was required to approve the rezoning.

Submit judgment.

Dated: August 24, 2009



Honorable Rose H. Sconiers, J.S.C.