EM JAY Indus. v Board of Zoning Appeals of the Town of Smithtown
2010 NY Slip Op 33516(U)
December 22, 2010
Sup Ct, Suffolk County
Docket Number: 36699/2009
Judge: William B. Rebolini
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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

EM JAY Industries,

Petitioner,

-against-

The Board of Zoning Appeals
of the Town of Smithtown,

Respondents.

Motion Sequence No.: 001; MD
CDISPO
SETTJ

Motion Date: 10/29/09
Submitted: 9/1/10

Index No.: 36699/2009

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In this CPLR Article 78 proceeding, the petitioner seeks, *inter alia*, a judgment vacating and annulling the resolution adopted by the respondent The Board of Zoning Appeals of the Town of Smithtown (BZA) on September 8, 2009, which issued a SEQRA positive declaration regarding the petitioner's land use application. The petitioner challenges the BZA's determination that an environmental impact statement (EIS) is necessary in order to consider its application.

The petitioner is the owner of approximately 3.44 acres of improved property located on the east side of Montclair Avenue, in the hamlet of St. James, in the township of Smithtown, New York. The property is currently zoned Light Industrial (LI), and it has been used for a concrete ready-mix business, also known as a concrete batching business, for almost 50 years. In September 1961, the BZA issued an interpretation that the use as a concrete batching business was permitted under the then existing "G" light industrial zoning district. In April 2005, the petitioner purchased the property with the intention of continuing the concrete batching business

as well as a storage yard for contractors' supplies and a trucking station, all of which it contends have been ongoing since 1961. After the purchase, the petitioner performed certain work on the property, including the renovation of an existing building, construction of a storage building, replacement of an existing fence, and construction of a retaining wall. In addition, the petitioner intended to relocate the concrete batching plant to the northeast corner of the property. However, on August 31, 2005, the Town of Smithtown (Town) issued an inspection notice to the petitioner indicating that its retaining wall violated the building code. On March 22, 2006, the Town issued a second inspection notice to the petitioner, indicating multiple building code violations, together with a stop work order.

The petitioner then filed applications with the Town Building Department for permits, which were denied on June 10, 2008. The denial indicated that the petitioner was required to seek variances from the BZA before the permits could be approved. On June 16, 2008, the petitioner filed its application with the BZA, which included a SEQRA short environmental assessment form (EAF). The petitioner's application to the BZA included, among other items, requests for a certificate of existing use (CEU) for the concrete batching plant and the storage yard, a variance to reconstruct, alter and restore the concrete batching plant facilities, and a special exception (known in other jurisdictions as a special permit) to operate a trucking station. The BZA held public hearings dealing with the substance of the petitioner's application on July 8, 2008, January 27, 2009, February 24, 2009, March 24, 2009, July 28, 2009, and September 8, 2009.

On September 8, 2009, the BZA adopted a resolution issuing a SEQRA positive declaration regarding the petitioner's land use application. By letter the same date, the positive declaration, which included a paragraph setting forth the reasons supporting the determination, was mailed to the petitioner. The petitioner then timely commenced this proceeding.

The petition sets forth four causes of action. The first and second allege that the BZA acted in excess of its jurisdiction because an existing nonconforming use is exempt from review under SEQRA, and that the BZA's resolution was in violation of lawful procedure or was affected by an error of law. The third alleges that, in adopting the positive declaration, the BZA acted in an arbitrary and capricious manner. The fourth seeks a declaration that the BZA exceeded its jurisdiction under SEQRA and requests an award of damages.

"The law is well settled that judicial review of a SEQRA determination is limited to determining whether the challenged determination was affected by an error of law or was arbitrary and capricious, an abuse of discretion, or was the product of a violation of lawful procedure" (Matter of Village of Tarrytown v. Planning Bd. of Vil. of Sleepy Hollow, 292 AD2d 617 [2nd Dept., 2002], *lv denied* 98 NY2d 609 [2002]). Arbitrary action is without sound basis in reason and is generally taken without regard to the facts (see, Matter of County of Monroe v. Kaladjian, 83 NY2d 185 [1994]). In addition, there must be a literal compliance, not substantial compliance, with SEQRA environmental review procedures and regulations (see, Aldrich v.

Pattison, 107 AD2d 258 [2nd Dept., 1985]). Courts initially review the agency procedures to determine whether they were lawful. Courts may then review the record to determine 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 (see, Matter of Jackson v. New York State Urban Dev. Corp., 67 NY2d 400 [1986]).

The petitioner's contentions regarding the alleged violations of SEQRA include claims that the BZA failed to consider the preexisting nonconforming uses of its property, failed to take a "hard look" at the relevant statutory factors in adopting the positive declaration, and failed to complete the EAF as required under SEQRA.

With regard to the first contention, the petitioner has submitted a letter from the Town's Chief Building Official dated October 27, 2004, which stated that the permitted uses of the property included the ready-mix concrete plant with batching, dispatching and service of a fleet of trucks, and warehousing and outside storage of construction materials and equipment. The petitioner asserts that it relied upon this letter in undertaking the purchase of the property as well as the work performed at the site and the uses of the site now in controversy. However, a review of that letter does not reveal that it intended to approve any uses beyond those historically present on the site. In fact, the record reveals that the petitioner's application involves matters well beyond the mere continuation of one or more preexisting nonconforming uses. The additional use of the property as a trucking station for tenants and the addition of outdoor storage for those tenants go beyond the preexisting nonconforming use of the property as a concrete batching plant and, absent proof in the record that the expansion pre-dates the enactment of SEQRA and relevant amendments to the Town's zoning code, makes the application subject to environmental review (see, Salmon v. Flacke, 61 NY2d 798 [1984]). In addition, the Court cannot find that those uses, as well as other as-built and proposed changes to the property are not an extension or expansion of the preexisting nonconforming use exempt from SEQRA review (see, Town of Clarkstown v. M.R.O. Pump & Tank, 32 AD3d 925 [2nd Dept., 2006]; Matter of 550 Halstead Corp. v Zoning Bd. of Appeals of Town/Vil. Of Harrison, 307 AD2d 291 [2nd Dept., 2003]; Matter of Mooney v. Board of Appeals of Town of Islip, 202 AD2d 674 [2nd Dept., 1994]).

Therefore, the BZA did not act in excess of its jurisdiction in this matter, and it properly considered the preexisting nonconforming use of the petitioner's property.

The petitioner's second contention that the BZA failed to take a "hard look" at the potential lack of adverse environmental impact is likewise without merit. The BZA relied on input from the Town Planning Department and the Town Department of Environment and Waterways, and it held extensive hearings affording the petitioner the opportunity to submit extensive documentation and testimony. Having recognized the need for an overall environmental assessment of this complex application for CEUs, variances and a special exception, the BZA cannot be said to have acted in an arbitrary or capricious manner.

The petitioner's third contention that the BZA violated SEQRA by failing to complete the short EAF is also without merit. Because the application in question was classified as an unlisted action, a short EAF must be submitted to the lead agency "to assist it in determining the environmental significance or nonsignificance of actions" (6 NYCRR 617.2 [m]; *see* 6 NYCRR 617.6 [a] [3]). The record reveals that the petitioner completed part I of the EAF. However, the BZA did not complete part II or part III of the form and, in its stead, issued a written determination of its findings regarding its issuance of a positive declaration. 6 NYCRR § 617.7, entitled "Determining Significance," provides in pertinent part:

> a) The lead agency must determine the significance of any Type I or Unlisted action in writing in accordance with this section.
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> * * *
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> (b) For all Type I and Unlisted actions the lead agency making a determination of significance must:
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> * * *
>
> (4) set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation.

Here, the BZA complied with the requirements that its determination of significance and its issuance of a positive declaration be set forth in written form. Although it is preferred practice that the BZA set forth more of a reasoned elaboration for the basis of its determinations, the record is adequate for this Court to exercise its supervisory review to determine that the BZA strictly complied with SEQRA procedures (see, Matter of Holmes v. Brookhaven Town Planning Bd., 137 AD2d 601 [2nd Dept., 1988]), as the degree of detail with which each factor must be discussed varies with the circumstances of each case (see, Ellsworth v. Town of Malta, 16 AD3d 948 [3rd Dept., 2005]; Coppola v. Good Samaritan Hosp. Med. Ctr., 309 AD2d 862 [2nd Dept., 2003]).

The primary purpose of SEQRA is "'to inject environmental considerations directly into governmental decision making'" (Akpan v. Koch, 75 NY2d 561 [1990], quoting Matter of Coca-Cola Bottling Co. of N.Y. v. Board of Estimate of City of N.Y., 72 NY2d 674 [1988]). To this end, a positive declaration by a lead agency that an action requires an environmental impact statement (EIS) is warranted when a proposed project "may have a significant effect on the environment" (ECL 8-0109 [2]). "The threshold at which the requirement that an EIS be prepared is triggered is relatively low: it need only be demonstrated that the action may have a significant effect on the environment" (Oak Beach Inn Corp. v Harris, 108 AD2d 796 [2nd Dept., 1985]; see also, Spitzer v. Farrell, 100 NY2d 186 [2003]; Chinese Staff & Workers Assn. v. City

of New York, 68 NY2d 359 [1986]). "Because the operative word triggering the requirement of an EIS is 'may,' there is a relatively low threshold for the preparation of an EIS" (Matter of Barrett v. Dutchess County Legislature, 38 AD3d 651 [2nd Dept., 2007]).

Although the petitioner may not be satisfied with the determination, it has not produced sufficient evidence to controvert the determination prepared by the BZA and, thus, it has not established that the BZA failed to take a "hard look" at the environmental impacts or lacked "reasoned elaboration" for its analyses and findings (see, Matter of Eadie v. Town Bd. of the Town of N. Greenbush, 47 AD3d 1021 at 318 [3rd Dept., 2008]; Matter of Jackson v New York State Urban Dev. Corp., 67 NY2d 400 [1986] at 417).

Accordingly, this Article 78 petition is denied and the proceeding is dismissed.

Settle judgment (see, 22 NYCRR §202.48).

So ordered.

Dated: December 22, 2010

William B. Rebolini

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

__X__ FINAL DISPOSITION_____ NON-FINAL DISPOSITION