Matter of Ranco Sand & Stone Corp. v Vecchio
2011 NY Slip Op 34221(U)
November 29, 2011
Supreme Court, Suffolk County
Docket Number: 09-45491
Judge: Daniel Martin
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[* 1]

SHORT FORM ORDER

INDEX No. 09-45491

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL M. MARTIN
Justice of the Supreme Court

MOTION DATE 1-14-10
ADJ. DATE 8-23-11
Mot. Seq. # 001 - CDISPSUBJ
002 - MG

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In the Matter of

RANCO SAND AND STONE CORP.,

Petitioner,

- against -

PATRICK VECCHIO, THOMAS McCARTHY, EDWARD WEHRHEIM, PATRICIA BIANCANEILLO, ROBERT J. CREIGHTON, constituting the Town Board of the Town of Smithtown, Suffolk County and the TOWN OF SMITHTOWN,

Respondents.

For Relief Pursuant to Article 78 of the Civil Practice Law and Rules of the State of New York,

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Upon the following papers numbered 1 to 13 read on this motion to dismiss the petition ; Notice of Petition and supporting papers 1 - 6 ; Notice of Motion / Order to Show Cause and supporting papers 7 - 13 ; Notice of Cross Motion and supporting papers___; Answering Affidavits and supporting papers___; Replying Affidavits and supporting papers ___; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the respondents for an order pursuant to CPLR 3211 (a) (7) and 7804 (f) dismissing the petition is granted.

The petitioner commenced this CPLR article 78 proceeding seeking a judgment annulling, as arbitrary and capricious, a resolution adopted by respondent Town Board of the Town of Smithtown on August 11, 2009 that issued a positive State Environmental Quality Review Act (SEQRA) declaration with respect to the petitioner's change of zone application and that required the petitioner to prepare and

submit a draft environmental impact statement (DEIS). The petitioner also seeks relief in the nature of mandamus declaring and directing respondent Town of Smithtown to proceed with the petitioner's application without the required DEIS.

The petitioner acquired property located at 154 Old Northport Road, Kings Park, Town of Smithtown, New York (the 154 parcel) in 2002. The property is an irregularly shaped parcel consisting of approximately 2.16 acres and is bounded by Old Northport Road, the Sunken Meadow Parkway, a Long Island Power Authority easement, 152 Old Northport Road (the 152 parcel), and a small section of vacant land purportedly used as a drainage facility.

The petitioner filed a change of zone application for the 154 parcel in 2002 with respondent Town of Smithtown (Town) to amend the Town's zoning map from the current zoning of R-43 (residential) to HI (heavy industrial). The zoning of the adjacent parcel of land, 152 Old Northport Road, was amended to HI pursuant to a stipulation of settlement on April 4, 2002 in a declaratory judgment action entitled, "Estate of Peter Horan, plaintiff, against Town of Smithtown, Patrick R. Vecchio, Supervisor, Eugene A. Cannataro, Michael J. Fitzpatrick, Bradley L. Harris, Michael T. Sullivan, constituting the Town Board of the Town of Smithtown, Suffolk County, New York, and Victor T. Liss, Town Clerk of Town of Smithtown, defendants," under Index No. 89-12853 (the 1989 action). Since 1991, the 152 parcel has been owned by the Peter J. Horan Trust and the sole present beneficiary of the Trust is Marilyn A. Horan, who is the majority owner of the petitioner. The petitioner does not occupy the 154 parcel. The primary tenant continuously occupying the majority of the 152 and 154 parcels pursuant to a single lease is a school bus company that is using the parcels for the parking and repair of school buses. The 154 parcel is improved with a single-family residence, built over 60 years ago, which has been used by a security guard.

The Town Board requested that the petitioner appear before the Town Planning Board prior to the Town Board public hearing on the zoning change application. The Planning Board hearing was held on November 6, 2002, and on March 17, 2004, the Planning Board recommended approval of the application. The Planning Board made no determination with respect to the State Environmental Quality Review Act (SEQRA), Article 8 of the Environmental Conservation Law. The Town took no further action on the application for five years until August 11, 2009, when the Town Board adopted a resolution as lead agency under SEQRA and made a positive SEQRA declaration, determining that the zone change may have a significant effect on the environment and that preparation of a DEIS was required.

The petitioner asserts that among the reasons stated by the Town Board for requiring a DEIS is the incompatible use with existing residential land uses in the vicinity of the 154 parcel, yet the Town Board's resolution admits that the property is currently being used for heavy industrial purposes. The petitioner emphasizes that its application is solely for a change of zone, not for change of use or permission to construct a structure or facility. The petitioner argues that the facts before the Town Board do not support its determination. The petitioner propounds that the 154 and 152 parcels are being used in the same manner, in compliance solely with HI zoning provisions, and inasmuch as no formal environmental review was undertaken as part of the zone change application for the 152 parcel or settlement of the 1989 action, none should be required for the 154 parcel.

The respondents now move for an order pursuant to CPLR 3211 (a) (7) and CPLR 7804 (f) dismissing the petition on the ground that it fails to state a cause of action. The respondents contend that the instant proceeding is not ripe for judicial review inasmuch as the issuance of the positive declaration by the Town Board is not a final determination and that the adoption of a positive declaration by the Town was not arbitrary and capricious. In addition, the respondents contend that the sequence of events relating to the adjacent property are distinguishable from this proceeding inasmuch as the prior litigation was resolved with a settlement agreement that was subsequently converted into a court order rendering the application a Type II action pursuant to 6 NYCRR 617.5 (c) (29) for the purposes of SEQRA.

In considering a motion to dismiss a CPLR article 78 proceeding pursuant to CPLR 3211(a) (7) and 7804 (f), all of the allegations in the petition are deemed to be true and are afforded the benefit of every favorable inference (*see* ***Matter of Eastern Oaks Dev., LLC v Town of Clinton***, 76 AD3d 676, 678, 906 NYS2d 611 [2d Dept 2010]; ***Matter of Bloodgood v Town of Huntington***, 58 AD3d 619, 621, 871 NYS2d 644 [2d Dept 2009]). The motion must be determined solely on the allegations contained in the petition (*see* ***Matter of East End Resources, LLC v Town of Southold Planning Bd.***, 81 AD3d 947, 949, 917 NYS2d 315 [2d Dept 2011]; ***Matter of McComb v Reasoner***, 29 AD3d 795, 797, 815 NYS2d 665 [2d Dept 2006]; ***Matter of Long Is. Contrs. Assn. v Town of Riverhead***, 17 AD3d 590, 594, 793 NYS2d 494 [2d Dept 2005]). The court must also accept as true all factual submissions made in opposition to the dismissal motion (*see* ***Wohlgemuth v Lang Constr., LLC***, 18 AD3d 650, 795 NYS2d 634 [2d Dept 2005]).

A petitioner may commence a CPLR article 78 proceeding seeking review of an administrative determination only after the determination has become final and binding (*see* CPLR 217 [1]; ***Matter of Surton Constr. Contr. Corp. v New York City School Constr. Auth.***, 81 AD3d 654, 916 NYS2d 157 [2d Dept 2011]). A determination is "final and binding" when the agency has taken a "definitive position on the issue that inflicts actual, concrete injury" and when the petitioner has exhausted administrative remedies (***Walton v New York State Dept. of Correctional Servs.***, 8 NY3d 186, 194, 831 NYS2d 749 [2007] [internal quotation marks omitted]; *see* ***Matter of Surton Constr. Contr. Corp. v New York City School Constr. Auth.***, *supra* at 656). SEQRA is intended to minimize to the greatest degree possible the adverse environmental consequences of government actions (*see* ***Matter of Chase Partners, LLC v Incorporated Vil. of Rockville Ctr.***, 43 AD3d 1049, 843 NYS2d 116 [2d Dept 2007]; ***Matter of Sun Beach Real Estate Dev. Corp. v Anderson***, 98 AD2d 367, 369, 469 NYS2d 964 [2d Dept 1983]). Environmental Conservation Law § 8-0105 (4) defines "actions" to include:

> (i) projects or activities directly undertaken by any agency; or projects or activities supported in whole or part through contracts, grants, subsidies, loans, or other forms of funding assistance from one or more agencies; or projects or activities involving the issuance to a person of a lease, permit, license, certificate or other entitlement for use or permission to act by one or more agencies;
>
> (ii) policy, regulations, and procedure-making.

Where an agency's determination commits the agency to a definite course of future conduct, "such

determination constitutes an 'action' within the meaning of SEQRA and, concomitantly, a 'final determination' for Statute of Limitations purposes" (***Matter of Wing v Coyne***, 129 AD2d 213, 217, 517 NYS2d 576 [3d Dept 1987] quoting ***Matter of Save the Pine Bush v City of Albany***, 70 NY2d 193, 203, 518 NYS2d 943 [1987]; *see* 6 NYCRR 617.2 [b] [2]; ***Matter of Gordon v Rush***, 100 NY2d 236, 762 NYS2d 18 [2002]; ***Matter of Jones v Amicone***, 27 AD3d 465, 468, 812 NYS2d 111 [2d Dept 2006]).

Here, the Town Board's SEQRA determination is not yet ripe for judicial review (*see* ***Matter of Southwest Ogden Neighborhood Assn. v Town of Ogden Planning Bd.***, 43 AD3d 1374, 844 NYS2d 530 [4th Dept 2007], *lv denied* 9 NY3d 818, 852 NYS2d 14 [2008]; ***Matter of Young v Board of Trustees of Vil. of Blasdell***, 221 AD2d 975, 977, 634 NYS2d 605 [4th Dept 1995], *affd* 89 NY2d 846, 652 NYS2d 729 [1996]). A lead agency's SEQRA review obligations are not considered complete until it issues a SEQRA findings statement (*see* ***Matter of Chase Partners, LLC v Incorporated Vil. of Rockville Ctr.***, *supra* at 1053; ***Matter of Jones v Amicone***, 27 AD3d at 467, citing ***Matter of Long Is. Pine Barrens Socy. v Planning Bd. of Town of Brookhaven***, 78 NY2d 608, 578 NYS2d 466 [1991]). The Town Board's mere issuance of a positive SEQRA declaration and requirement that the petitioner file a DEIS did not create a justiciable controversy inasmuch as there is no question at this juncture concerning a choice of lead agency, or a conflicting determination by the Town with respect to SEQRA and the 154 parcel, nor has a sufficient record been established on this matter (*compare* ***Matter of Gordon v Rush***, supra).

Accordingly, the motion is granted and the petition is dismissed.

Dated: 11/29/11

J.S.C.

__X__ FINAL DISPOSITION ___ NON-FINAL DISPOSITION