

**Gasoline Heaven at Commack, Inc. v Town of  
Smithtown Town Bd.**

2013 NY Slip Op 33095(U)

November 26, 2013

Supreme Court, Suffolk County

Docket Number: 21799/2012

Judge: Ralph T. Gazzillo

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SHORT FORM ORDER

Index No: 21799/2012

Supreme Court - State of New York  
IAS PART 6 - SUFFOLK COUNTY

MOT. SEQ: 001 MD; 002 MG  
003 MG

**PRESENT:**

Hon. RALPH T. GAZZILLO  
A.J.S.C.

-----X

Gasoline Heaven at Commack, Inc., Kathy Bacchi, :  
Jonathan Bacchi, Edward Fiorvanti and :  
Janice Fiorvanti, :  
: :  
: :  
Plaintiff(s), :  
- against - :  
: :  
Town of Smithtown Town Board, Hess Corporation :  
L.M.I. Commack Realty Corp. and Fayland Realty, :  
Inc., :  
: :  
Defendant(s). :  
-----X

Upon the following papers numbered 1 to 41 read on this proceeding brought pursuant to CPLR Article 78 and CPLR 3001; Notice of Petition and petition/complaint and supporting papers numbered 1-6 ; Respondent Town of Smithtown’s Notice of Motion to Dismiss and supporting papers (including Memorandum of Law) numbered 7-18; Respondent Hess’ motion to dismiss and supporting papers (including Memorandum of Law) numbered 19-27; Affirmation in opposition and supporting papers (including Memorandum of Law) numbered 28-40; Respondent Hess’ reply Memorandum of Law numbered 41; it is,

**ORDERED** that the respondents’ motions to dismiss are granted and the petition/complaint is dismissed, and it is further

**ORDERED** that counsel for petitioner shall serve a copy of this Order with Notice of Entry upon counsel for all other parties, pursuant to CPLR §§2103(b)(1), (2) or (3), within thirty (30) days of the date the order is entered and thereafter file the affidavit(s) of service with the Clerk of the Court.

The instant proceeding seeks relief pursuant to CPLR Article 78 annulling a determination of the Town Board of the Town of Smithtown (hereinafter "Town Board") dated March 22, 2012 and filed with the Town Clerk of the Town of Smithtown on March 23, 2012. Specifically, petitioner seeks to annul the Town Board's adoption of an amendment to the Town of Smithtown Zoning Code (hereinafter "Zoning Code") and Building Zone Map (hereinafter "Zoning Map"). The amendment was requested by the respondents pursuant to Petition # 2011-07 for a change of zone from the WSI (Wholesale Service Industry) District, PB (Professional Business) District and the R-15 (Residential 15,000 sf single family) District to the NB (Neighborhood Business) District. The subject premises is located on the southeast corner of Jericho Turnpike (Route 25) and Harned Road in the hamlet of Commack. The purpose of the requested rezoning to permit the construction of a Hess Service Station with twelve fueling positions, a 1,231 sf Hess Express convenience store and a 2,340 sf canopy.

There are three named petitioners. They are: Gasoline Heaven at Commack, Inc., (hereinafter "Gasoline Heaven"), Kathy Bacchi and Jonathan Bacchi (hereafter "Bacchi") and Edward Fiorvanti and Janice Fiorvanti (hereinafter "Fiorvanti"). Gasoline Heaven is the owner of a gasoline service station and convenience store located 600 feet to the east of the subject premises on Route 25. The Bacchis and Fiorvantis are both residents of Smiths Lane, Commack, New York and their respective residences are located in the vicinity of the subject premises.

The subject premises consists of two adjacent tax lots on the southeast corner of Jericho Turnpike and Harned Road in Commack. The premises is .77 acres and is rectangular in shape with 125 of frontage on Jericho Turnpike and 202 feet of frontage on Harned Road. A portion of the premises is improved with a gasoline service station that has not been in operation for approximately eight (8) years. The adjoining tax lot is improved with a commercial building. These approvals followed the adoption of an amendment to the Town of Smithtown Zoning Code (hereinafter "Zoning Code") and Building Zone Map (hereinafter "Zoning Map") by the Town of Smithtown. The zoning amendment was requested by the respondents pursuant to Petition # 2011-07 for a change of zone from the WSI (Wholesale Service Industry) District, PB (Professional Business) District and the R-15 (Residential 15,000 sf single family) District to the NB (Neighborhood Business) District

Petitioners challenge the Town Board's rezoning of the subject property on the the zoning on property owned or sought to be owned by respondents LMI Commack Realty Corp., Fayland Realty, Inc. and Hess Corporation (hereafter "applicants") alleging that the petitioners failed to take the "hard look" required by New York's State Environmental Quality Review Act (hereinafter "SEQRA") (6 NYCRR Part 617). Petitioners take issue in particular with the Town's adoption of a "negative declaration" in connection with the rezoning of the premises and argue that failing to require the applicant to issue a "positive declaration" which would require the preparation of an Environmental Impact Statement (EIS) which, according to the petitioners, would have studied the environmental concerns and impacts on the community and provide mitigation for any adverse impacts identified in the EIS. In addition, the petitioner alleges that the respondent Town Board engaged in illegal "spot zoning" of the premises.

Respondent Town Board and respondents Hess Corporation, L.M.I. Commack Realty Corp. and Fayland Realty, Inc. each move to dismiss the proceeding. In its moving papers, the Town Board movants assert that the proceeding should be dismissed because petitioners lack the requisite standing and that they have failed to state a cause of action based upon the documentary evidence that exists with respect to the subject change of zone. Respondent applicants also move to dismiss the proceeding based upon petitioners' lack of standing. In addition the respondent applicants assert that the Town Board fully complied with SEQRA when it considered their application. Further, the applicants assert that the petitioners fail to state a claim for illegal spot zoning.

“When a party moves to dismiss a complaint pursuant to CPLR 3211 (a) (7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (see *Guggenheimer v Ginzburg*, 43 NY2d 268, 275; *Foley v D'Agostino*, 21 AD2d 60, 64-65). In considering such a motion, the court must “ ‘accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory’ ” (*Nonnon v City of New York*, 9 NY3d 825, 827, quoting *Leon v Martinez*, 84 NY2d 83, 87-88). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus” (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 quoting *Sokol v Leader*, 74 A.D.3d 1180 at 1180,1181).

In analyzing the claims of the petitioners, however, it is first necessary to determine whether the petitioners have the requisite standing to maintain the proceeding or action. In order for petitioners to have standing they must satisfy two requirements; i.e. that they are within the zone of interest that the regulations were designed to protect and that they were adversely affected by the determination (see, *Burns Pharm. of Rensselaer County v. Conley*, 146 Ad2d 842). The issue of standing in a proceeding such as the one at bar was clearly outlined by the Court of Appeals in *Sun-Brite Car Wash, Inc. v. Board of Zoning and Appeals of Town of North Hempstead*, 69 N.Y.2d 406. With regard to standing, the Court stated as follows:

“Whether in the form of an article 78 proceeding for review of an administrative determination or an action for an injunction, challenges to zoning determinations may only be made by “aggrieved” persons. By the same token, an aggrieved person may have standing to seek judicial review even where a statute vests exclusive power to enjoin zoning violations in local authorities ( see, e.g., Village Law § 7-714), because such a person pursues “more than a civic interest in law enforcement; he is vindicating a discrete, separate identifiable interest of his own” (citations omitted) (see, *Sun-Brite Car Wash, Inc. v. Board of Zoning and Appeals of Town of North Hempstead*, 69 NY2d 406, 416)).

In *Sun Brite*, with respect to the issue of standing, the Court of Appeals held that

“[a]ggrievement warranting judicial review requires a threshold showing that a person has been adversely affected by the activities of the defendants ... or - put another way - that it has sustained special damage, different in kind and degree from the community generally” (see, *Sunbrite* at 413). Moreover, [e]conomic harm caused by business competition is not an interest protected by the zoning laws (see *Sun-Brite, Id.*; *Matter of Friedman v Town Clerk of Town of Hemstead*, 62 AD3d at 700; *Scannell v. Town Board of the Town of Smithtown*; 250 AD2d 832; *Riverhead PGC,LLC v. Town of Riverhead*; 73 AD3d 931).

The petitioners/plaintiffs in this proceeding have slightly different interests with respect to analyzing requisite standing. Although the parties do not differentiate between their interest and/or injuries in their petition, their responses to the motions do. Specifically, Gasoline Heaven’s interests are commercial in nature whereas the Bacchis’ and Fiorvantis’ are related to their residences. However, although the petitioners interests are somewhat different, none of them alleges harm or injury that is different than which would be experienced by the general public. Accordingly, none of the parties have the standing required to maintain the instant proceeding.

With regard to Gasoline Heaven, the Court finds it does not have standing. As set forth in the multitude of cases, economic harm created by the business competition is not an interest protected by zoning laws. Since Gasoline Heaven’s is located approximately 600 feet away from the subject premises, its claimed traffic concerns are no different than that which would be experienced by the public at large should the defendants construct the service station/convenience store project. Accordingly, although Gasoline Heaven might be considered to be within the “zone of interest”, it has failed to establish that it will suffer an injury different than that of the general public.

Although the individual petitioners’ properties are located in close proximity to the subject premises and might therefore be considered to be within the “zone of interest”, they too have failed to allege an injury that is different than that which would be experienced by the general public. None of the individual petitioners’ properties are adjacent to the subject property. Moreover, the complaints advanced these individuals which are alleged to create “unique” injury have apparently been created by the alleged illegal activities of its *other* adjoining commercial neighbors in having removed trees that created a buffer zone and/or due to the installation of additional parking stalls without proper approvals. The balance of the harm the individual petitioners allege is speculative since the actual site plan for development of the property was not approved at the time the proceeding/action was commenced and since their complaints relate to increased traffic, light pollution and noise, none of which would not be unique to them. Accordingly, the individual petitioners also lack standing to challenge the rezoning of the subject premises.

Based upon petitioner's lack of standing, the petition must be dismissed. Accordingly, the Court need not reach the petitioner's remaining contentions.

Dated: 11/26/13  
Riverhead, NY

  
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Ralph T. Gazzillo  
A.J.S.C.

NON-FINAL DISPOSITION

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