Matter of Butler v Planning Bd. of theTown of Amherst
2013 NY Slip Op 33839(U)
November 8, 2013
Supreme Court, Erie County
Docket Number: I-2013-001307
Judge: John L. Michalski

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

In the Matter of the Application of **EDWARD J. BUTLER, JR., KAREN BUTLER, JEFF GENRICH, RAYMOND PAOLINI, JAMES REYNOLDS and THE LIVINGSTON PARKWAY ASSOCIATION, INC.**

Petitioners,

Index No. I-2013-001307

For a Judgment Pursuant to Article 78 of the CPLR

v.

THE PLANNING BOARD OF THE TOWN OF AMHERST; ISKALO 5000 MAIN LLC and ISKALO DEVELOPMENT CORP.

Respondents.

DECISION & ORDER

Michalski, J.

Petitioners brought this Civil Practice Law and Rules Article 78 special proceeding seeking an Order vacating Respondent Town of Amherst Planning Board's decision to grant approval to Iskalo 5000 Main LLC's Site Plan Application, and an Order enjoining Iskalo from conducting any further development of the parcel at issue until such time as the municipal Respondents fully comply with the applicable state and local law. For the reasons set forth below, that application is ***denied***.

BACKGROUND

In October of 2011, Iskalo 5000 Main LLC (Iskalo) purchased the parcel of land at 5000 – 5010 Main Street in Amherst, New York for the purpose of constructing a six story Hyatt Place

Hotel on the site. On January 14, 2013 Iskalo filed a Site Plan Application (SPA) with the Town of Amherst Planning Board (the Board) for the hotel project. Copies of the SPA, which included the requisite Environmental Assessment Form (EAF), were then forwarded to the town's Planning Department and the Zoning Board of Appeals. The Planning Department subsequently circulated the document to the pertinent town departments[1] and committees, as well as to the Erie County Department of Environment and Planning, and the New York State Department of Transportation (DOT).

On January 15, 2013 the Board held an initial public hearing on the SPA. Over the course of the next two months, there ensued a period of extensive comment, correspondence, and memoranda exchange between the aforementioned state and local agencies, the public at large, and Iskalo. During that time, and based upon that input, Iskalo modified its SPA on four separate occasions. On March 12, 2013 the Town of Amherst's Building Department issued a memorandum recommending that the Board approve the SPA. The next day, the town's Traffic Safety Coordinator issued a memorandum recommending approval. The town's Senior Fire Inspector did likewise on March 21, 2013. Later that day – March 21, 2013 – the Board held a second public hearing on the matter, at which Petitioners, all owners of real property abutting the west and northwest boundary of 5000 – 5010 Main Street, their counsel, and nearly a dozen neighborhood residents voiced their opposition to the project. At the close of the proceedings, the Board voted unanimously to issue a "Negative Declaration" under the New York State Environmental Quality Review Act (SEQRA), and to approve the SPA.

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[1] Those departments included the: Building Department, Engineering Department, Highway Department, Assessor's Office, Traffic Safety Coordinator, Fire Chiefs Council, Plumbing Inspector, and the Senior Landscape Architect.

Petitioners subsequently brought this Civil Practice Law and Rules (CPLR) Article 78 proceeding, claiming the Board acted unlawfully, arbitrarily, capriciously, and otherwise abused their discretion in issuing a SEQRA "Negative Declaration" as a precursor to approving the SPA; and in granting the SPA in violation of New York State Town Law sections 274(a) and 263, and Town Zoning Ordinance §83-8-3-1. As such, they also requested injunctive relief under CPLR § 6301 precluding Iskalo from any further development or construction at the site.

STANDARD OF REVIEW

The determinations of a public body may be challenged only where they are made " . . . in violation of lawful procedure, affected by an error of law, or arbitrarily and capriciously or an abuse of discretion . . ." (CPLR § 7803-3). Our Courts have consistently held that this deferential standard of review applies to a Planning Board's determination concerning a SPA (*Kempisty v. Town of Gedes*, 93 A.D.3d 1167; *In-Town Shopping Centers v. Planning Board of Brookhaven*, 73 A.D.3d 925).

ANALYSIS

I. SEQRA VIOLATION

Petitioners allege that the Board erroneously issued a "Negative Declaration" under SEQRA (6 NYCRR 617.7) after arbitrarily and capriciously determining that the Iskalo project would "cause no adverse environmental impacts or that the identified adverse environmental impacts will not be significant" (see 6NYCRR 617.7(a)(2)). In making a "significance" determination, 6 NYCRR 617.7(b) requires a Planning Board to:

> . . . 2) review the EAF, the criteria contained in subdivision (c) of this section and any other supporting information to identify the relevant areas of environmental concern; 3) thoroughly analyze the

> identified relevant areas of environmental concern to determine if the action may have a significant adverse impact on the environment; 4) set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation."

Contrary to Petitioners' contention, both the public and Court record establish that the Board identified and thoroughly evaluated all significant areas of environmental concern (see 6 NYCRR 617.7(b)(2 and 3); 6 NYCRR 617.7(c)(1-3); *H.O.M.E.S. v. New York State Urban Development Corporation*, 69 A.D.2d 222). Each such area was addressed in, *inter alia*, either the "Negative Declaration," the Board's resolution to approve the SPA, the affidavits from Assistant Town Planing Director Gary Black and Board Chairman Jonathan O'Rourke, the Engineering Report and Storm Water Pollution Prevention Plan (SWPPP) Iskalo submitted with the SPA, the study concerning the proposed noise barrier, the SRF Associates Traffic Impact Study, and the DOT letter regarding traffic patterns, and the transcripts from the public hearing. Collectively, this evidence establishes that the Board was sufficiently mindful of its SEQRA obligations. We also find that the "Negative Declaration" shows the requisite "reasoned elaboration" for the Board's "significance" determination (see 6 NYCRR 617.7(b)(4)).

Accordingly, we find no SEQRA violation.

II. VIOLATION OF TOWN LAW § 274

Petitioners further challenge that the Board violated Town Law § 274 (a)(2) in approving the SPA. That section reads:

> "2. Approval of site plans. (a) The town board may, as part of a zoning ordinance or local law adopted pursuant to this article or other enabling law, authorize the planning board or such other

> administrative body that it shall so designate, to review and approve, approve with modifications or disapprove site plans prepared to specifications set forth in the ordinance or local law and/or in regulations of such authorized board. Site plans shall show the arrangement, layout and design of the proposed use of the land on said plan. The ordinance or local law shall specify the land uses that require site plan approval and the elements to be included on plans submitted for approval. The required site plan elements which are included in the zoning ordinance or local law may include, where appropriate, those related to parking, means of access, screening, signs, landscaping, architectural features, location and dimension of buildings, adjacent land uses and physical features meant to protect adjacent land uses as well as any additional elements specified by the town board in such zoning ordinance or local law."

Clearly, this section is enabling statute, and can not, therefore, form the basis of any cause of action. However, even if we were to assume Petitioners intended to proceed under the applicable ordinances, their arguments are nonetheless unpersuasive.

SPA determinations are governed under Town Zoning Ordinance (TZO) § 8-7-9. That section reads:

> "In rendering a final decision, the Planning Director or Planning Board, as applicable, shall consider and make findings that:
>
> A. The proposed site plan is consistent with the development plan if one is required;
> B. The proposed site plan is consistent with the purpose and specific requirements of this Ordinance and generally consistent with the policies of the Comprehensive Plan;
> C. Adequate services and utilities will be available prior to occupancy; and
> D. The site plan is consistent with all other applicable laws."

Here, Petitioners allege that the Board acted unlawfully, arbitrarily, capriciously, and otherwise abused their discretion by:

1) incorrectly determining that Iskalo "had met certain conditions prior to commencing the project,"
2) failing to consider that the "hotel project would trespass upon land

not owned by the applicant,"

3) incorrectly determining that the project would "not harm the interests of the Petitioners, [and] residents of the community and neighborhood,"

4) failing to explore whether there were "any feasible alternatives which would minimize harm to said residents," and

5) violating the "set-back" provisions in Town Zoning Ordinance § 2-5-4(b)(3).

Nothing in TZO § 8-7-9 requires the Board to determine whether the project would "harm the interests of the Petitioners [and] residents of the community", or whether there were "any feasible alternatives which would minimize harm to said residents." As to Petitioners "trespass" argument, town Planning Boards have absolutely no authority to resolve boundary disputes. Moreover, it can not be said that the Board improperly or unreasonably relied upon the survey submitted with the SPA in making its determination merely because Petitioners' survey depicted differing property lines.

We also find that the project does not violate the TZO § 2-5-4(b)(3) "set- back" provision. This section requires that improvements on commercial property be set-back from the property line of any abutting residentially zoned property at least a distance equal to the height of the proposed improvement. Contrary to Petitioners' contention, the architectural drawings submitted with the SPA clearly indicate that the proposed hotel will measure sixty five feet in height.[2] The survey submitted with the SPA shows that the boundary of the nearest parcel of residentially zoned property is sixty seven feet from the proposed hotel's foundation. Thus, the project complies with the "set-back" mandate.

Finally, there is ample evidence in the record demonstrating that the Board thoroughly

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[2] Under Zoning Ordinance §2-5-4(a), the height of a building with a flat roof – as the proposed hotel would have – is the measurement of the vertical base from the finished grade to the highest point of roof coping.

considered the TZO § 8-7-9 criteria in approving the SPA. Though the documents and affidavits aforementioned certainly underscore this conclusion, perhaps the evidence best demonstrating the Board's diligence is their attachment of no fewer than nine conditions[3] to that approval.

Accordingly, Petitioners have failed to show that the Board acted unlawfully, arbitrarily, capriciously, or otherwise abused their discretion under Town Law § 274(a).

III. VIOLATION OF TOWN LAW § 263

Petitioners further allege the Board violated Town Law § 263 in that the SPA was "substantially inconsistent" with the town's Comprehensive Plan.

Initially, we note that the pertinent section of Town Law § 263 reads: "Such *regulations* (our emphasis) shall be made in accordance with a comprehensive plan." Thus, it is clear that this section applies only to legislative, as opposed to administrative, actions. As a purely administrative body, a Planning Board has no authority to enact regulations. Nonetheless, the record before us clearly establishes the Board's compliance and comportment with the Comprehensive Plan; most particularly in the Planning Department's findings, the Board's "Negative Declaration", and the O'Rourke and Black affidavits. While Petitioners – and perhaps even this Court – may disagree with the Board's determination, that disparity of opinion is an insufficient basis upon which to set it aside, *Bergstol v. Town of Monroe* (15 A.D.3d 324, *lv den* 5 N.Y.3d 701). In other words, unless the aggrieved parties "establish[es] a clear conflict with the comprehensive plan", the challenged determination can not be set aside, *Matter of Ferraro v. Town of Amherst Planning Board* (79 A.D.3d 1691). We find no such conflict here.

[3] Satisfaction of those conditions is not at issue in this proceeding.

Accordingly, there is no Town Law § 263 violation.

IV. VIOLATION OF TOWN ZONING ORDINANCE § 83-8-3-1

Petitioners further allege that the Board violated TZO § 83-8-3-1 in failing to recognize that "the drainage plans for the proposed hotel, which would collect storm water runoff . . . are planned to be discharged into 'Mike's Pond', which abuts the hotel property and is owned by the Petitioners herein."

The Board has no jurisdiction insofar as resolving allegations of TZO violations are concerned (see TZO § 83-1-3-1). More significantly, however, the "Negative Declaration" and the Resolution approving the SPA clearly demonstrate that the Board thoroughly reviewed Iskalo's Engineer's Report and the SWPPP, and were satisfied that not only would there be "no significant adverse impacts" to the pond or the area directly abutting it, but there would, in fact, be an "improvement from current conditions" upon the project's completion (see "Negative Declaration", pg. 3).

Petitioners' additional contention that the project would trespass onto their land is also unpersuasive. As noted above, the Board does not have the authority to resolve boundary disputes, nor can it be said that they acted unlawfully, arbitrarily, capriciously, or otherwise abused their discretion in relying upon Iskalo's survey merely because Petitioners' survey depicted differing property lines.

Accordingly, the Board did not violate TZO § 83-8-3-1 in approving the SPA.

V. PRELIMINARY INJUNCTION

In assessing a claim for CPLR § 6301 relief, "it is not for a court to determine finally the merits of an action . . . rather, [its] purpose . . . is to preserve the status quo until a decision is reached on the merits", *Hoppman v. Riverview Equities Corp.* (16 A.D.2d 631); *Weisner v. 791 Park Avenue Corp.* (7 A.D.2d 805).

A preliminary injunction will be granted only where the moving party demonstrates:

1) a likelihood of ultimate success on the merits;
2) irreparable injury absent the granting of a preliminary injunction;
3) that a balancing of the equities favors his position, *Gambar Enterprises v. Kelly Services* (69 A.D.2d 297); *Town of Porter v. Chem-Troll Pollution Services* (60 A.D.2d 987).

Where the moving party fails to satisfy all three criteria, the request must be denied, *N.Y. State Inspection, Sec. & Enforcement Employees, Dist. Council 82 v. Cuomo* (103 A.D.2d 312).

Given the voluminous and highly detailed record before us, and evaluating that evidence through the prism of the Article 78 standard of review, we conclude that Petitioners have failed to establish the likelihood that the Board acted unlawfully, arbitrarily, capriciously, or otherwise abused their discretion in rendering its determinations. Thus, they have not satisfied the first of the three criteria in the injunctive relief analysis, *Gambar Enterprises* (*supra*); *Town of Porter* (*supra*); *Tucker v. Tora* (54 A.D.2d 322).

Accordingly, there is no basis upon which to grant an injunction.

WHEREFORE, it is hereby ORDERED that Petitioners' request for Article 78 relief is ***denied*** in its entirety; and it is further ORDERED that the request for a Preliminary Injunction is ***denied***.

Dated: Buffalo, New York
November 8, 2013

Hon. John L. Michalski

GRANTED
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