Matter of Amity Mobile Home Civic Assoc. v Town of Babylon
2014 NY Slip Op 30662(U)
February 25, 2014
Sup Ct, Suffolk County
Docket Number: 09973/12
Judge: Joseph C. Pastoressa
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Index No: 09973/12

SUPREME COURT OF THE STATE OF NEW YORK
IAS/ TRIAL PART 34- SUFFOLK COUNTY

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Seq # 002 CASE DISP MG

PRESENT:
HON. JOSEPH C. PASTORESSA
JUSTICE OF THE SUPREME COURT

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IN THE MATTER OF THE APPLICATION OF AMITYVILLE MOBILE HOME CIVIC ASSOCIATION,

Petitioner(s),

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

TOWN OF BABYLON, FRONTIER PARK CORP., FRONTIER PARK CO., LLC, FRONTIER PARK CO., LLP AND NEW FRONTIER II, LLC

Respondent(s).

Upon the foregoing papers, the petitioner Amityville Mobile Home Civic Association (hereinafter "petitioner") moves for a judgment annulling respondent Town of Babylon (hereinafter "Babylon") determinations regarding a change of zone application pursuant to CPLR Article 78.

The petitioner seeks to challenge a rezoning and a State Environment Quality Review Act (SEQRA) determination issued by the respondent Town Board of the Town of Babylon regarding real property located at 805 Broadway, Amityville, New York (hereinafter "subject property"). The subject property is approximately 20.26 acres and is utilized as a mobile home park consisting of approximately 356 mobile home units. The existing mobile home park is not connected to sanitary water systems but rather their respective septic is flushed and/or drained into numerous cesspools located throughout the subject property. In May 8, 2008 Notice of Formal hearing issued by the Suffolk County Department of Health Services (SCDHS) Frontier Park Company LLC, was cited with numerous violations of the Suffolk County Sanitary Code requirements including that the mobile home park is not hooked into a sewer district. In response to the Notice of Formal Hearing, Frontier Park Co. LLC executed a stipulation dated July 13, 2008 consenting to a $50,000 civil penalty that was to be waived pending compliance with several conditions. The stipulation provided in pertinent part as follows regarding the sewer connection violation:

"That as regards to the violation regarding the Respondent's failure to hook up to the sewers, the Department has been apprised of the fact that the Respondent intends to change the use of the

premises to alternate residential housing and recognizing the difficulties inherent in connection with said change of use and the relocation of approximately 360 families, the Respondent has agreed to move forward regarding the discontinuance of the use of septic system in the following manner..."

Among other things, the Stipulation required Frontier Park Co., LLC to "file with the Town of Babylon Planning Department, or any other appropriate department, its redevelopment plan, or, alternatively, a plan shall be submitted to the Suffolk County Department of Public Works regarding connection to the Suffolk County South West Sewer District." In the stipulation, Frontier Park Co., LLC also "reserve[d] the right to seek a modification of this stipulation including, but not limited to the abandonment of any proposed alternate housing development provided the respondent provides the department with a satisfactory plan to discontinue the use of septic systems and/or for the connection to the sewers."

Thus, it is uncontroverted that under no circumstance may the use of the subject property as a mobile home park continue, unless the existing septic systems are closed and the property is connected to the municipal sewer system. It is further, uncontroverted that the approximate estimated cost of closing the existing septic systems and connecting the property to the municipal sewer system would approach 12 million dollars, an amount which H. Lee Blumberg, a member of Frontier Park Co., LLC, indicated would make it an economically unfeasible obligation for the purpose of continuing the operation of the current mobile home park. Further, even if it were economically feasible the mobile home park owners would have to be displaced to make such modifications.

Hence, the respondent New Frontier II LLC applied to the Town Board and the Planning Board of the Town of Babylon on or about January 18, 2011 to amend the zoning ordinance of the respondent Town of Babylon to change the zoning of parcels of the subject property from Business E and Residential B to Multiple Residence and for site plan review and a major subdivision. In addition, a Full Environmental Assessment Form was filed with the respondent Babylon on or about February 8, 2011. The respondent Babylon on or about May 20, 2011 issued a positive declaration requiring the applicant/respondent New Frontier II LLC to prepare and submit a Draft Generic Environmental Impact Statement ("DGEIS") regarding the application for a change of zone pursuant to SEQRA. The respondent New Frontier II LLC on or about August 8, 2011 filed the DGEIS with the respondent Babylon. The respondent Babylon on or about September 13, 2011 pursuant to resolution number 517 voted to accept the DGEIS. The respondent Babylon on or about October 4, 2011 pursuant to resolution number 553 voted to schedule a public hearing on the respondent New Frontier II LLC's application for a change of zone to be held on November 10, 2011. The Planning Board of the Town of Babylon on or about October 24, 2011 pursuant to resolution number 064-2011 recommended that the Town Board of the Town of Babylon approve the application for a change of zone sought by the applicant/respondent New Frontier II LLC. The respondent Babylon held a public hearing on the proposed change of zone on November 10, 2011, whereby the applicant/respondent New Frontier II, LLC presented expert witnesses on behalf of the applicant including an environmental, planning and design, and traffic experts. The applicant/respondent New Frontier LLC submitted a Final Generic Environmental Impact Statement (FGEIS) to the respondent Babylon and the respondent Babylon on December 6, 2011 pursuant to resolution number 701 voted to accept the applicant/respondent New Frontier II LLC's FGEIS and determined that the document is "acceptable with respect to its scope, adequacy and content for the purpose of public review." The respondent Babylon in December 2011 pursuant to resolution number 742 voted to adopt environmental findings regarding the applicant/respondent New Frontier II LLC's application for a change of zone. The resolved clause of resolution 742 of the respondent Babylon states the following: "that the Town Board of the Town of Babylon hereby certifies that consistent with social, economic and other essential considerations from among the reasonable alternatives available, the

action is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable, and that adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigative measures that were identified as practicable." Moreover, attached to respondent Babylon's resolution 742 as Exhibit "A" is the Town Board's "Findings" consisting of topics entitled discussion, alternatives, no action, development under the existing zoning, community character, major mitigation measures, fees, standard mitigation measures and conditions. The respondent Babylon on December 29, 2011 pursuant to resolution number 743 voted to approve to amend the Town zoning map and change the zoning of the subject property from "E" Business and "B" Residence to Multiple Residence Use District subject to conditions.

The petitioner avers that the respondent Babylon did not have subject matter jurisdiction to approve the change of zone application or that the respondent New Frontier II LLC did not have standing to pursue the application on behalf of Frontier Park Co. LLC on the alleged grounds that respondent Frontier Park Company LLC is not the owner of the subject property. In addition, the petitioner avers that it has the right of first refusal to the subject property, and that the respondent Babylon violated SEQRA in failing to take a "hard look" at the environmental impacts of the proposed action including but not limited to the failure "to properly assess the impact on the Project of the adjacent superfund site, the failure to provide a written and funded plan for relocating the Park residents, the failure to adequately (sic) to test the impact of the Project on groundwater through test borings for possible contamination at depth especially near the superfund site, the failure to record a FOIL with the NYDEC, the failure to provide a detailed engineering evaluation and costing regarding access to sewers for the existing Park, the failure to provide well reports, the failure to do field screenings, and the failure to collect or test for existing soil contamination".

The court finds that the averments raised by the petitioner regarding the ownership of the subject property are specious and dehors the record and are not part of the limited determination which the Town Board had before it (see Kaufman v Incorporated Village of Kings Point, 52 AD3d 604, 607 [2nd Dept 2008]; Kam Hampton I Realty Corp. v Board of Zoning Appeals of the Village of East Hampton, 273 AD2d 387 [2nd Dept 2000]). Specifically, the petitioner failed to show that the issue of ownership was raised before the respondent Babylon in connection with the subject application for a change of zone. The averments contained in the petition that the issue of ownership was raised before the Town Board are refuted in that the petitioner's undated correspondence to the Town Board merely requested an adjournment and reference to a letter by the petitioner's attorney dated January 17, 2012 was after the proceedings were concluded in connection with this application. In any event, the respondent Frontier Park Company LLC. established through documentary evidence and an affirmation that it is the owner of the subject property. The 2003 deed and numerous real property documents as well as the uncontroverted affirmation of H. Lee Blumberg, President of respondent Frontier Park Corp., establish that the intention in 2003 was to transfer ownership of the subject property to respondent Frontier Park Co., LLC rather than Frontier Park Co. LLP. It is well established that "[e]very instrument creating, transferring, assigning or surrendering an estate or interest in real property must be construed according to the intent of the parties, so far as such can be gathered from the whole instrument, and is consistent with the rules of law" [RPL 240(3)]. Here, there was a typographical error in the deed that mistakenly had the transfer being to an "LLP" rather than an "LLC" entity. The court notes that the acknowledgment and signature line of the deed had the correct entity name and that the "LLP" entity did not exist in contrast to the LLC entity which was incorporated some four months before the 2003 conveyance. In addition, numerous real property documents including a Real Property Transfer Report, the Combined Real Estate Transfer Tax Return and Credit Line Mortgage Certificate show that the conveyance was to Frontier Park Co., LLC. Most importantly the

corporate officer of the grantor, H.Lee Blumberg, avers that it was his intent to convey the subject property to the LLC entity. Accordingly, under the circumstances presented, as a matter of law, the respondents demonstrated that the 2003 was intended to and did convey ownership of the subject property to Frontier Park Co. LLC (see Levitt v 1317 Wilkins Corp., 58 NYS2d 507). Similarly, the 2009 correction deed specifically and expressly cured the typographical error in the 2003 deed and confirmed the identity of the correct grantee, "Frontier Park Co., LLC" (see, Abley Properties, Inc. v Reidi, 18 Misc. 3d 1103[A], Kings County, Supreme Court, 2007). Turning to the averments in the petition concerning SEQRA. It 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 East End Property Co. v Kessel, 46 AD3d 817, 820 [2d Dept 2007] quoting Matter of Village of Tarrytown v Planning Board of Village of Sleepy Hollow, 292 AD2d 617, 619 [2d Dept 2002]; see Akpan v Koch, 75 NY2d 561, 570 [1990]). Courts "may 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" (Matter of East End Property Co. v Kessel, supra quoting Matter of Jackson v New York State Urban Dev. Corp., 67 NY2d 400, 417 [1986]; see Matter of Riverkeeper Inc v Planning Board of Town of Southeast, 9 NY3d 219 [2007]). In this regard, "while judicial review must be meaningful, the courts may not substitute their judgment for that of the agency for it is not their role to weigh the desirability of any action or choose among alternatives" (Apkan v Koch, supra at 570 quoting Matter of Jackson v New York State Urban Dev. Corp., supra at 416; see Matter of Riverkeeper v Planning Board of Town of Southeast, supra).

In the Matter of East End Property Company #1, LLC v Richard M. Kessel, 46 AD3d 817, the Second Department stated the applicable standard:

> "The State Environmental Quality Review Act ([ECL art 8] hereinafter SEQRA) was designed to "insure that agency decision-makers–enlightened by public comment where appropriate will identify and focus attention on any environmental impact of proposed action, that they will balance those consequences against other relevant social and economic considerations, minimize adverse environmental effects to the maximum extent practicable, and then articulate the bases for their choices" (Matter of Jackson v New York State Urban Dev. Corp., 67 NY2d 400, 414-415, 494 NE2d 429, 503 NYS2d 298; Matter of Halperin v City of New Rochelle, 24 AD3d 768, 775, 809 NYS2d 98; Matter of Coalition for Future of Stony Brook Vil. v Reilly, 299 AD2d 481, 483, 750 NYS2d 126). It is axiomatic 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, 619, 741 NYS2d 44; see Akpan v Koch, 75 NY2d 561, 570, 554 NE2d 53, 555 NYS2d 16; Matter of UPROSE v Power Auth. Of State of N.Y., 285 AD2d 603, 607, 729 NYS2d 42). Courts "may 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" (Matter of Jackson v New York State Urban Dev. Corp., 67 NY2d at 417, quoting Aldrich v Pattison, 107 AD2d 258, 265, 486 NYS2d 23; see Matter of New York City Coalition to End Lead Poisoning v Vallone, 100 NY2d 337, 348, 794 NE2d 672, 763 NYS2d 530). In this regard, "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 satisifed SEQRA, procedurally and substantively" (Matter of Jackson v New York State urban

Dev. Corp., 67 NY2d at 416; see Matter of Chemical Specialities Mfrs. Assn. v Jorling, 85 NY2d 382, 397, 649 NE2d 1145, 626 NYS2d 1; Chinese Staff & Workers Assn. v City of New York, 68 NY2d 359, 363, 502 NE2d 176, 509 NYS2d 499).

Furthermore, SEQRA mandates literal compliance with its procedural requirements and substantial compliance is insufficient to discharge the responsibility of the agency under the act (see Matter of Group for S. Fork v Wines, 190 AD2d 794, 795, 593 NYS2d; Matter of Rye Town/King Civic Assn. v Town of Rye, 82 AD2d 474, 481, 442 NYS2d 67). "Literal compliance is required because the legislature has directed that the policies of the State and its political subdivsions shall be administered to the fullest extent possible in accordance with SEQRA" (Matter of Consolidated Edison Co. Of N.Y. v New York State Dept. of Envtl. Conservation, 112 AD2d 989, 991, 492 NYS2d 800)".

Here, the petitioner contends that the respondent Babylon failed to identify or take a hard look at certain environmental impacts such as soil contamination, sewage, and relocating the park residents. However, the record demonstrates that the DGEIS and FGEIS, which was prepared by an environmental consulting firm, identified all relevant issues, including but not limited to water, sewage, soil, soil testing, relocation of residents and evaluated the potential significant environmental impacts. While the petitioner disputes some of the findings in a cursory affidavit of an expert, an agency may rely on consultants to conduct the analyses that support their environmental review of a proposed project (see Matter of Brooklyn Bridge Park Legal Defense Fund v New York State Urban Dev. Corp., 50 AD3d 1029 [2d Dept 2008]; Matter of Halperin v City of New Rochelle, 24 AD3d 768 [2d Dept 2005]). The choice between conflicting evidence rests in the discretion of the administrative agency (see Matter of Brooklyn Bridge Park Legal Defense Fund v New York State Urban Dev. Corp., supra). In this case, the DGEIS and the FGEIS were reviewed by the respondent Babylon which found that they adequately addressed the potential environmental impacts. The respondent New Frontier II, LLC in preparing the DGEIS and FGEIS identified the relevant areas of environmental concern and the respondent Babylon took the "hard look" at them and made a reasoned elaboration of the basis for its determination (see Eadie v Town Board of Town of North Greenbush, 7 NY3d 306 [2006]; Gernatt Asphalt Prods. Inc. v Town of Sardina, 87 NY2d 668 [1996]; Patterson Materials Corp. v Town of Pawling, 264 AD2d 510 [2d Dept 1999]; Matter of Vill. of Tarrytown v Planning Bd. of Sleepy Hollow, 292 Ad2d 617 [2d Dept 2002]; Matter of Town of Babylon v New York State Department of Transportation, 47 AD3d 721[2d Dept 2008; Matter of Town of Babylon v New York State Department of Transportation, 33 AD3d 617 [2d Dept 2006). Specifically, the respondent Babylon in the DGEIS and the FGEIS looked at the impact of the following categories: land, water, ecological, human, cultural, infrastructure, and mitigation measures. The court finds that the final DGEIS and the FGEIS were specific regarding the enumerated categories contained therein. The respondent Babylon's public hearings, staff and departmental review of documents such as the DGEIS and FGEIS, as well as the December 29, 2011 Findings Resolution number 742 demonstrate that it took a "hard look" at the proposed environmental impacts of the proposed change of zone. Moreover, contrary to the petitioner's contention, the respondent Babylon in its "Findings" carefully considered the presence of cesspools and above ground tanks on the subject property and the efforts needed to address that issue and the mitigation measures required by SEQRA. Furthermore, the petitioner's averment that no FOIL request was filed with the NYSDEC and that no field testing data was presented in the environmental documents submitted by the applicant/respondent New Frontier II LLC is without merit. The FGEIS contains a Phase I/II Environmental Site Assessment report of the subject property which confirms that soil sampling, sediment sampling and groundwater sampling were all conducted at the subject property. In addition, the FGEIS shows that a FOIL request was filed with the NYSDEC in

connection with this application. The respondent Babylon heard expert testimony submitted by the applicant at the public hearing on the DGEIS of November 10, 2011 on the cost of connecting the existing facilities to the county sewer system at the subject property. Finally, contrary to the petitioner's contention concerning the lack of a relocation plan for the residents, the respondent Babylon specifically addressed the issue in its adopted December 29, 2011 Findings resolution number 742 entitled under "Major Mitigation Measures" as follows:

> "1. The project sponsor shall continue to work with the Town of Babylon and Long Island Housing Partnership on a relocation program for the residents of Frontier Park. The project sponsor shall provide a relocation reimbursement of $20,000 per unit, to be disbursed during each phase of the project to members of the Amityville Mobile Home Civic Association, unless otherwise directed by the Town of Babylon. Full purchase price will be refunded to everyone who brought a trailer unit within last two years. Eligible recipients are residents who purchased units from property owners; H. Lee Blumberg and/or associates. This does not cover private sales. The two year period commences on the date application was filed with Planning Department or as subject to agreement with the Town of Babylon."

Therefore, contrary to the petitioners' contention, the record demonstrates that the environmental Findings of the respondent Babylon had a rational basis (see Matter of Marcus v Board of Trustees, supra; Matter of Perrin v Bayville Village Board, 70 AD3d 835 [2d Dept 2010]; Barrett v Dutchess County Legislature, 38 AD3d 651 [2d Dept 2007]).

Lastly, the petitioner's arguments concerning a first right of refusal to the subject property were addressed and found patently merit less by this court in a decision dated February 25, 2014 in a related action entitled Amityville Mobile Home Civic Association v Town of Babylon, Frontier Park Corp., Frontier Park Co. LLP, Frontier Park Co. LLC, New Frontier II LLC, index number, 16576/12.

Accordingly, the petition is dismissed.

This shall constitute the decision and order of the court.

DATED: February 25, 2014

HON. JOSEPH C. PASTORESSA, J.S.C.

FINAL DISPOSITION __x__ NON-FINAL DISPOSITION ____

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