

Matter of Calverton Manor, LLC v Town of Riverhead
2014 NY Slip Op 31884(U)
July 15, 2014
Sup Ct, Suffolk County
Docket Number: 05582/2004
Judge: William B. Rebolini
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

MEMORANDUM

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 SUFFOLK COUNTY

COPY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

<hr/> In the Matter of the Application of Calverton Manor, LLC, <div style="text-align: center;">Petitioner/Plaintiff,</div> For a Judgment pursuant to Article 78 of the Civil Practice Law & Rules <div style="text-align: center;">- against -</div> Town of Riverhead and Town Board of the Town of Riverhead, <div style="text-align: center;">Respondents/Defendants.</div> <hr/>	<u>Index No.:</u> 05582/2004 <u>Motion Sequence No.:</u> 014; MD; CD <u>Motion Date:</u> 10/4/07 <u>Submitted:</u> 2/5/14 <u>Motion Sequence No.:</u> 015; MD <u>Motion Date:</u> 10/4/07 <u>Submitted:</u> 2/5/14 <u>Attorney for Petitioner/Plaintiff:</u> Certilman, Balin, Adler & Hyman, LLP 100 Motor Parkway, Suite 156 Hauppauge, NY 11788 <u>Attorney for Respondents/Defendants:</u> Twomey, Latham, Shea, Kelly, Dubin & Quatararo, LLP 33 West Second Street Riverhead, NY 11901
---	--

In this hybrid Article 78 proceeding/declaratory judgment action, the petitioner/plaintiff Calverton Manor, LLC (petitioner) seeks judgment annulling and declaring the zoning comprehensive plan adopted by the respondent Town Board of the Town of Riverhead (Town Board) on November 3, 2003 to be illegal, unconstitutional, invalid, void, and of no effect. Petitioner also seeks a judgment annulling, reversing and setting aside the resolution and other actions of the Town Board approving a Draft Generic Environmental Impact Statement, a final Generic Environmental Impact Statement, and a findings statement, all prepared in connection with the Town Board's proposed comprehensive plan. In addition, Petitioner seeks partial summary judgment on its claims.

The record establishes that in 1997 the Town Board authorized the Town Planning Board to prepare a revision of the Town's comprehensive plan. In 1998, the Town hired a consultant for the preparation of the plan. From 1999 to 2003, the Town conducted focus groups, public workshops, surveys and interviews with the public, soliciting the citizens' concerns, ideas and opinions regarding the future development of the Town. The Town also created a Citizen's Advisory Committee to

Calverton Manor LLC v Town of Riverhead**Index No.: 05582/2004****Page No. 2**

review the draft comprehensive plan prior to its finalization in draft form and release to the general public.

The draft comprehensive plan examined eleven different elements with Chapter 2, the Land Use Plan, being the centerpiece, weaving together the many goals and recommendations set forth throughout the plan. The land use plan envisioned a thriving commercial corridor along Route 58 with reduced traffic congestion and an attractive visual quality. A key provision of the land use plan was the expansion of the business district zoning along Route 58 to allow destination retail uses at the western end of Route 58. It also proposed the creation of a new zoning district called Destination Retail Center (DRC). The purpose of this new district was to provide a location for large retail centers along Route 58, while linking development to open space protection along the Route 58 corridor and in agricultural zones. The proposed design concepts included campus-like layouts, no strip development/freestanding businesses, a higher floor area ratio with the purchase of Transfer of Development Rights (TDR), significant open space, and landscaping requirements in parking lots.

Chapter 3 of the draft comprehensive plan, entitled Agricultural Protection, proposed amending the Town Code to require TDR to increase coverage within the DRC district from 10 percent to a maximum of 15 percent, at the rate of one development right per 1,500 square feet of increased floor area. One purpose of the proposed Agricultural Protection-TDR sending zone was to promote and sustain agricultural activity and farming while protecting prime soil through the transfer of development rights. A Rural Corridor (RLC) zone was also proposed to allow a limited range of roadside shops and services in a rural setting along a corridor leading into a village center in downtown Riverhead, mainly along Route 25.

Chapter 6 of the draft comprehensive plan, entitled Business Districts, recognized that Route 58 is Riverhead's largest and most important commercial center and that high percentages of residents utilize that roadway (Plan, p 6-2). It acknowledged that the roadway suffers from traffic congestion and poor aesthetics, and it recognized the need to address such issues before additional development is permitted (Plan, p 6-6).

On May 29, 2002, the Town held a public scoping session on the Generic Environmental Impact Statement (GEIS) in connection with the proposed revised comprehensive plan. In the spring of 2003, the Town Board formally proposed an action with two components. The first was the adoption of the new comprehensive plan, and the second was the amendment of the Town's Zoning Code (Chapter 108) to implement the recommendations of the comprehensive plan. By resolution dated May 16, 2002, the Town Board declared itself lead agency in the State Environmental Quality Review Act (SEQRA) review of the proposed comprehensive plan, determined it to be a Type 1 action, and directed that a Draft Generic Environmental Impact Statement (DGEIS) be prepared. The DGEIS and draft comprehensive plan were presented to the Town Board in June of 2003.

On July 1, 2003, the Town Board accepted the DGEIS as complete with respect to scope, content and adequacy. On July 7 and July 21, 2003, the Town Board held hearings on the DGEIS and the draft comprehensive plan. At the public hearing, a number of organizations appeared, including the Long Island Farm Bureau, Long Island Builders Institute, Long Island Association,

Calverton Manor LLC v Town of Riverhead**Index No.: 05582/2004****Page No. 3**

Long Island Housing Partnership, Pine Barrens Society and New York League of Conservation Voters. They addressed issues of farmland preservation, affordable housing, TDRs, traffic and environmental concerns. While the majority of speakers supported the proposed comprehensive plan, most also made suggestions for additions, amendments, deletions or improvements to the plan. A number of property owners, including petitioner, expressed concern regarding the effect of the implementation of the comprehensive plan on the development of their properties. At the public hearing on July 7, 2003, a representative of the petitioner informed the Town Board that as part of its application to develop its property, petitioner proposed to donate a portion of the property for the development of a YMCA facility.

The draft comprehensive plan was referred to the Suffolk County Planning Department by letter dated July 23, 2003. On September 3, 2003, the Suffolk County Planning Commission voted to conceptually approve the draft comprehensive plan with a number of comments thereto. On October 21, 2003, the Town Board accepted the Final Generic Environmental Impact Statement (FGEIS) as complete and a notice of completion was filed. On November 3, 2003, the Town Board adopted the SEQRA findings statement and the comprehensive plan.

The Court takes judicial notice that two days after the adoption of the comprehensive plan, the respondent Town Board, by Resolution #1217 dated November 5, 2003, adopted an interim measure designed to provide for the continued processing of non-residential development plans pending the adoption of legislative amendments to the Town Zoning Code necessitated by the terms of the newly adopted comprehensive plan. Pursuant to Resolution #1217, development plans for non-residential property that were consistent with existing zoning classifications would continue to be processed by the Town, notwithstanding that said development plans were likely to be inconsistent with anticipated amendments to the Zoning Code, dictated by the terms of the newly adopted comprehensive plan.

Petitioner owns two parcels of land consisting of approximately 41.7 acres, located at or near the northwesterly corner of Manor Lane and Route 25, in the hamlet of Calverton. The parcels formerly were zoned Business Country Rural (Business CR), Residence A, and Agricultural A. As a result of the Town Board's adoption of certain local laws implementing the Town's comprehensive plan, the parcels are now zoned Rural Corridor (RLC) and placed within the Agricultural Protection Zone (APZ). In or about March of 2001, prior to the zoning change, petitioner filed a three phase site plan application with the Town for approval of a "campus style" retail development of the Business CR zoned portion of the property. The first phase was to consist of retail buildings of 4,000 and 13,000 square feet and two restaurants of 10,000 square feet each, together with related site improvements, on approximately 9.85 acres of the business zoned property. Development of the balance of the site (Phases II and III) would occur at a later time. However, the Town found that the floor-area ratios for the proposed buildings did not comply with the purposes and requirements of the zoning code and advised petitioner's then-attorney by letter to revise the site plan. In June of 2002, petitioner submitted an additional and separate application for preliminary site plan approval. A full environmental assessment form (EAF) was submitted therewith. This application detailed Phase I of a multi-phase development. Phase I, as already noted, would consist of retail buildings and two restaurants together with associated infrastructure on the Business CR zoned part of the

Calverton Manor LLC v Town of Riverhead**Index No.: 05582/2004****Page No. 4**

property. Phases II and III were to be developed on the remaining acres of the property. Petitioner had previously informed the Town in discussions that Phases II and III would include a residential subdivision and further commercial development. The Town suggested that petitioner submit a more fully developed EAF that took into consideration Phases II and III to avoid improper segmentation under SEQRA.

In August of 2002, the Town began the SEQRA review process by notifying other involved agencies and requesting input on the issue of designating a lead agency. None of the involved agencies were interested in being designated lead agency. On October 3, 2002, the Town Planning Department prepared a staff report regarding the environmental review that would be required under SEQRA. The staff report evaluated the entire project and noted a number of potentially large environmental impacts, including traffic and groundwater concerns, and recommended that a positive declaration notice of significance be issued. The report also raised the issue of the impact on the proposed comprehensive plan, which was not yet adopted but was in an advanced stage. There was no activity with regard to this application in the Planning Department between October 3, 2002 and July of 2003. However, as noted above, at the public hearing held on the proposed Comprehensive Plan on July 7, 2003, a representative of petitioner informed the Town Board that the petitioner, as part of its application for the subject site, proposed to donate a portion of the property for the development of a YMCA facility. In August of 2003, petitioner submitted a revised site proposal by filing a revised EAF which set forth changes to the proposal, including the construction of a YMCA facility instead of the residential subdivision, and a sewage treatment plant. On August 25, 2003, the Planning Department notified the petitioner's then-attorney that the full EAF had not been revised to take into account the major changes in the proposed project.

On August 26, 2003, the Planning Department and Town Board received a memo from the Fire Marshall stating that the revised site plan did not address any of the comments raised in a June 20, 2002 letter sent to petitioner, and suggested that an additional meeting be set up between the Fire Marshall, the Planning Department, the Fire Commissioner, the Fire Chief and petitioner. A copy of this memo was sent to petitioner and its then-attorney. The meeting never took place. On September 18, 2003, the Town requested additional comments from the State Department of Transportation on petitioner's revised traffic study, and stated that the Town considered this application a modification of the initial project and not a new action requiring a new SEQRA coordination and determination of lead agency. On September 22, 2003, the Planning Department issued an additional SEQRA staff report on petitioner's revised plan and once again recommended a positive declaration of environmental significance.

It is here that the parties' versions of the facts diverge. Petitioner alleges that it never received the September 22, 2003 staff report and that the Town improperly, illegally and in violation of its rights failed and refused to properly carry out and complete the site plan process. Petitioner further alleges that it should be allowed to develop its property in accordance with the zoning classifications that existed prior to the re-zoning of the property on June 22, 2004. In opposition, respondents allege that the petitioner received and failed to respond to the staff report and the Fire Marshall's comments and never properly completed the site plan process and, thus, that it is not entitled to such relief.

Calverton Manor LLC v Town of Riverhead

Index No.: 05582/2004

Page No. 5

The site plan issue, however, is not before the Court in this matter. Rather, it is at issue in two of four related actions/proceedings having the same caption and pending before this Court under index numbers 04-25551 and 05-04714.

Here, the burden is on petitioner to establish that the action taken by the respondent Town Board with regard to its zoning ordinances was unconstitutional, illegal or invalid for the purposes of the declaratory judgment proceeding (*see Ilasi v City of Long Beach*, 38 NY2d 383, 342 NE2d 594, 379 NYS2d 831 [1976]; *see also Amrod v Mayor*, 87 AD2d 621, 448 NYS2d 247 [2d Dept 1982]). A heavy burden falls on one challenging the determination of a local government board. Parties who attack an ordinance have the burden of showing that the regulation assailed is not justified under the police power of the state by any reasonable interpretation of the facts; if the validity of the legislative classification for zoning purposes is fairly debatable, the legislative judgment must be allowed to control (*Matter of Town of Bedford v Village of Mount Kisco*, 33 NY2d 178, 186, 351 NYS2d 129 [1973]; *see Matter of Hart v Town Bd. of the Town of Huntington*, 114 AD3d 680, 980 NYS2d 128 [2d Dept 2014]; *Infinity Consulting Group, Inc. v Town of Huntington*, 49 AD3d 813, 854 NYS2d 524 [2d Dept 2008]). Only as a last resort should courts strike down legislation on these grounds (*see Kravetz v Plenge*, 84 AD2d 422, 428, 446 NYS2d 807 [4th Dept 1982]).

Petitioner argues that the Town failed to comply with Town Law § 272-a (5)(b) and General Municipal Law § 239-m as it did not make a proper referral to the Suffolk County Planning Commission (SCPC). Petitioner alleges there were significant differences between the comprehensive plan submitted to the SCPC and the comprehensive plan adopted by the Town in November of 2003.

General Municipal Law § 239-m requires that all zoning actions and amendments affecting real property within 500 feet of the boundary of any city, village, town or existing or proposed county or state park or road be referred to the county planning commission for its review, which then has 30 days to report its recommendation to the Town (*see* General Municipal Law § 239-m[2], [3], [4]). This referral shall be made prior to the municipality taking final action on a zoning amendment (*see* General Municipal Law § 239-m[2]). The statute further lists what documents must be provided to the County Planning Commission including, *inter alia*, a completed environmental assessment form (General Municipal Law § 239-m[1][c]). A municipality's failure to refer a zoning amendment to the County Planning Commission is a jurisdictional defect which renders its enactment invalid (*Matter of Zelnick v Small*, 268 AD2d 527, 702 NYS2d 105 [2d Dept 2000]; *Matter of Ernalex Const. Realty Corp. v City of Glen Cove*, 256 AD2d 336, 681 NYS2d 296 [2d Dept 1998]).

Here, the draft comprehensive plan was properly submitted to the Suffolk County Planning Commission by letter dated July 23, 2003. On September 3, 2003, the Suffolk County Planning Commission voted to conceptually approve the draft comprehensive plan with a number of comments thereto. Several of these comments were incorporated into the comprehensive plan that was adopted, including decreasing the size of the RLC zone along Middle Country Road, adding mandatory cluster provisions, and including the maximum amount of receiving areas for the TDR Program.

Calverton Manor LLC v Town of Riverhead

Index No.: 05582/2004

Page No. 6

Petitioner contends that the Town, in referring the draft comprehensive plan to the SCPC, failed to include a “full statement of such proposed action” in violation of General Municipal Law § 239-m(1)(c). However, that section refers to “all materials required by and submitted to the referring body.” Since this provision refers to materials submitted by a third-party applicant to the Town, it is not applicable herein. Furthermore, General Municipal Law § 239-m(1)(c) states that “any referring body may agree with the county planning agency as to what shall constitute a full statement for any and all of those proposed actions which the referring body is authorized to act upon.” Since the SCPC accepted and reviewed the submitted draft comprehensive plan, it can only be concluded that the SCPC had a “full statement of [the] proposed action” before it for review (*see, e.g., Matter of Basha Kill Area Assn. v Planning Board of the Town of Mamakating*, 46 AD3d 1309, 849 NYS2d 112 [3d Dept 2007]; *Matter of Batavia First v Town of Batavia*, 26 AD3d 840, 811 NYS2d 236 [4th Dept 2006]).

The only significant changes between the draft comprehensive plan and the adopted comprehensive plan were those comments of the SCPC which were incorporated into the adopted plan. None of the other changes were significant enough to require a referral back to the SCPC. Under these facts, the Court finds that the respondents complied with the requirements of General Municipal Law § 239-m. In light of this determination, the court also finds that the respondents complied with the referral requirements of Town Law § 272-a.

Petitioner also alleges that the respondents failed to comply with the requirements of SEQRA. Judicial review of an agency determination under SEQRA is limited to “whether the agency identified the relevant areas of environmental concern, took a ‘hard look’ at them and made a ‘reasoned elaboration’ of the basis of its determination” (*Matter of Riverkeeper, Inc. v Town of Southeast*, 9 NY3d 219, 231-232, 881 NE2d 172, 851 NYS2d 76 [2007], quoting *Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417, 494 NE2d 429, 503 NYS2d 298 [1986]; *Matter of Highview Estates of Orange County, Inc. v Town Board of Town of Montgomery*, 101 AD3d 716, 955 NYS2d 175 [2d Dept 2012]). An agency decision should be annulled only if it is arbitrary and capricious, or unsupported by evidence (*Matter of Riverkeeper, Inc. v Town of Southeast*, *supra* at 9 NY2d 232). When reviewing a SEQRA determination, “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 satisfied SEQRA, procedurally and substantively” (*Matter of East End Prop. Co. #1, LLC v Kessel*, 46 AD3d 817, 820, 851 NYS2d 565 [2d Dept 2007], quoting *Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 416, 494 NE2d 429, 503 NYS2d 298 [1986]; *see Red Wing Props., Inc. v Town of Milan*, 71 AD3d 1109, 898 NYS2d 593 [2d Dept 2010]).

In its reply memorandum of law, the petitioner claims that the Town, in approving the comprehensive plan and enacting the zoning amendments, failed to make a SEQRA positive declaration; that it failed to designate a lead agency; that it failed to issue a positive declaration and failed to publish such notice in the Environmental Notice Bulletin; that it failed to prepare a notice of completion of the DGEIS and failed to publish such notice in the Environmental Notice Bulletin; and that it held a public hearing on the DGEIS a mere six days after the acceptance thereof, rather than the minimum 15 days required by SEQRA regulations. However, the record establishes that the Town did issue a positive declaration and designate a lead agency (*see* Exhibit “3” of the

Calverton Manor LLC v Town of Riverhead**Index No.: 05582/2004****Page No. 7**

Supplemental Return) and the Court takes judicial notice that the notice of positive declaration was published in the Environmental Notice Bulletin on June 5, 2002. Also, the Town did prepare a notice of the completion of the FGEIS (see Exhibit 8 of the Supplemental Return) and the Court takes judicial notice that said notice was published in the Environmental Notice Bulletin on October 29 and November 5, 2003. It is further alleged that the Town held a public hearing on the DGEIS six days after the acceptance of that document by the Town Board, rather than the 15 days required by SEQRA regulations. A second hearing was held on July 21, 2003, twenty days after the acceptance of the DGEIS. Thus, petitioner has failed to raise any facts sufficient to establish that the respondents violated the procedural requirements of SEQRA.

Turning to the substantive requirements of SEQRA, it is noted that the use of a generic impact statement is specifically authorized when adopting a comprehensive plan in accordance with Town Law § 272-a [4] (see 6 NYCRR 617.10[b]). It is further noted that generic environmental impact statements may be broader and more general than site or project specific environmental impact statements and should discuss the logic and rationale for the choices advanced (*Ecumenical Task Force v Love Canal Area Revitalization Agency*, 179 AD2d 261, 583 NYS2d 859 [4th Dept 1992]). Here, based upon the facts in the record and the relevant law, it is determined that the respondent Town Board complied with the substantive requirements of SEQRA in that it identified the relevant areas of environmental concern with regard to the proposed comprehensive plan, took a hard look at them and made a reasoned elaboration of the basis of its determination. Furthermore, there was no improper segmentation of the environmental review herein, because the Town Board not only reviewed the comprehensive plan, but it also considered the corresponding zoning amendments which would implement the comprehensive plan. The Court has considered petitioner's remaining claims and finds them to be without merit.

Petitioner failed to carry its heavy burden of proof with regard to its motion for summary judgment. Petitioners' proof is insufficient to overcome "the strong presumption of validity" attached to the Town Board's adoption of the comprehensive plan (see *Asian Ams. for Equality v Koch*, 72 NY2d 121, 527 NE2d 265, 531 NYS2d 782 [1988]; see also *Matter of Birchwood Neighborhood Assn. v Planning Bd. Of Town of Colonie*, 112 AD3d 1184, 977 NYS2d 454 [3d Dept 2013]) and, therefore, the motion is denied. Furthermore, it is declared that the comprehensive plan which is the subject of this action is a legal, constitutional and valid exercise of the police and zoning powers of the respondent Town Board of the Town of Riverhead. Accordingly, the petition is denied.

Dated:

7/15/2014


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