

Matter of Calverton Manor, LLC v Town of Riverhead
2014 NY Slip Op 31886(U)
July 15, 2014
Sup Ct, Suffolk County
Docket Number: 25551/2004
Judge: William B. Rebolini
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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

In the Matter of the Application of

Index No.: 25551/2004

Calverton Manor, LLC,

Motion Sequence No.: 009; MDMotion Date: 9/10/09

Petitioner/Plaintiff,

Submitted: 2/5/14For a Judgment pursuant to Article 78 of the
Civil Practice Law & Rules,Motion Sequence No.: 010; MDMotion Date: 9/10/09Submitted: 2/5/14

-against-

Attorney for Petitioner/Plaintiff:

Town of Riverhead and

Town Board of the Town of Riverhead,

Certilman, Balin,

Adler & Hyman, LLP

Respondents/Defendants.

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Hauppauge, NY 11788

Attorney for Respondents/Defendants:

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Riverhead, NY 11901

In this hybrid Article 78 proceeding/declaratory judgment action, the petitioner/plaintiff Calverton Manor, LLC (petitioner) seeks a judgment annulling Resolutions #491A and #522 of the Town Board of the Town of Riverhead (Town Board) adopted on June 22, 2004, enacting Local Law No. 13 of 2004, which established an Agricultural Protective Zoning (APZ) district in the Town of Riverhead and reclassified a substantial portion of the petitioner's property located on the northwesterly corner of Manor Lane and Route 25 in the hamlet of Calverton. As a first cause of action, petitioner seeks a judgment declaring said enactment to be unconstitutional, illegal and void. As a second cause of action in the event that the Court does not invalidate the enactment, petitioner seeks a judgment declaring that it is entitled to develop its property in accordance with the zoning classifications that existed prior to the June 22, 2004 zoning enactments. Issue having been joined, petitioner also seeks partial summary judgment on its claims.

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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 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. 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.

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.

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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, 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.

In April of 2004, the Town submitted an abstract of the proposed APZ to the Suffolk County Planning Commission, in accordance with General Municipal Law § 239-m and Suffolk County Administrative Code Article XIV. Richard Hanley, the planning director of the Town, appeared before the Suffolk County Planning Commission at a meeting on May 5, 2004 to answer any questions its members had with regard to the zoning regulations that the Town intended to enact in accordance with its comprehensive plan, including the APZ. After a public hearing on April 15, 2004, the Town Board, on June 22, 2004, adopted Resolution 491A, a local law amending the Town's Zoning Code and map to create the APZ District.

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

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the floor area ratios for the proposed buildings did not comply with the purposes and requirements of the zoning code and, by letter, advised petitioner's then-attorney 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 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 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, 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 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 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. The report also noted that "[t]he two largest impacts, traffic and growth and community character, are in the first case, considered by a study with which involved agencies may find fault and in the second case, not considered at all. . ."

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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 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.

It is noted that four related actions/proceedings with the same caption are pending before this Court under index numbers 04-5582, 04-11004, 05-4714 and 05-20338, respectively. In the proceeding bearing Index Number 04-5582, this Court upheld the Town's SEQRA review with regard to the Comprehensive Plan and declared that the Town's comprehensive plan is a legal, constitutional and valid exercise of the police and zoning powers of the respondent Town Board of the Town of Riverhead.

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 alleges that the Town failed to comply with General Municipal Law § 239-m when it adopted a local law establishing the Agricultural Protection Zone, because it did not make a proper referral to the Suffolk County Planning Commission (SCPC). 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*

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City of Glen Cove, 256 AD2d 336, 681 NYS2d 296 [2d Dept 1998]).

On April 13 and April 14, 2004, the Town Clerk forwarded to the SCPC and numerous other public agencies resolutions adopted by the Town Board on April 6, including Resolution #297, which authorized the Town Clerk to publish and post a notice of consideration of a local law amending the Town Code and adopting the APZ zoning amendment to implement portions of the comprehensive plan. The notice of public hearing contained a detailed abstract of the local law and a proposed zoning map. Upon receiving the referral, the SCPC reviewed the APZ and other proposed amendments. The SCPC issued a staff report on May 5, 2004 recommending approval of all of the Town's zoning amendments, including the APZ. The staff report states that the amendments were reviewed in connection with the town-wide zoning reclassifications to implement the recently enacted comprehensive plan of the Town. As already noted, Richard Hanley, the planning director of the Town, appeared before the SCPC at a meeting on May 5, 2004 to answer questions its members had with regard to the zoning regulations that the Town intended to enact in accordance with its comprehensive plan, including the APZ. At the meeting, Thomas Isles, the Suffolk County Director of Planning, stated that the matter had been referred to the Commission by the Town of Riverhead. After the presentation, with a number of members absent, the SCPC voted to approve the staff report by a vote of seven to zero, with one abstention. The seven votes were not enough to carry the resolution, however, resulting in no action and a referral back to the Town.

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]).

Petitioner asserts that the Town did not comply with General Municipal Law § 239-m because the version of the APZ that was sent to the SCPC was substantially different from the one that was adopted. However, the record does not support this view, and none of the 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.

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*

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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]).

Since the Town’s SEQRA review of the comprehensive plan has been upheld in the related matter bearing index number 04-5582, the review herein is limited to whether or not the Town complied with SEQRA with regard to the adoption of the APZ district.

6 NYCRR 617.10(b) states, in relevant part, as follows:

. . . [A]gencies may prepare generic EISs on the adoption of a comprehensive plan prepared in accordance with...section 272-a of the Town Law...and the implementing regulations. Impacts of individual actions proposed to be carried out in conformance with these adopted plans and regulations and the thresholds or conditions identified in the generic EIS may require no or limited SEQR review as described in subdivisions (c) and (d) of this section.

Town Law § 272-a (8) states in relevant part:

. . . A town comprehensive plan may be designed to also serve as . . . a generic environmental impact statement pursuant to the state environmental quality review act statute and regulations. No further compliance with such law is required for subsequent site specific actions that are in conformance with the conditions and thresholds established for such actions in the generic environmental impact statement and its findings.

Here, where the APZ district was adopted in compliance with the comprehensive plan and in conformance with the conditions and thresholds established in the GEIS for site specific actions, no further SEQRA review was required (see *Matter of Danyla v Town Bd of Town of Florida*, 259 AD2d 850, 686 NYS2d 213 [3d Dept 1999] [Town’s preparation of a comprehensive plan and GEIS just prior to re-zoning satisfied the requirements of SEQRA]). In view of the foregoing, the Court finds that the Town complied with its obligations under SEQRA.

Moreover, the doctrine of legislative equivalency requires that existing legislation be amended or repealed by the same procedure as was used to enact it (*JEM Realty Company v Town Bd. of Town of Southold*, 297 AD2d 278, 279, 746 NYS2d 41[2d Dept 2002]). Contrary to the allegations of the petitioner, the record establishes that there was no violation of this doctrine.

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A town's zoning determination is entitled to a strong presumption of validity; therefore, one who challenges such a determination bears the heavy burden of demonstrating, beyond a reasonable doubt, that the determination was arbitrary and unreasonable or otherwise unlawful (*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]). For the foregoing reasons, the petitioner has failed to meet its burden of proof. Accordingly, the petitioner's application pursuant to Article 78 of the CPLR for a judgment annulling the Town Board's resolutions which amended the Town Code and established an APZ district in the Town of Riverhead is denied.

Petitioner's application for a judgment declaring the establishment of an APZ zoning district in the Town of Riverhead to be unconstitutional, illegal and void is denied in view of petitioner's failure to meet its burden of showing such enactment was unconstitutional and not justified under the police power of the state by any reasonable interpretation of the facts (*see Matter of Hart v Town Bd. of the Town of Huntington, supra*). The Court finds that the respondents are entitled to the entry of judgment in their favor declaring that the adoption of the APZ district which is the subject of this action was a legal, constitutional and valid exercise of the police and zoning powers of the respondent Town Board of the Town of Riverhead.

Petitioner contends that it should be allowed to develop its property in accordance with the zoning classification that existed prior to the re-zoning of its property on constitutional grounds. A substantive due process claim consists of two elements: (1) a cognizable property interest, meaning a vested property interest, and (2) a demonstration that the governmental action was wholly without legal justification (*Bower Assoc. v Town of Pleasant Valley*, 2 NY3d 617, 627, 814 NE2d 410, 781 NYS2d 240 [2004]). Beyond a vested property right arising from substantial expenditures pursuant to a lawful permit, a legitimate claim of entitlement to a permit can exist only where there is either a "certainty or a very strong likelihood" that an application for approval would have been granted (*Bower Assoc. v Town of Pleasant Valley, supra* at 2 NY3d 628, quoting *Harlen Assoc. v Incorporated Vil. of Mineola*, 273 F3d 494, 504 [2d Cir 2001]). Only the most egregious official conduct can be said to be arbitrary in the constitutional sense (*Bower Assoc. v Town of Pleasant Valley, supra* at 2 NY3d 628, citing *City of Cayuga Falls, Ohio v Buckeye Community Hope Found.*, 538 US 188, 123 SCt 1389 [2003]). In addition, the essence of the constitutional guarantee of equal protection is that all persons similarly situated must be treated alike (*Bower Assoc. v Town of Pleasant Valley, supra* at 603). It is not sufficient for the petitioner to demonstrate only that it was treated differently than similarly situated landowners. Rather, there must be proof that the applicant was singled out with an "evil eye and unequal hand, so as practically to make unjust and illegal discriminations" (*see Matter of 303 West 42nd St. Corp. v Klein*, 46 NY2d 686, 693, 389 NE2d 815, 416 NYS2d 219 [1979], quoting *Yick Wo v Hopkins*, 118 US 356, 373-374). Here, petitioner alleges 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 contends 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 never properly completed the site plan process and, thus, is not entitled to such relief. The evidence before this Court reveals that there exist triable questions of fact on the issue of whether there was

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an improper delay in the review of petitioner's application by the respondent Town (*see Rocky Point Drive-In, L.P. v Town of Brookhaven*, 21 NY3d 729, 999 NE2d 1164, 977 NYS2d 719 [2013]).

The court directs that the entry of judgment on the first cause of action be held in abeyance pending the determination of the remaining cause of action (*see* CPLR 3212 [e][2]).

Dated:

7/15/2014


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