Itzler v Town Bd. of the Town of Huntington
2015 NY Slip Op 32259(U)
November 24, 2015
Supreme Court, Suffolk County
Docket Number: 14-18447
Judge: Joseph C. Pastoressa
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MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 34

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LEE ITZLER, ANN ITZLER, RICHARD APPOLLONIA, LAURI HOLT, VINCENT MODICA, and DAVID PRESTIPINO,

Petitioners,

For an Order and Judgment Pursuant to Article 78 of the CPLR and Section 3001 of the CPLR,

- against -

TOWN BOARD of the TOWN OF HUNTINGTON, BK ELWOOD, LLC, and OAK TREE FARM DAIRY, INC.,

Respondents.

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By: Pastoressa , J.S.C.
Dated: November 24, 2015

Index No. 14-18447
Mot. Seq. # 001 - MD
002 - MD; CDISPSUBJ

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In this article 78 proceeding, the petitioners seek a judgment annulling and vacating the determination of the respondent Town Board of the Town of Huntington ("Town Board") to rezone a 37 plus acre parcel known as the Oaktree Dairy on Elwood Road in the Town of Huntington from R-40 zone (one acre residential) to an R-RM (retirement community district), with approval to build 256 residential units.

In the amended petition, petitioners seek a judgment determining on the first cause of action, that the respondent Town's action in approving the change of zone from single family residential to retirement community constituted illegal spot zoning. The second and third causes of action allege that the Town violated the State Environmental Quality Review Act ("SEQRA") by failing to issue a positive declaration and require the preparation of an Environmental Impact Statement ("EIS"). The fourth, fifth sixth and seventh causes of action all allege that the Town violated SEQRA by failing to take a hard look at various aspects of the environmental impact of the zone change on the surrounding residential community.

The property which is the subject of this proceeding is located within the Town of Huntington on Elwood Road, south of Pulaski Road and north of Jericho Turnpike. The subject property has been used as a dairy farm for more than 70 years, originally as a permitted use and later pursuant to special use permits issued by the Zoning Board of Appeals under application numbers 5873, 7910 and 12946. The property is currently owned by Oaktree Dairy Farm, Inc. ("Oaktree") and is under contract to be sold to BK Elwood LLC ("BK Elwood"). Oaktree has represented that should the conditional contract of sale with BK Elwood fall through, it will seek to sell the property to another dairy company. In March 2012, BK Elwood submitted an application to the Town Board to rezone the property from a R-40 residence district zoning classification to a R-RM retirement district zoning classification to allow the property to be redeveloped as a multi-family "senior" housing project known as "The Seasons at Elwood." Under the R-RM zone, the 37 plus acre property could be developed with a maximum of 538 units. BK Elwood's initial application sought approval of 482 units. The firm of Nelson, Pope & Vorhees, LLC ("NPV") prepared an Expanded Environmental Assessment form ("EEAF") dated June 2012, which was submitted to the Town. In response to a comment letter from the Town, the number of requested units was reduced to 444 units. Thereafter, following discussions with the Town and community (some of whom favored the project and some of whom were adamantly opposed thereto), BK Elwood reduced the requested number of units to 356. A further EEAF was prepared in response to this reduction, dated May 2014.

At the Town Board meeting held on May 6, 2014, at the public portion of the meeting, numerous citizens spoke both for and against the proposed zoning change. There was also a dialogue between two Town Board members and the attorney for BK Elwood about concerns with the density of the proposed housing, at the then requested 360 units.

The Town Board held a public hearing on the BK Elwood application on June 17, 2014. At the opening of the meeting, Supervisor Petrone announced that the Board would not be voting on the application that night so that the parties can continue to discuss the application. BK Elwood presented evidence with regard to environmental, traffic, economic issues, among others, as well as its attempts to reach out to the Elwood community with regard to the project. They also submitted a traffic study and other documents in support of their application. A number of residents spoke in favor of the application. A larger number of speakers spoke in opposition to the project. It is noted that the record contains approximately 2,700 letters and e-mails in support of the application. The Town also received in excess of 5,000 letters, e-mails, as well as a number of petitions opposing the project. It is further noted that the EAF and the Expanded EAF were available for the public to examine, on the Town's website.

Thereafter, based upon comments at the public hearing and following further discussion with the Town, the proposal was altered yet again to 256 units which is approximately 47% of the density allowed in the R-RM zone. A supplemental EEAF dated August 2014, was prepared to reflect the changes created by the reduction of the project to 256 units and was submitted to the Town by a letter dated August 5, 2014.

At its meeting on August 6, 2014, the Planning Board passed a resolution recommending to the Town Board that the requirements for SEQRA had been met, that a negative declaration should be issued based on the reasons set forth in the EAF Parts II and III, and that they should approve the application to rezone the subject property from R-40 zone (one acre residential) to an R-RM (retirement community district). The Resolution further noted that the planning Department "has reviewed the information provided with the SEQRA documents, has duly classified the action as Type I in accordance with the provisions of 6 NYCRR 617..., has coordinated the action which has established the Town Board as Lead Agency, and has prepared an EAF Parts II and III which analyzes the planning and zoning issues relative to the subject application as well as consistency with the Horizons 2020 Comprehensive Plan update and evaluates the potential project impacts in accordance with the SEQRA regulations..." The Planning Board further stated that the project will not have a significant effect on the environment "as applicant has offered or will be required to mitigate the existing and anticipated environmental impacts from the proposed senior housing development."

At its meeting on August 19, 2014, respondent Town Board adopted a local law approving the zone change and issuing a negative declaration pursuant to SEQRA upon a finding that the requirements of SEQRA had been met. The decision provided that "upon due deliberation of the completed Environmental Assessment Form...the Town Board finds that the action will not have a significant effect on the environment because the rezoning action incorporates measures and conditions of approval to mitigate impacts; and further finds that the proposed action to rezone the property is consistent with the Town of Huntington Comprehensive Plan and with long term planning policies..."

The rezoning was also subject to a number of conditions, including that the property was to be limited to a yield of 256 senior units; that affordable units be provided in accordance with the Town Code; that the improvements listed in the Expanded EAF/Traffic study were to be provided by applicant at its own expense and, further, they were to install other traffic improvements, if required, by the County of Suffolk; that a soil management plan be provided; and that the open space area located on the northeast portion of the property should be enhanced during site plan review.

The court notes at the outset that the affidavits of Daniel J. Gulizio and John M. Semioli, as purported experts, which were submitted with the petition herein, are not admissible and will not be considered, since they were not submitted during the application process or at the public hearings and, thus, were not part of the record before the respondent ZBA (Kaufman v Inc. Vil. of Kings Point, 52 AD3d 604, 607 [2d Dept 2008]; Merlotto v Town of Patterson Zoning Bd, 43 AD3d 926; Manzi Homes v Trotta, 286 AD2d 737).

It is further noted that the petitioners' claim that the property can no longer be used as a dairy because it has lost its status as a nonconforming use due to the fact that it has not been so used for more

than a year is without merit. The use to which the property in question is being put ceased to be nonconforming when the owners of that property were granted a series of special permits or variances, the most recent of which, issued in 1974, were permanent in nature (see Matter of Kogel v Zoning Bd. of Appeals of Town of Huntington, 58 AD3d 630; Matter of Borer v Vineberg, 213 AD2d 828; Matter of Concerned Citizens of Westbury v Board of Appeals of Inc. Vil. of Westbury, 173 AD2d 615). Thus, the possibility that the prior use of the property could be reinstated still exists.

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 Highview Estates of Orange County, Inc. v Town Bd of Town of Montgomery, 101 AD3d 716; Matter of Riverkeeper, Inc. v Town of Southeast, 9 NY3d 219). An agency decision should be annulled only if it is arbitrary, capricious, or unsupported by evidence (Matter of Save Open Space v Planning Bd. of the Town of Newburgh, 74 AD3d 1350, 1352; Matter of East End Prop. Co. # 1, LLC v Kessel, 46 AD3d 817, 820; Matter of Riverkeeper, Inc. v Town of Southeast, supra). When reviewing a SEQRA determination, it is not the role of the courts to weigh the desirability of any SEQRA action or choose among alternatives, but to assure that the agency has satisfied SEQRA procedurally and substantively (Red Wing Properties, Inc. v Town of Milan, 71 AD3d 1109; Matter of East End Prop. Co. #1, LLC v Kessel, 46 AD3d 817; Matter of Basha Kill Area Assn. v Planning Bd. of the Town of Mamakating, 46 AD3d 1309; see also Matter of Jackson v New York State Urban Dev. Corp, 67 NY2d 400, 416).

Respondents contend the Town Board failed to take the "hard look" required by SEQRA before concluding that an environmental impact statement (hereinafter EIS) was not required. SEQRA requires an EIS when an agency action "may have a significant effect on the environment," and such an impact is presumed to be likely where, as here, a type I action is involved (ECL 8–0109[2]; see Matter of Frigault v Town of Richfield Planning Bd., 107 AD3d 1347, 1349; 6 NYCRR 617.4[a][1]); however, a type I action does not, "per se, necessitate the filing of an [EIS]" (Matter of Shop–Rite Supermarkets, Inc. v Planning Bd. of the Town of Wawarsing, 82 AD3d 1384, 1386, lv denied 17 NY3d 705; see Matter of Gabrielli v Town of New Paltz, 93 AD3d 923, 924, lv denied 19 NY3d 805). A negative declaration may be issued, obviating the need for an EIS, if the lead agency—here, the Town Board—determines that "no adverse environmental impacts [will result] or that the identified adverse environmental impacts will not be significant" (6 NYCRR 617.7[a][2]; see Matter of City Council of City of Watervliet v Town Bd. of Town of Colonie, 3 NY3d 508, 520; Matter of Troy Sand & Gravel Co., Inc. v Town of Nassau, 82 AD3d 1377, 1378). Upon judicial review, a court cannot substitute its judgment for that of the Board, and may annul a board's decision "only if it is arbitrary, capricious or unsupported by the evidence" (Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast, 9 NY3d 219, 232; accord Matter of Residents for Responsible Govt. v Grannis, 75 AD3d 963, 966, lv denied 16 NY3d 701).

As noted above, while it is true that a "negative declaration by a lead agency may not be subject to conditions, a type I action subject to SEQRA may be modified during the approval process and still receive a negative declaration" (Matter of Hoffman v Town Bd. of Town of Queensbury, 255 AD2d 752, 753, lv denied 93 NY2d 803; see Village of Chestnut Ridge v Town of Ramapo, 99 AD3d 918, 925; Matter of Granger Group v Town of Taghkanic, 77 AD3d 1137, 1141, lv denied 16 NY3d; Matter of Inc. Vil. of Poquott v Cahill, 11 AD3d 536, 542; Matter of Merson v McNally, 90 NY2d 742, 752–753). A

lead agency may issue a negative declaration where it concludes "that there will be no adverse environmental impacts or that the identified adverse environmental impacts will not be significant" (6 NYCRR 617.7[a][2]). Herein, the EEAF established that the proposed project would have no significant traffic impacts, that the contaminants in the soil were not a threat to the groundwater, that nitrogen levels would be within required drinking water standards and that the project overall would have no significant impact on the groundwater. The petitioners have failed to adduce any admissible evidence to challenge these findings (see Matter of Village of Tarrytown v Planning Bd. of Vil. of Sleepy Hollow, 292 AD2d 617, 619; Riverhead Bus. Improvement Dist. Mgt. Assn. v Stark, 253 AD2d 752; Matter of Kahn v Pasnik, 231 AD2d 568). A negative declaration may be properly issued on a Type I action where, as here, the project has been modified during the initial review process to accommodate environmental concerns of the lead agency and other interested parties. The modifications must negate the continued potentiality of the adverse effects of the proposed action. The modifications may not be conditions unilaterally imposed by the lead agency, but adjustments incorporated by the project sponsor to mitigate concerns identified by the public and the reviewing agencies and be publicly evaluated prior to the issuance of the negative declaration. Here, there were concerns expressed about density, traffic, open space and environmental concerns. Through negotiations with the Town and based on concerns expressed by the community, BK Elwood first reduced the project from 444 units to 356 units and then, after the public hearing to 256. Each modification reduced density, traffic, increased the amount of open space, and reduced potential environmental effects (see Matter of Thorne v Village of Millbrook Planning Bd., 83 AD3d 723, 725; Matter of Merson v McNally, supra; Matter of Village of Tarrytown v Planning Bd. of Vil. of Sleepy Hollow, supra). Thus, the negative declaration properly issued.

Petitioners also argue that cumulative impacts were not considered as part of the SEQRA review because two other senior housing projects are located nearby. One, the Matinecock Court project is located 1.6 miles from the subject property on Elwood Road. This project has already been approved and subject to SEQRA review. It was considered in the traffic study submitted with the SEQRA review herein. The second proposed project, The Benchmark, is more than five miles from the subject property and the application has not yet been heard by the Town Board. Based upon the facts submitted, the petitioners' claim is without merit. The existence of a broadly conceived policy regarding land use in a particular locale is not a sufficiently unifying ground for tying otherwise unrelated projects together and requiring them to be considered in tandem as "related" proposals for purposes of the State Environmental Quality Review Act (SEQRA) (Matter of Long Is. Pine Barrens Socy. v Planning Bd. of Town of Brookhaven, 80 NY2d 500, 513; Matter of Halperin v City of New Rochelle, 24 AD3d 768). Such is the case here.

As a final challenge, the petitioners allege that the SEQRA review was improperly segmented, because the Town Board decision states that further SEQRA review might be required "based upon new information or revisions to the concept plans." "Segmentation" is defined under SEQRA as "the division of the environmental review of an action such that various activities or stages are addressed under [SEQRA] as though they were independent, unrelated activities, needing individual determinations of significance" (6 NYCRR 617.2[ag]; see 6 NYCRR 617.3[g][1]). "Considering only a part or segment of an action is contrary to the intent of" SEQRA (6 NYCRR 617.3[g][1]; Matter of Highview Estates of Orange County, Inc. v Town Board of Town of Montgomery, 101 AD3d 716).

However, 6 NYCRR 617. 7 (e) and (f) provide that a new SEQRA review may be necessary when "changes may be proposed for the project" and "new information is discovered." Thus, the Town Board's decision is in accord with SEQRA regulations, and the petitioners' claim is wholly without merit.

Therefore, based upon the facts in the record and the relevant law, the court finds 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 rezoning, took a hard look at them and made a reasoned elaboration of the basis of its determination (see Matter of Highview Estates of Orange County, Inc. v Town Bd of Town of Montgomery, supra; Matter of Riverkeeper, Inc. v Town of Southeast, supra).

Turning next to the rezoning of the subject property, a party challenging the determination of a local governmental board bears the heavy burden of showing that the target regulation "is not justified under the police power of the state by any reasonable interpretation of the facts" (Matter of Town of Bedford v Village of Mount Kisco, 33 NY2d 178, 186, quoting Shepard v Village of Skaneateles, 300 NY 115, 118 [1949]). If the validity of the legislative classification for zoning purposes is even fairly debatable, it must be sustained upon judicial review; thus, when a petitioner fails to establish a clear conflict with the comprehensive plan, the zoning classification must be upheld (Hart v Town Bd. of Town of Huntington, 114 AD3d 680; see Nicholson v Incorporated Vil. Of Garden City, 112 AD3d 893; Infinity Consulting Group, Inc. v Town of Huntington, 49 AD3d 813, 814; Taylor v Incorporated Vil. of Head of Harbor, 104 AD2d 642, 645).

Generally, town land use regulations must be in compliance with a town's comprehensive plan in order to limit ad hoc or "spot" zoning, which affects the land of only a few without proper concern for the needs or design of the entire community (see Rocky Point Drive–In, L.P. v Town of Brookhaven, 21 NY3d 729, 737; Matter of Bergami v Town Bd. of the Town of Rotterdam, 97 AD3d 1018, 1019; Matter of Gernatt Asphalt Prods. v Town of Sardinia, 87 NY2d 668, 685; Udell v Haas, 21 NY2d 463, 469). "The requirement of a comprehensive ... plan not only insures that local authorities act for the benefit of the community as a whole but protects individuals from arbitrary restrictions on the use of their land" (Asian Ams. for Equality v Koch, 72 NY2d 121, 131).

Contrary to petitioners' contention, the zoning map amendment does not constitute illegal spot zoning merely because it involves a single parcel only and is not ad hoc zoning legislation affecting the land of a few without proper regard to the needs or design of the community as a whole (see Residents for Reasonable Development v City of New York, 128 AD3d 609; Matter of Town of Bedford v Village of Mount Kisco, 33 NY2d 178, 187–188). Although the proposed development will increase the density of the neighborhood, it also will preserve a sizable portion of the property as open land, provide senior housing, and provide a number of affordable units. Thus, the determination to rezone the subject property was in compliance with the overall policies outlined in the comprehensive plan. The conclusion that the rezoning is consistent with the comprehensive plan leads to the further conclusion that the rezoning does not amount to impermissible spot zoning (see Restuccio v City of Oswego, 114 AD3d 1191, 1191; Little Joseph Realty, Inc. v Town of Babylon, 52 AD3d 478, 479). The record establishes that the zoning change is part of "a well considered and comprehensive plan to serve the

general welfare of the community" (see Residents for Reasonable Development v City of New York, supra; Collard v Incorporated Vil. of Flower Hill, 52 NY2d 594, 600).

Where, as here, a petitioner fails to establish a clear conflict with the comprehensive plan, the zoning classification must be upheld (see Restuccio v City of Oswego, supra; Hart v Town Bd. of Town of Huntington, supra; Infinity Consulting Group, Inc. v Town of Huntington, 49 AD3d 813, 814; Bergstol v Town of Monroe, 15 AD3d at 325; Taylor v Incorporated Vil. of Head of Harbor, supra).

In light of the foregoing, the amended petition is denied and the proceeding is dismissed. This shall constitute the decision and order of the court.

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