Matter of Waterloo Contrs., Inc. v Town of Seneca Falls Town Bd.

2017 NY Slip Op 31977(U)

September 13, 2017

Supreme Court, Seneca County

Docket Number: 51182

Judge: William F. Kocher

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STATE OF NEW YORK
COUNTY OF SENECA SUPREME COURT

In the Matter of the application for a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules of:

WATERLOO CONTRACTORS, INC.

Petitioner,

DECISION

INDEX No. 51182

v

TOWN OF SENECA FALLS TOWN BOARD and TOWN OF SENECA FALLS TOWN CLERK

Respondents.

Petitioner has brought this Article 78 action challenging the "Negative Declaration" issued pursuant to SEQRA in connection with Local Law #2 of 2017. Specifically, petitioner requests that the Court annul the SEQRA negative declaration issued in connection with Local Law # 2 of 2017 and order the respondent Town of Seneca Falls Town Board ("respondent") to issue a positive declaration and prepare a Draft Environmental Impact Statement. Petitioner also contends that respondents have violated the Open Meetings Law. Petitioner seeks attorney's fees resulting from the violation of the Open Meetings Law. Respondents have filed an Answer. Petitioner has filed reply papers.

In 2016, the respondent Town of Seneca Falls Town Board adopted Local Law #3 of 2016 which restricted waste disposal services in the Town of Seneca Falls. Local Law #3 also provided that operation of solid waste management facilities in the town would be prohibited by the year 2025. In 2017, after a change in the makeup of the Town Board, Local Law #2 of 2017

was introduced to rescind Local Law #3 of 2016. A public hearing was held on March 29, 2017 during which several town residents testified as to the odor from the solid waste disposal services and the traffic problems caused by trucks.

The Town Board met on April 4, 2017, May 2, 2017 and May 5, 2017 to discuss Local Law #2 of 2017. On May 5, 2017, the Town Board of the Town of Seneca Falls, by a vote of 3-2, adopted the SEQRA Negative Declaration (based upon the Short Environmental Assessment Form) and adopted Local Law #2 of 2017 which rescinded Local Law #3 of 2016. Petitioner contends that inasmuch as the words "odor", "traffic" or "character of the community" were not used at the May 5, 2017 meeting, the town did not take a "hard look" at the adverse environmental impact of Local Law #2 of 2017. Petitioner states that there was no discussion of potential adverse environmental impacts at the May 5 meeting before the board adopted the negative declaration and Local Law #2.

In their Reply papers, for the first time, petitioner contends that the respondent improperly determined that the adoption of Local Law #2 was an Unlisted action when it should have been determined to be a Type I action. An Unlisted action allows for the use of the short EAF (6 NYCRR 617.6[a][3]) whereas a Type I action requires the preparation of a full EAF (6 NYCRR 617.6[a][2]). Specifically, petitioner points to 6 NYCRR 617.4(b)(9) which provides that included as a Type I action are "any Unlisted action (unless the action is designed for the preservation of the facility or site) occurring wholly or partially within, or substantially contiguous to, any historic building, structure, facility, site or district or prehistoric site that is listed on the National Register of Historic Places." Petitioner contends that there are a number of historic locations in the immediate vicinity of the landfill.

[* 3]

In light of the fact that petitioner raised this issue for the first time in the Reply papers, this Court will not address this issue and makes no finding as to whether the action was properly characterized as an Unlisted action or should have been treated as a Type I action. Furthermore, inasmuch as the petitioner did not fully address the issue before the Town Board, the record is incomplete and this Court is unable to rule on the issue.

For both Type I and Unlisted actions, an EIS (Environmental Impact Statement) is required where the lead agency determines that "the action may include the potential for at least one significant adverse environmental impact" (6 NYCRR 617.7[a][1]). The EIS is not required where the lead agency determines "either that there will be no adverse environmental impacts or that the identified adverse environmental impacts will not be significant." Here, respondent issued a "negative declaration" thereby determining that there were no significant negative environmental impacts and eliminating the need for an Environmental Impact Statement.

As the Court of Appeals has stated, "SEQRA contains no provision regarding judicial review, which must be guided by standards applicable to administrative proceedings generally: 'whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion' (CPLR 7803[3]; see, *Matter of City of Schenectady v Flacke*, 100 AD2d 349, 353, lv. denied 63 NY2d 603, *Matter of Environmental Defense Fund v. Flacke*, 96 AD2d 862). In a statutory scheme whose purpose is that the agency decision-makers focus attention on environmental concerns, 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" (*Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 416).

This Court's review of the respondent's SEQRA determination 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 for its determination" (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417 [citations omitted]).

The question here is whether respondent fully complied with SEQRA in enacting Local Law #2 of 2017. As respondent points out, the landfill has been fully operational, so it is not the licensing or approval of the landfill that is in question. Since Local Law #2 of 2017 repealed Local Law #3 of 2016 the question is what is the environmental impact, if any, of repealing Local Law #3 thereby allowing the landfill to continue operation past the year 2025. The short EAF utilized by respondent does not identify a single area of environmental impact from operating the landfill past the year 2025.

Respondent contends that short environmental assessment form required them to consider the potential environmental impact of Local Law #2 of 2017 and because there would be no change in the operation of the landfill until 2025, regardless of the adoption of the local law, there was effectively no environmental impact. Respondent contends that post 2025 operations of the landfill are speculative in light of the further regulatory approval that must be provided by the NYSDEC. In support of its argument, respondent cites the NYSDEC SEQRA handbook and *Indus. Liaison Comm. of Niagara Falls Area Chamber of Commerce v Williams* (72 NY2d 137, 143). In the *Indus. Liaison* case, the Court of Appeals stated, "it is not arbitrary and capricious or a violation of existing law for the agency, when it takes its 'hard look' and makes its 'reasoned determination' under SEQRA, to ignore speculative environmental consequences which might arise under the new or amended regulation." Here, respondent contends that any environmental

impacts are speculative because the landfill will have to undergo additional regulatory approval in order to continue operation after 2025.

Cases that have cited *Indus. Liaison* case focus on the speculative nature of the environmental impact because of intervening factors, not the necessity of future regulatory approvals (see, *Schulz v New York State Dept. of Envtl. Conservation*, 200 AD2d 793, 795 [commission need not consider the possibility that proposed regulations would "result in a shift from single-family homes and small commercial enterprises to larger types of development, such as condominiums and larger motels"]).

Respondent's argument fails for several reasons. Although the Court is mindful that speculative environmental impacts should not be considered, respondent's argument would allow environmental review under SEQRA to be delayed until the final agency to grant or deny approval to a project is set to make a decision. The language of SEQRA itself states, "The basic purpose of SEQR is to incorporate the consideration of environmental factors into the existing planning, review and decision-making processes of state, regional and local government agencies **at the earliest possible time** [emphasis added]" (6 NYCRR 617.1[c]).

Furthermore, SEQRA inherently incorporates some speculation into the environmental impact evaluation. An Environmental Impact Statement is required when it is determined that "The action **may include the potential** for at least one significant adverse environmental impact [emphasis added] (6 NYCRR 617.7[a][1]).

The fact that continued operation of the landfill after 2025 is subject to further NYSDEC approval did not eliminate or minimize the respondent's obligation to take a "hard look" at the environmental impact of operating the landfill after 2025. It defies credulity that respondent took

a "hard look" at the environmental impacts resulting from the continued operation of the landfill after 2025 and were able to determine that there was not one single area of environmental concern that would result in any impact more than a small impact.

The respondent's issuance of a negative declaration is hereby annulled as is Local Law #2 of 2017. Based upon the record presented to this Court, respondent is directed to issue a positive declaration.

Petitioner also contends that the Respondent violated Public Officer's Law § 103(e) which provides, "Agency records available to the public pursuant to article six of this chapter, as well as any proposed resolution, law, rule, regulation, policy or any amendment thereto, that is scheduled to be the subject of discussion by a public body during an open meeting shall be made available, upon request therefor, to the extent practicable as determined by the agency or the department, prior to or at the meeting during which the records will be discussed."

On April 4, 2017, petitioner submitted correspondence to the Town Board outlining six categories of potential adverse environmental impacts that would result from the adoption of Local Law #2. Petitioner also requested copies of all records scheduled to be discussed at the Board's meeting on April 4, 2017. Petitioner was not provided with copies. The respondents state that the April 4 email was not opened by the town clerk on that date. The board met again on May 5, 2017. On that day petitioner again submitted information regarding the negative environmental impact and again requested copies of all records scheduled to be discussed at the Board's meeting on May 5, 2017. Petitioner was again refused copies of the records.

Petitioner contends that it is entitled to counsel fees and costs based upon the violations of the Public Officers Law § 103(e) which provides, "Agency records available to the public

pursuant to article six of this chapter, as well as any proposed resolution, law, rule, regulation, policy or any amendment thereto, that is scheduled to be the subject of discussion by a public body during an open meeting shall be made available, upon request therefor, to the extent practicable as determined by the agency or the department, prior to or at the meeting during which the records will be discussed".

The Court of Appeals has held that "not every violation of the Open Meetings Law automatically triggers its enforcement sanctions [citations omitted]" *(Gordon v Vil. of Monticello, Inc.*, 87 NY2d 124, 127). Specifically, the Court of Appeals stated that unintentional or technical violations should not trigger an award of counsel fees.

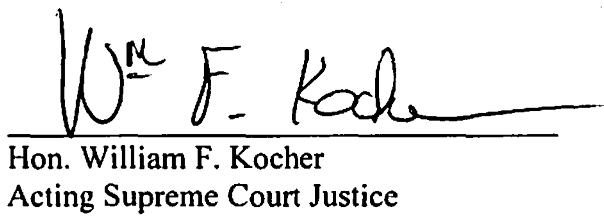
Here, attorney for the petitioner, Mr. Zamelis, states that he requested documents before both the April 4, 2017 meeting and the at the May 5, 2017 meeting, but none were ever provided. With regard to the May 5, 2017, Mr. Zamelis requested the documents both before the meeting and at the meeting after they were distributed to the Town Board members. Mr. Zamelis states that Supervisor Lazzaro declined to provide him with a copy during the meeting. In his affidavit, Supervisor Lazzaro states that the he informed Mr. Zamelis that the documents would be provided at the conclusion of the meeting. He also stated, "I then personally provided a detailed account of the SEQRA review for Local Law #2 of 2017 and then read into the record the complete statement of Findings for Local Law #2 of 2017. As such, all attendees, including counsel for Petitioner, were fully apprised of the actions being taken that evening as well as the record before the Town Board."

The Court finds that although the better practice would have been to provide Mr. Zamelis with a copy of the documents he requested at the commencement of the meeting or before the

meeting, the failure to do so was a technical violation not warranting counsel fees. This Court is persuaded that the reading into the record the information that the petitioner was seeking minimized the effect of denying Mr. Zamelis copies of the records at the commencement of the meeting.

This constitutes the Decision of the Court. Petitioner is to submit the order on notice to the respondents.

DATED: 9/13, 2017.



Hon. William F. Kocher
Acting Supreme Court Justice