Matter of Willow Glen Cemetery Assn. v Dryden Town Bd.
2017 NY Slip Op 32676(U)
December 22, 2017
Supreme Court, Tompkins County
Docket Number: EF2017-0208
Judge: Eugene D. Faughnan

At a Special Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tompkins County Courthouse, Ithaca, New York, on the 27th day of October, 2017.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : TOMPKINS COUNTY

In the Matter of

WILLOW GLEN CEMETERY ASSOCIATION and SARAH JANE OSMELOSKI,

Index No. EF2017-0208

Petitioners

vs.

DRYDEN TOWN BOARD; TOWN OF DRYDEN PLANNING BOARD; TOWN OF DRYDEN; SCOTT PINNEY; SUN8 PDC LLC; DISTRIBUTED SUN LLC and DAVID SPROUT, in his capacity as Code Enforcement Officer of the Town of Dryden,

Respondents.

DECISION AND ORDER

In the Matter of

WILLOW GLEN CEMETERY ASSOCIATION and SARAH JANE OSMELOSKI,

Index No. EF2017-0213

Petitioners

vs.

DRYDEN TOWN BOARD; TOWN OF DRYDEN PLANNING BOARD; TOWN OF DRYDEN; SCOTT PINNEY; SUN8 PDC LLC; DISTRIBUTED SUN LLC and DAVID SPROUT, in his capacity as Code Enforcement Officer of the Town of Dryden, and CASSANDRA PETRILLOSE

Respondents.

EUGENE D. FAUGHNAN, J.S.C.

Petitioners, Willow Glen Cemetery Association ("the cemetery") and Sarah Jane Osmeloski ("Osmeloski"), have filed two separate actions challenging determinations with respect to a proposed solar project submitted by Respondents, SUN8 PDC LLC and Distributed Sun LLC (collectively referred to herein as SUN8).[1] Petitioners first action was commenced by the filing of a Petition and Complaint on September 18, 2017 (Action One), and challenges determination made by the Dryden Town Board approving the project. Action One is a hybrid Article 78/declaratory judgment proceeding seeking an injunction against the issuance of any building permits or the commencement of any construction, and an Article 30 declaration that the Town of Dryden Solar Law is void as *ultra vires*. Petitioners filed a second action on September 25, 2017 challenging the determination of the Town of Dryden Planning Board granting preliminary plat approval for the subdivision. The same Respondents are named in Action Two, and an additional Respondent, Cassandra Petrillose, an adjacent landowner, was added. The Petitioner filed a single Memorandum of Law in connection with both files, and Respondent sought dismissal of both actions in one set of Responding papers. The Court, likewise, will address both actions in a single Decision and Order.

BACKGROUND FACTS

SUN8 seeks to construct a solar project in the Town of Dryden on farmland owned by Respondent Scott Pinney ("Pinney"). SUN8 has a lease with Pinney and intends to place its solar project on the leased premises. Under New York State Public Service Law §66-j, to qualify for the type of net metering project proposed here, power installation is limited to 2 megawatts per parcel. However, the Public Service Commission has issued an order that permits multiple 2 megawatt installations to be constructed together on subdivided parcels. In order to accommodate its project, SUN8 plans to subdivide the Pinney parcel into five separate parcels,

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[1]All the papers filed in connection with these motions are included in the electronic case file maintained by the County Clerk, and have been considered by the Court.

and SUN8 submitted 5 separate applications and site plans.

The cemetery property is adjacent to the Pinney parcel, and Petitioners claim the view from the cemetery offers peaceful and scenic views for cemetery visitors, which will be destroyed by SUN8's project. Osmeloski is a horse trainer who also owns property next to the Pinney parcel, and alleges that the animals may be placed in distress due to noise, glare and physical obstruction.

In July, 2016, the Town Board passed a law imposing a 6 month moratorium on certain public utility installations. Subsequently, the moratorium was extended. Before, the moratorium even expired, SUN8 made a special hardship request for the Town to start the zoning review process for the project it would be submitting. On February 17, 2017, the Town of Dryden amended it zoning code to include a local law regarding solar energy systems, and granted SUN8's hardship request for a waiver from the moratorium. On February 20, 2017, SUN8 applied for a special use permit to install its solar equipment.

Over the next several months, the Town Board, Planning Board and other municipal organizations held meetings in connection with the proposed solar project. Those meetings culminated in the Town Board granting a Special Use Permit and Site Plan approval on August 17, 2017, and the Planning Board approving the Subdivision Preliminary Plat on August 24, 2017.

Thereafter, Petitioners filed these two actions, and Memoranda of Law in support. Petitioners subsequently made a motion to: 1) extend the time to serve Pinney; and 2) in the event the Petition is denied, a stay pending appeal. Respondent Pinney filed an Answer to the complaint. SUN8 filed a Verified Answer with Affirmative Defenses/Objections in Point of Law seeking to dismiss the Petition. The Town of Dryden Respondents collectively also filed a Verified Answer with Affirmative Defenses/Objections in Point of Law. The parties appeared before the Court on October 27, 2017 in connection with these two cases.

Legal Discussion and Analysis

In Article 78 proceedings involving land use "the determination of a municipal land use agency must be confirmed if it 'was rational and not arbitrary and capricious.'" *Halperin v. City of New Rochelle*, 24 AD3d 768, 772 (2nd Dept. 2005), *citing Matter of Sasso v. Osgood*, 86 NY2d 374, 384 (1995); *see also Pecoraro v. Bd. of Appeals of Town of Hempstead*, 2 NY3d 608 (2004); *Matter of Ifrah v. Utschig*, 98NY2d 304 (2002). Deference "must be afforded to local officials in making judgments concerning land use in their community. *Halperin* at p. 771 (citation omitted). The judicial role in reviewing such decisions is a limited one, with consideration only being given to whether the action was illegal, arbitrary or an abuse of discretion. *Pecoraro, supra.* A determination is rational "if it has some objective factual basis, as opposed to resting entirely on subjective considerations such as general community opposition." *Halperin, supra*; *see Matter of Caspian Realty, Inc. v. Zoning Bd. of Appeals of Town of Greenburgh,* 68 AD3d 62 (2nd Dept. 2009). Whether the reviewing court would have made the same decision as the board, or "might have decided the application differently is of no moment." *Braunstein* at 1093. The court's role is to review land use decisions, not to make them. *See Pecoraro, supra.*

Action One contains five causes of action: 1) the Town Board lacked jurisdiction to grant site plans and special use permits to the project, because Subdivision review should have applied which is the province of the Planning Board, or in the alternative, the Town Board's decision was arbitrary and capricious; 2) the determinations are void due to lack of highway access; 3) the Town Law with respect to solar energy is void and/or unconstitutional as applied; 4) seeking an injunction to prevent the code enforcement officer from issue building permits, and 5) the Town Board failed to take a "hard look" as required under SEQRA.

Action Two also contains five causes of action: 1) the Planning Board's decision failed to comply with Town Law § 280-a; 2) the preliminary plat approved by the Planning Board failed to provide for proper access, and failed to accurately depict the property; 3) Petitioner's do not have easement access from Lot One; 4) the Town Board improperly conditioned its site plan and

special use permit approval on Planning Board review of the subdivision, and 5) the project did not contain a necessary statement under the Town's Right to Farm Law.

Respondents argue that there is nothing improper with both site plan review and subdivision review, and that subdivision review need not occur first. Respondents also claim that each of the lots on the Preliminary Plat has sufficient access to public roadways. Respondents also point out that Petitioners made no allegations as to how the Town Law is unconstitutional. Respondents finally point to the Record to show that the applications were complete and appropriately reviewed, and that the Town Board did, indeed, take a "hard look" in compliance with SEQRA.

1. Site plan review and subdivision review

Petitioners appear to make two separate argument concerning the site plan review process. The first is that both site plan review and subdivision review cannot be conducted for the same project. It must be only one review. The second argument is that, if there can be both reviews in the same process, the subdivision review must be concluded before site plan review can be conducted.

"A site plan is not a subdivision plat. A site plan usually evidences the proposed development of a single lot, whether for one principal building and permitted accessory buildings, or for a group of buildings (such as a group residential development or an industrial park), intended to remain in one ownership. A subdivision plat contemplates division of one tract into a number of smaller lots with eventual separate ownership of each such lot." *Riegert Apts Corp. v. Planning Bd. of Clarkstown,* 57 NY2d 206, 211 (1982) (*citing* 2 Rathkopf, Zoning and Planning [4th ed], § 30.04[1], pp 30-13 - 30-14); *Pomona Pointe Assocs Ltd. v. Incorporated Vill of Pomona*, 185 Misc2d 131, 136-137 (Sup. Ct. Rockland County 2000). Town Law §274-a(1) defines site plan as "a rendering, drawing, or sketch prepared to specifications and containing necessary elements, as set forth in the applicable zoning ordinance or local law, which shows the arrangement, layout and design of the proposed use of a single parcel of land as shown on said

plan." That section further states that plats which are subject to review under subdivision review (Town Law §276) "shall continue to be subject to review and shall not be subject to review as site plans under this section."

Petitioners argue that since this proposed project involves dividing the Pinney parcel into 5 smaller parcels, it is subject to subdivision review. Since it is subject to subdivision review, then site plan review should not be undertaken; or if site plan review can be undertaken, it needs to occur after the subdivision review. Petitioners also claims that the Town Board improperly considered all 5 parcels at once under the Site Plan map, instead of reviewing the parcels individually.

The Court concludes that site review and subdivision review are not mutually exclusive and there is no requirement that subdivision review occur first. Town Law provides instruction when there is site plan and subdivision plan reviews in the same project. The same section of the Town Law § 274-a(6)(d) states that:

> " Notwithstanding the foregoing provisions of this subdivision, if the land included in a site plan under review is a portion of a subdivision plat which has been reviewed and approved pursuant to section two hundred seventy-six of this article, the authorized board shall credit the applicant for any land set aside or money donated in lieu thereof under such subdivision plat approval."

Town Law §274-a(6)(d).

In *Pomona Pointe*, supra, the court concluded that §274-a(6)(b) "necessarily presumes the power of the Planning Board to conduct both subdivision approval and site plan review for the same property." *Pomona Pointe* at 136. The court further concluded that the statute means "that within the process of subdivision approval, individual lots cannot be subjected to site plan review." *Id.* at 137.

The language of the relevant statutory provisions and the rationale from *Pomona Pointe*, leads this Court to the conclusion that Town Law does not prohibit the coexistence of site plan review and subdivision review on the same project. Furthermore, the Dryden Zoning Law

specifically permits it. The definition of site plan under the Dryden Zoning Law includes "[p]lats showing lots, blocks or sites subject to review as subdivision under Town Law § 276 and the Town of Dryden Subdivision Law are also subject to review as site plans." Thus, the Dryden Zoning Law specifically contemplates both site plan and subdivision occurring for the same project.

The Court also finds no fault in the Town Board issuing its site plan approval before the subdivision review was completed by the Planning Board. Although it makes sense to have the subdivision review complete so that the site review can be undertaken with definitive parcels, it is not required. "A planning board's entertainment of a site plan application is not, by statute or State regulation, contingent upon subdivision approval... The opposite is also true, i.e., one need not first obtain subdivision approval before having its site plan application considered." *Newman v. Town of Poughkeepsie Planning Bd.*, 180 Misc2d 673 (Sup. Ct. Dutchess County 1999).

In the present case, both the Planning Board and Town Board conducted several meetings on the project, and made various determinations along the way. At some of the meetings, more information was requested, and at some meeting comments were allowed. The Planning Board reviewed the Site Plan application and provided comments for the Town Board's consideration. Both of the processes were proceeding simultaneously, and were addressing issues and questions as presented. The applicants were providing documents and responses to both the Town Board and Planning Board. The Town Board was not reviewing the matter with some unknown, or ill-defined, subdivision plan looming in the shadows. The review processes were inter-related, and likely benefitted from each other. The fact that the Town Board had its meeting a week earlier than the Planning Board does not mean that the Board's site plan approval was improper just because the Planning Board had not yet granted subdivision approval.

The Court concludes that the site plan review and subdivision review are not mutually exclusive processes; and that the Town Board's site plan approval, followed by the Planning Board's subsequent subdivision approval, were permissible and appropriate in this case.

2. Objections to the lot layout and access

This proposed project is planned for an area that is bounded by George Road on the east, and Route 13 to the South. Lot 1 is the northernmost lot, and extends to the east to George Road. Lots 2, 3 and 4 are located, in order, south of Lot 1, but on the western part of the tract. They do not extend all the way to George Road. The Petrillose lot, and Osmeloski lot are between Lots 2, 3 and 4 and George Road. Lot 5 is located to the east of Lot 4, and abuts Route 13 to the south. It does not extend all the way to George Road on the east. Applicants plan to use a common driveway, or access road, to connect Lots 2, 3 and 4 to Route 13.

In Action One, Petitioners argued that the proposed lots lacked all the appropriate highway accesses. Specifically, they allege that "[o]nly one of the five lots, the easternmost Lot 1, abutted a public highway" and that Lot 1 did not have deeded access to the highway. They further argue that the Site Plan Map proposes an access road, but that the Dryden subdivision law only allows such a road to access 4 parcels. Petitioners also claim that due to the positioning of the solar panels on Lot 1, it would be essentially landlocked.

In Action Two, Petitioners claim that the preliminary plat is defective because it did not provide for access to Lots 2, 3 and 4; and that Lot 1 is bisected by Virgil Creek, and therefore access from George Road on the east is not sufficient for all of Lot 1. They also argue that Lot 1 does not have sufficient access to George Road because it lacks the easement access. They also claim that the preliminary plat failed to comply with the Town of Dryden Right to Farm Law.

At the Planning Board Hearing, applicants stated that Lot 1 would have legal access and frontage from George Road and could use an available easement. They also claimed that they could still use the common driveway to access Lot One but would not have to do so.

Dryden Subdivision Law 1201(A) provides that a common driveway accessing more than 4 parcels requires Planning Board review and approval. Four parcels or less only requires Planning Department review. Petitioner, however, claims that the definition of common

driveway under the Town of Dryden Subdivision Law is limited to no more than 4 lots.

Town Law §280-a requires that each of the subdivided lots must abut a public street or highway. Petitioners claim that there is no access to the western portion of Lot 1, because Virgil Creek passes through Lot 1. The solar installation will be on the western part of Lot 1, and will essentially be landlocked. It could only be reached by the access road running up from Route 13.

The parties do not agree on the access for each of these parcels. It appears, to the satisfaction of the court, that there is legally sufficient access. Lot 5 abuts Route 13, and Lot 1 abuts George Road. There is a common driveway that runs from Route 13 and could be used for access to any or all of the Proposed Lots, including the "land locked" part of Parcel 1. Lots 2, 3 and 4 have access to Route 13 by virtue of the common driveway. The Planning Board will decide on the adequacy of access during their review of the final plat. That review has not yet occurred due to the stay imposed by the filing of this action. At this point, it is not clear if the common driveway will be utilized by all 5 lots. It may well be that the common driveway will not include Lot 1. If the common driveway is limited to 4 lots, then Petitioners' arguments about the definition of common driveway will be moot.

The Court also cannot conclude that the proposed plan violates Town Law §280-a, which requires access from a street or highway prior to issuance of a building permit. §280-a is a measure to insure means of having access in the event of fire or other emergency. At this juncture, the Court is only dealing with subdivision approval, which does not implicate Town Law §280-a.

3. Constitutionality of Town of Dryden's solar law

Petitioners have alleged in Action One that the Town of Dryden Solar Law is void and/or unconstitutional as applied. However, Petitioners have not provided any factual allegations to support that claim.

4. Objections to the maps reviewed

Petitioners claim that the Planning Board improperly considered a map that had not been submitted for review. Specifically, they claim that Petitioners introduced a new map at the August 24, 2017 Planning Board meeting, and then the Planning Board approved this new map. However, it should not have been considered because Dryden's subdivision law requires the map to be submitted in advance. In particular, Petitioners claim that Map 2 (Major Subdivision Preliminary Plat) was the map submitted to the Planning Board for review, and that map was voted down. SUN8 then provided another map, Map 3, that the Planning Board reviewed, and then the Planning Board voted to approve the map, with certain conditions.

The transcript shows that although Map 3 was discussed, it was only for illustrative purposes. As described in the affidavit of Bharath Srinivasan ("Srinivasan"), there was discussion about changes the Planning Board wanted. Srinivasan had a map that contained information similar to what the Planning Board was requesting, and therefore, offered to show Map 3 to the Planning Board and the public. Throughout the meeting, there were statements made that Map 3 could not be considered by the Planning Board since it had not been submitted previously. The Planning Board was limited to voting on the Preliminary Plat and map that had been presented but could impose conditions. In fact, the Planning Board did approve that plat with certain conditions, some of which were illustrated by Map 3.

Although some confusion may have resulted from the production of another map at the meeting, the Planning Board approved the Map 2. That was the only Preliminary Plat that was before the Board, and had been available to the public and posted on the Town's website. The discussion throughout the meeting reflects the understanding that the Planning Board could only vote on Map 2, and could impose conditions, but that it could not consider another map. The Court concludes that the Planning Board's approval reflects that correct understanding, and that the Planning Board approved Map 2, with conditions.

The Court also agrees with Respondents that the failure to include language related to

farm use was harmless error. The Right to Farm law requires notice to newcomers and non-farmers to make them aware of the farming practices in the area. Here, Pinney is himself a farmer, and he will be retaining ownership of the land anyway. SUN8, the lessee, is also aware of the rights of farmers. Any future owners or lessees will be protected by notice on the final plat, which has not yet been approved by the Planning Board.

5. SEQRA and "hard look"

Petitioners challenge the Town Board's negative declaration following a SEQRA evaluation alleging that the it failed to take a "hard look" at the potential environmental consequences of the project. They allege that the negative declaration on July 20 was incomplete and premature because the layout of the lots had not even been determined. Without that information, the Town Board could not determine visual impact on the cemetery's view. Petitioners also argue that a Type I negative declaration must be publish in the Environmental News Bulletin, but that it was not done in this case.

Generally, a Court's review of a legislative body's determination regarding SEQRA "is limited to whether the determination was made in accordance with lawful procedure and whether, substantively, the determination 'was affected by an error of law or was arbitrary and capricious or an abuse of discretion'" *Akpan v. Koch*, 75 NY2d 561, 570 (1990), *quoting* CPLR 7803 [3]. The Respondent is required "to identify the relevant areas of environmental concern, take a hard look at such areas and make a reasoned elaboration of the basis for its determination" *Matter of Anderson v. Lenz*, 27 AD3d 942, 943 (3rd Dept. 2006); *see Matter of Jackson v. New York State Urban Dev. Corp.*, 67 NY2d 400, 417 (1986). "Assuming respondent fulfills its obligations in that regard, our inquiry is at an end, for it is not the role of this Court to second-guess respondent's determination and/or substitute our judgment for the conclusions it has reached". *Anderson* at 944.

In the present matter, the Town Board declared itself the lead agency. As noted above, this review process began in early 2017 and continued over a 6 month time frame. There were

multiple meetings, public hearings and reports from independent consultants, including an ecological assessment, habitat assessment, aquatic report and visual impact statement and landscaping plan. The project has also been reviewed by the New York State Department of Environmental Conservation, the United State Army Corps of Engineers, the United States Fish and Wildlife Service and the New York State Historic Preservation Office, and no significant concerns have been noted.

The Court concludes that the Town "evaluated the necessary criteria, took the required hard look at areas of environmental concern and explained the basis for its determination to issue a negative declaration" *Matter of Citizens for Responsible Zoning v. Common Council of City of Albany*, 56 AD3d 1060, 1062 (3rd Dept. 2008) *see Matter of Cathedral of St. John the Divine v. Dormitory Auth. of State of N.Y.*, 224 AD2d 95 (3rd Dept. 1996); *Matter of Ahearn v. Zoning Bd. of Appeals of Town of Shawangunk*, 158 AD2d 801, 803-804 (3rd Dept. 1990); *Matter of Citizens for Responsible Zoning v. Common Council of City of Albany*, 56 AD3d 1060, 1062 (3rd Dept. 2008). Therefore, the Court finds that the negative declaration was not arbitrary, capricious or affected by error of law.

6. Standing of Cemetery Association

Respondents raised an issue as to whether the cemetery, as a corporate entity, had standing to proceed as a Petitioner in this matter. Petitioners suggested that, to the extent there is any issue about that, the cemetery's president could be substituted. However, both parties agreed that Osmeloski has standing, so clearly at least one Petitioner has standing. Accordingly, even if the cemetery does not have standing, it would not result in dismissal of the entire Petition(s). Therefore, the Court need not rule on the issue of the cemetery's standing.

7. Request for a stay

In the event that Petitioners are not successful before this Court, they seek a stay pending appeal. However, the rendering of this Decision and Order concludes this Court's role in the

process. The Petitioner's avenue to challenge this Court's Decision and Order would be through the appellate process. Accordingly, Petitioners request for a stay is DENIED.

CONCLUSION

Based upon the foregoing, both Petitions are DISMISSED.

This constitutes the Decision and Order of the Court. The transmittal of copies of this Decision and Order shall not constitute notice of entry (see CPLR 5513).

Dated: December 22, 2017
Ithaca, New York

HON. EUGENE D. FAUGHNAN
Supreme Court Justice