

**Matter of Downey v City of N. Tonawanda**

2019 NY Slip Op 33972(U)

September 5, 2019

Supreme Court, Niagara County

Docket Number: E162567/2017

Judge: Sara Sheldon

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STATE OF NEW YORK  
SUPREME COURT : COUNT OF NIAGARA

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In the Matter of the Application of MARTIN and  
KIMBERLY DOWNEY, et. al.

Petitioners,

-vs-

INDEX NO. E162567/2017  
DECISION AND ORDER

THE CITY OF NORTH TONAWANDA;  
THE PLANNING BOARD OF THE CITY OF  
NORTH TONAWANDA; and  
MCW CONSTRUCTION, INC.

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SHELDON, J.

The Petitioners, through their attorneys, Lippes & Lippes, Richard J. Lippes, Esq., of counsel, having initiated this proceeding pursuant to Article 78 of the Civil Practice Law and Rules seeking to annul the approval by the City of North Tonawanda Planning Board of the site plan for a proposed multi-family residential development at 1100 Sweeney Street, in the City of North Tonawanda (hereinafter referred to as the "Property"). This action was first commenced by a Verified Petition dated September 6, 2017, followed by the filing of the "First Amended Verified Petition" dated September 7, 2017. Subsequent thereto the Planning Board of the City of North Tonawanda (hereinafter referred to as the "Board") rescinded its prior approval on May 1, 2018. However, the Petitioner then brought an Order to Show Cause dated May 24, 2018, which this Court granted, prohibiting MCW CONSTRUCTION, INC (hereinafter referred to as "MCW") from commencing any construction activities on the Property. The Board then, after

considering a revised site plan submission by MCW, granted MCW site plan approval on August 6, 2018. Petitioners then filed a "Second Amended Verified Petition" dated September 5, 2018 seeking to annul the subsequent approval by the Board.

Petitioners submitted for the Court's review and consideration a Memorandum of Law by Richard J. Lippes, Esq., dated June 10, 2019. Defendants City of North Tonawanda (hereinafter referred to as the "City") and the Board through their attorney, North Tonawanda City Attorney, Luke A. Brown, Esq. submitted for the Court's review and consideration a Response in Opposition with Exhibits dated January 8, 2019, an Answer dated February 19, 2019 and a Supplemental Response in Opposition with Exhibits dated June 25, 2019. The Certified Record was received April 18, 2019. Defendant, MCW, through their attorney, Michael G. Putzak, Esq, submitted for the Court's review and consideration an Affirmation in Response dated June 24, 2019.

Now, upon reading and considering the submissions of the parties and having heard oral argument on July 1, 2019, Plaintiffs having appeared by Lippes & Lippes, Richard J. Lippes, Esq., of counsel, the Board and the City having appeared by North Tonawanda City Attorney, Luke A. Brown, Esq. and MCW having appeared by Michael G. Putzak, Esq, this Court makes the following Decision and Order:

The first issue that must be addressed is whether the Petitioners have standing in this suit. The Petitioners herein reside directly adjacent to the proposed construction site where 64 condominium units will be constructed. The Petitioners allege in their Second Amended Verified Petition that there will be "increased traffic, increased flooding and sewer backup of their home and property" as well as "increases noise, light pollution" if the condominium units

are constructed. Respondent asserts that these types of harm are also suffered by the public at large and the Court of Appeals has stated that the Petitioner must show harm different from that of the public at large. See *Society of Plastics Industry v. County of Suffolk*, 77 N.Y.2d 761 (1991). However, the Courts in this State have determined that proximity to the project under construction along with an alleged harm to their property are sufficient to establish standing. *King v. County of Monroe*, 255 A.D.2d 1003 (4<sup>th</sup> Dept. 1998). As the Petitioners herein are land owners adjacent to the proposed project and have alleged harms to their property, this Court determines that the Petitioners do have standing in this matter.

The Court turns next to the procedures followed by the City and the Board in granting MCW approval of the project. The parties agree that § 239-M of the General Municipal Code requires a reference of the Board's determination be made to the Niagara County Planning Board (hereinafter referred to as the NCPB), and indeed such a reference was made. However, § 239-M requires that the reference include a "full statement of such proposed action." The term "full statement" is defined in § 239-M(1)(c) as:

"...all materials required by and submitted to the referring body as an application on a proposed action, including a completed Environmental Assessment Form and all other materials required by such referring body in order to make its determination of significance pursuant to the State Environmental Quality Review Act under Article 8 of the Environmental Conservation Law and its implementing regulations."

The purpose of this requirement is so that the "county or regional board review and make recommendation on an application in substantially the form and content which is before the

municipal agency for final action.” See *Ferrari v. Town of Penfield Planning Board*, 181 A.D.2d 149 (4<sup>th</sup> Dcpt. 1992).

The City and Board claim in their responding papers that the NCPB required “adequate information upon which to make its decision” including “adequate written description of proposal”, “Sketch Plan, Survey, Plats or Site Plans of property affected . . .” and “SEQR EAF” as is stated in the NCPB’s referral form. The City and Board assert that since the NCPB approved the action, it can be presumed that the NCPB had all the statutorily required information before it. This Court cannot make such an assumption.

This Court is required to review and base it’s decision on the certified record which is devoid of the documentation submitted to the NCPB. As such, this Court must determine that the Board has failed to meet the statutory requirements of § 239-M of the General Municipal Code. See *LCS Realty Co. v. Incorporated Village of Roslyn*, 273 A.D.2d 474 leave to appeal den. 96 N.Y.2d 705 (2000). Further, the referral form submitted to the NCPB in the certified record is from January 11, 2017. The Board approval that is the subject of this Petition was granted after the Board rescinded it’s prior approval and a new request for approval was made by MCW including a revised Environmental Assessment Form prepared on May 9, 2018. There is nothing in the record to show that the NCPB had reviewed this revised information and made a proper determination under § 239-M of the General Municipal Code. Therefore, this Court finds that the Board’s approval is null and void as it has failed to comply with § 239-M of the General Municipal Code.

As this Court has determined that the Board’s determination is void, there is no need to reach the other arguments of the Petitioner. However, this Court notes that there were several

issues that were raised as having potential negative environmental impacts that do not appear to have been given a “hard look” by the Board as lead agency pursuant to SEQR. First and foremost there is the issue of the denuding of approximately four (4) acres of mature trees on the site that is not addressed or considered in the Board’s determination. Next, there is only cursory language that the “proposed action may result in the loss of flora and fauna” there is no description as to the types or amounts of flora and fauna that would be impacted by the project. Finally, the Environmental Assessment Form states in general terms that the fauna in the area is a “typical Western New York wildlife” there is no detail provided, no discussion as to the effects on any such wildlife.

While this Court is mindful of the ruling in *Jackson v. New York State Urban Dev. Corp.*, wherein the Court stated that the lead agency is not required to address all environmental issues, but may use discretion in selecting which ones are relevant. 67 N.Y.2d 400 (1986). It appears from the record before this Court that the Board did not take a “hard look” at substantial issues and did not make a reasoned elaboration for their determination. The failure to do so could be seen as arbitrary, capricious and unsupported by substantial evidence in the record. *Id.*

The lack of any reasoned elaboration for its determination of nonsignificance is most notably missing from the Board’s determination. “[T]he lead agency must provide a reasoned elaboration for its determination of nonsignificance. Conclusory statements, ‘unsupported’ by empirical or experimental data, scientific authorities or any explanatory information will not suffice as reasoned elaboration for its determination of environmental significance of nonsignificance” *Tonery v. Planning Board of the Town of Hamlin*, 256 A.D.2d 1097 (4<sup>th</sup> Dept. 1998) quoting *Matter of Tehan v. Scrivani*, 97 A.D.2d 769,771 (2<sup>nd</sup> Dept. 1983). Here the Board

adopted the letter of City Engineer Dale Marshall, dated July 2, 2019, in determining there to be a Negative Declaration on SEQR. However, the letter only offers a conclusory opinion of the City Engineer wherein he states: "it is my opinion that this project will result in no significant adverse impacts on the environment" This conclusory statement addresses the storm water runoff, traffic impact and wetland impacts only and does not address the denuding of the four (4) acres. There is certainly no elaboration in the Negative Declaration as is required by 6 N.Y.C.R.R § 617.17 and *Tupper v. City of Syracuse*. 71 A.D.3d 1460 (4<sup>th</sup> Dept. 2010).

In light of the Court's determination that the Respondent Board did not comply with the requirements of § 239-M of the General Municipal Code the Board's site plan approval is hereby determined to be null and void and the matter is returned to Respondents for further proceedings. Further, the injunction against MCW remains in full force an effect until such time as all the laws of the State of New York have been complied with.

Dated: September 5, 2019

  
HONORABLE SARA SHELDON