

Jellyfish Props. LLC v Incorporated Vil. of Greenport
2020 NY Slip Op 31943(U)
May 13, 2020
Supreme Court, Suffolk County
Docket Number: 0998-2019
Judge: David T. Reilly
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**SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 30 SUFFOLK COUNTY**

**PRESENT:
HON. DAVID T. REILLY, JSC**

INDEX NO.: 0998-2019

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**JELLYFISH PROPERTIES LLC, MANTA RAY
PROPERTIES LLC, A.B. GEZUNT LLC,
CHARLES MILOT, JOSEPH MONACO,
JUDITH KIRKPATRICK, JAMES BETZ, AND
STEPHEN PLOWDEN,**

**Sahn Ward Coshignano, PLLC
Attorneys for Plaintiffs-Petitioners
333 Earl Ovington Blvd., Suite 601
Uniondale, NY 11553**

Plaintiffs-Petitioners,

-against-

**Devitt Spellman Barrett, LLP
Attorneys for Defendants-Respondents
50 Route 111
Smithtown, NY 11787**

**INCORPORATED VILLAGE OF GREENPORT
AND THE BOARD OF TRUSTEES OF THE
INCORPORATED VILLAGE OF
GREENPORT,**

Defendants-Respondents.

_____^x

In this hybrid proceeding commenced pursuant to CPLR Article 78 plaintiffs-petitioners (petitioners) seek an Order annulling and reversing a decision issued by respondents for, among other things, failure to comply with the State Environmental Quality Review Act (SEQRA) and for failure to comply with General Municipal Law §239-m. The petitioners are all homeowners within the geographical limits of the Village of Greenport (the Village) and have traditionally rented their homes to guests for periods of one day to two weeks, allegedly in accordance with the historic practices of the Village. The Village is an incorporated municipal entity located within the Town of Southold and the Board of Trustees of the Village of Greenport (the Trustees) are the elected governing body of the Village.

According to the petition, the Village is approximately 1.2 square miles and has roughly 2,200 residents with a substantial number of residents living in the Village seasonally or on a part-time basis. Petitioners maintain that they have historically rented their homes to guests on a short term basis as the Village is a well-known tourist destination because of its fishing, boating, shops and restaurants, as well as its close proximity to vineyards, beaches, golf courses and other summertime activities.

Petitioners state that the Village has regulated rental properties by requiring permits since the adoption of Chapter 103 of the Village Code in 2013. Petitioners contend that the Trustees enhanced the rental permit requirements with an amendment to Chapter 103 of the Village Code in 2017, which states, “No owner shall cause, permit, or allow the occupancy or use of a rental property without a valid rental permit and no person shall occupy or otherwise use a dwelling unit or any part thereof as a rental unit without a valid rental permit being issued for the rental unit.” The rental permits were required to be renewed every two years and contained no prohibition against so-called “short-term rentals.”

On September 27, 2018 the Trustees conducted a public hearing to discuss the adoption of a new amendment to Chapter 103 of the Village Code entitled “Rental Properties” (the amendment” Petitioners argue that the alleged purpose was to prohibit the rental of residential homes for periods of less than fourteen (14) days. The amendment provides,

The Short Term Rental of a residential property or a portion thereof is prohibited, except for a two family house where one of the dwelling units is either Owner Occupied or is occupied as a Long Term Occupancy, or a portion of a single family house, the remainder of which is Owner Occupied or is occupied as a Long Term Occupancy.

The text of the amendment further defines the terms “Owner Occupied” as “Occupation by the owner of the property and/or the owner’s immediate family,” and “Long Term Occupancy” as “Occupancy by a written lease with a term of at least one year.” The amendment was adopted on October 25, 2018 as Local Law No. 8 of 2018 and filed with the New York Secretary of State on October 31, 2018.

Petitioners contend that the amendment, with no real explanation, treats homeowners differently based on whether they reside at the property or rent to someone who resides at the property. Petitioners claim disparate treatment by the Village and the Trustees particularly among those homeowners that own second homes. They maintain that no basis exists for the amendment as there were no stated problems with “short term rentals.” Petitioners admit that several residents of the Village spoke in favor of the amendment citing the necessity of reducing traffic and providing more affordable, long term rental units in the Village as an aid to increasing membership in the local fire department, but argue that this is a pervasive problem all over Long Island and other localities have not resorted to limiting short term rentals as a solution.

In support of this petition, petitioners cite the number of local business owners who testified against the amendment referencing the reduction of foot traffic in the Village and the loss of business that would be suffered by shop, restaurant and other business owners. Further, petitioners allege that property owners will suffer a decreased valuation in their properties if they are not permitted to rent their homes on a short term basis.

Petitioners now maintain that the Village and the trustees failed to comply with SEQRA in the adoption of the amendment in that an environmental assessment form was neither prepared or completed, the Village adopted a boilerplate negative declaration for the amendment in response to objections raised and little to no consideration was given to the potential impacts of the amendment. In addition, petitioners allege that the Village failed to refer the amendment to the Suffolk County Planning Commission (SCPC) for consideration prior to adoption in violation of General Municipal Law §239-m. Finally, petitioners assert both Federal and State Constitutional violations sounding in due process, equal protection and regulatory taking, as well as a violation of Village Law §7-700 and §7-722.

For their part, defendants-respondents (respondents) maintain that petitioners have not identified a potential environmental injury and they lack standing to contest the Village's SEQRA. In addition, respondents allege that the Environmental Assessment Form and final SEQRA determination were submitted to the SCPC prior to the amendment's adoption, thereby undermining petitioners' claims of a General Municipal Law §239-m violation. Further, respondents contend that the amendment imposes reasonable restrictions on short-term rentals in the interest of the health and safety of all residents of the Village, was enacted after extensive public comment and is consistent with the stated goals and of the rental regulations of the Village and the welfare of the community. Finally, respondents refute petitioner's conclusory allegations of lost revenue and assert that the amendment does not make a distinction based on a fundamental class.

Legislative enactments are entitled to an "exceedingly strong presumption of constitutionality" (*Lighthouse Shores v Town of Islip*, 41 NY2d 7, 11, 390 NYS2d 827 [1976]; see *ATM One, LLC v Incorporated Vil. of Hempstead*, 91 AD3d 585, 936 NYS2d 263 [2d Dept 2012]). In the face of the strong presumption of validity, a plaintiff has a heavy burden of demonstrating, beyond a reasonable doubt, that the ordinance has no substantial relationship to public health, safety, or general welfare (see *Town of N. Hempstead v Exxon Corp.*, 53 NY2d 747, 439 NYS2d 342 [1981]; *Tilcon New York, Inc. v Town of Poughkeepsie*, 125 AD3d 782, 5 NYS3d 102 [2d Dept. 2015]; *Peconic Ave. Businessmens' Assn. v Town of Brookhaven*, 98 AD2d 772, 469 NYS2d 483 [2d Dept 1983]). 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, 351 NYS2d 129 [1973], quoting *Shepard v Village of Skaneateles*, 300 NY 115, 118 [1949]). While this heavy presumption is rebuttable, unconstitutionality on due process grounds "must be demonstrated beyond a reasonable doubt and only as a last resort should courts strike down legislation on the ground of unconstitutionality" (*Lighthouse Shores Inc. v Town of Islip*, *supra*, 41 NY2d 7 at 11; see *Kravetz v Plenge*, 84 AD2d 422, 446 NYS2d 807 [4th Dept 1982]).

Turning first to the issue 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 Highview Estates of Orange County, Inc. v Town Bd of Town of Montgomery*, 101 AD3d 716, 955 NYS2d 175 [2d Dept 2012]; *Matter of Riverkeeper, Inc. v Town of Southeast*, 9 NY3d 219, 851 NYS2d 76 [2007]). An agency decision should be annulled only if it is arbitrary and capricious, or unsupported by evidence (*Matter of Save Open Space v Planning Bd. of the Town of Newburgh*, 74 AD3d 1350, 904 NYS2d 188 [2d Dept 2010]; *Matter of East End Prop. Co. # 1, LLC v Kessel*, 46 AD3d 817, 851 NYS2d 565 [2d Dept 2007]). 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, 898 NYS2d 593 [2d Dept 2010]; *Matter of East End Prop. Co. #1, LLC v Kessel*, 46 AD3d 817, 851 NYS2d 565 [2d Dept 2007]). Upon judicial review, the Court may not substitute its judgment for that of the Board, and may annul its decision “only if it is arbitrary, capricious or unsupported by the evidence” (*Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, *supra* at 76).

The full Environmental Assessment Form (EAF) which was prepared by the Village for the amendment makes it clear that the amendment would have no negative environmental impacts. The Notice of Determination of Non-Significance, Negative Declaration (the Notice) was issued by the Village on October 25, 2018 and it states, in pertinent part:

Based upon the information contained in the EAF the Trustees, as Lead Agency for the action contemplated herein, and after due deliberation, review and analysis of the proposed action, the EAF, the aforementioned EAF, and other relevant information cited herein, and the criteria set forth in 6 NYCRR §617.7, hereby determines that the proposed action will not result in any significant adverse impacts to the environment.

The Notice then goes on to note seven items which were considered in making the aforementioned determination. Included in those items are the findings that the amendment would not intensify the use of the land in the Village, there would not be an adverse change in the level of traffic, it would not impair the character or quality of the Historic District of the Village, the adoption of the amendment would not result in an adverse change to the natural resources within the Village and that the amendment would not result in two or more negative changes to the environment.

The record before the Court reflects that the Trustees “identified the relevant areas of environmental concern, took a ‘hard look’ at them, and made a ‘reasoned elaboration’ of the basis for their determination,” and properly issued a negative declaration herein (*see Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417, 503 NYS2d 298 [1986]; *see Matter of Riverkeeper, Inc. v Town of Southeast*, *supra*). Accordingly, petitioners’ first cause of action is dismissed.

With respect to petitioners' cause of action alleging a violation of General Municipal Law §239-m, that statute provides that a proposed amendment of a zoning ordinance by a town must be referred to the county planning agency if the amendment affects real property located within 500 feet of the boundary of any city, village, or town (*Matter of Calverton Manor, LLC v Town of Riverhead*, 160 AD3d 842, 76 NYS3d 72 [2d Dept 2018], citing *Matter of 24 Franklin Ave. R.E. Corp. v Heanship*, 139 AD3d 742, 744, 30 NYS3d 695 [2016]; see General Municipal Law § 239-m [3] [b] [ii]). That statute requires a town to refer a "full statement" (General Municipal Law § 239-m [1] [c]; [4] [b]) of its proposed action, which is defined as including "the complete text of the proposed ordinance or local law," to the relevant county planning agency (General Municipal Law § 239-m [1] [c]).

Respondents have submitted a letter from Sarah Lansdale, Suffolk County Director of Planning to the attorney for the respondents. In that letter Ms. Lansdale indicates that the application by respondents was submitted to the SCPC. This letter serves as evidence of respondents' compliance with General Municipal Law §239-m and, therefore, petitioners' second cause of action must be dismissed.

Turning then to petitioners' causes of action for constitutional violations, the takings clause of the Fifth Amendment, made applicable to the states through the Fourteenth Amendment, provides that private property shall not be taken for public use without just compensation. "Governmental regulation of private property effects a taking if it is 'so onerous that its effect is tantamount to a direct appropriation or ouster'" (*Consumers Union of U.S., Inc. v State of New York*, 5 NY3d 327, 357, 806 NYS2d 99 [2005], quoting *Lingle v Chevron U.S.A. Inc.*, 544 US 528, 537, 125 S Ct 2074 [2005]). To state a substantive due process claim in the land-use context, a petitioner must allege "(1) the deprivation of a protectable property interest and (2) that 'the governmental action was wholly without legal justification'" (*Matter of Ken Mar Dev., Inc. v Department of Pub. Works of City of Saratoga Springs*, 53 AD3d 1020, 1024–1025, 862 NYS2d 202 [3d Dept 2008], quoting *Bower Assoc. v Town of Pleasant Val.*, 2 NY3d 617, 781 NYS2d 240 [2003]). "Only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense'" (*County of Sacramento v Lewis.*, 523 US 833, 846, 118 SCt 1708 [1998]). Governmental regulation effects a per se regulatory taking only where the owner of real property has been called upon to sacrifice all economically beneficial uses for the common good, leaving the property economically idle (*Matter of Rent Stabilization Ass'n of New York City, Inc. v Higgins*, 83 NY2d 156, 608 NYS2d 930 [1993]). To show that a non-possessory governmental regulation of property has gone so far as to constitute a taking, the property owner must show by dollars and cents evidence that under no use permitted by the regulation under attack would the properties be capable of producing a reasonable return; the economic value, or all but a bare residue of the economic value, of the parcels must have been destroyed by the regulations at issue (*Matter of New Cr. Bluebelt, Phase 4*, 122 AD3d 859, 997 NYS2d 447 [2d Dept 2014]; see also *Kransteuber v Scheyer*, 80 NY2d 783, 587 NYS2d 272 [1992]). Petitioners have failed to present, with regard to any of their properties, any "dollars and cents" proof that under no use permitted by the amendment would the properties be capable of producing a reasonable return. The only evidence they have submitted is generalized and


speculative claims of some overall reduction in value of lots and lost revenue affected by the amendment which is far short of the requisite standard of proof. Finally, it is noted the amendment is rationally designed to accomplish a legitimate purpose related to the public health safety and/or welfare, namely protecting the character and integrity of the Village’s residential neighborhoods (*see Big Apple Food Vendors’ Assn. v City of New York*, 228 AD2d 282, 644 NYS2d 216 [1st Dept 1996]). Accordingly, these causes of action are dismissed.

Finally, as to petitioners’ claim that the amendment’s adoption violated Village Law §§7-700 and 7-722, a well-considered land-use plan can be shown by “evidence, from wherever derived,” that serves to “establish a total planning strategy for rational allocation of land use, reflecting consideration of the needs of the community as a whole” (*Taylor v Incorporated Vil. of Head of Harbor*, 104 AD2d 642, 644, 480 NYS2d 21 [2d Dept 1984]), ensuring that the public good will not be undetermined by “special interest, irrational *ad hocery*” (*Id.*, quoting *Matter of Town of Bedford v Village of Mount Kisco*, 33 NY2d 178, 188, 351 NYS2d 129 [1973]). Zoning legislation is tested not by whether it defines a comprehensive plan, but by whether it accords with a comprehensive plan for the development of the community. When a zoning ordinance is amended, the court decides whether it accords with a comprehensive plan in much the same way, by determining whether the original plan required amendment because of the community’s change and growth and whether the amendment is calculated to benefit the community as a whole as opposed to benefitting individuals or a group of individuals” (*Asian Americans for Equality v Koch*, 72 NY2d 121, 131, 531 NYS2d 782 [1982]; *see Matter of Stone v Scarpato*, 285 AD2d 467, 728 NYS2d 61 [2d Dept 2001]).

The Court finds that the alleged proof submitted by petitioners in support of their claims is conclusory and speculative, and insufficient to meet petitioners heavy burden of proof with regard to the amendment (*see Lighthouse Shores v Town of Islip*, 41 NY2d 7, 390 NYS2d 827 [1976]). Thus, when, as here, petitioners have failed to establish a “clear conflict” with a formal comprehensive plan, a zoning classification may not be annulled for incompatibility with the comprehensive plan (*Infinity Consulting Group, Inc. v Town of Huntington*, 49 AD3d 813, 814, 854 NYS2d 524 [2d Dept 2008]). Accordingly, petitioners’ remaining causes of action must be dismissed.

SETTLE JUDGMENT.

Dated: May 13, 2020
Riverhead, New York



DAVID T. REILLY
JUSTICE OF THE SUPREME COURT

 X FINAL DISPOSITION _____ NON-FINAL DISPOSITION