WG Woodmere, LLC v Nassau County Planning Commn.
2021 NY Slip Op 34315(U)
August 27, 2021
Supreme Court, Nassau County
Docket Number: Index No. 605035/19
Judge: Diccia T. Pineda-Kirwan
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Short Form Order/Judgment

NEW YORK SUPREME COURT - NASSAU COUNTY

Present: Honorable **DICCIA T. PINEDA-KIRWAN** Justice — IA PART 20

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WG WOODMERE, LLC, ET AL,

Petitioner(s)/Plaintiff(s),

-against-

NASSAU COUNTY PLANNING COMMISSION, ET AL,

Respondent(s)/Defendant(s).

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Index No.: 605035/19
Motion Date: 5/20/21
Seq. No.: 3
Teams: 11:00 A.M.

The following numbered papers read on this motion by plaintiffs/petitioners for summary judgment.

PAPERS	NUMBERED
Notice of Motion-Affidavits-Exhibits.........................	EF 24 - 39
Answering Affidavits-Exhibits.................................	EF 41 - 45
Replying..	EF 46 - 47

Upon the foregoing cited papers, and after Microsoft Teams conference, it is ordered that the motion by plaintiffs/petitioners for summary judgment, is determined as follows:

Plaintiffs/petitioners WG Woodmere, LLC, SG Barick LLC and LH Barick LLC (collectively "Plaintiffs"), own the Woodmere Club (the "Club"), a 117.62 acre golf and country club located in the hamlet of Woodmere, Village of Lawrence, and Village of Woodsburgh, Nassau County, New York. On December 19, 2018, plaintiffs filed an application with defendant/respondent the Nassau County Planning Commission ("NCPC") seeking "major subdivision" approval to subdivide the Club into 285 new building lots in order to develop and construct single family homes. Plaintiffs were required to pay $435,700.00 in application fees imposed by the NCPC and defendant/respondent the Nassau County Department of Public Works ("DPW"). Plaintiffs were also required to pay an additional $233,440.00 in connection with NCPC's review of the application pursuant to the State Environmental Quality Review Act ("SEQRA"). Plaintiffs estimate that under the current fee structure, they will be required to tender approximately $2,000,000.00 in filing and other fees to the NCPC and DPW, which they contend are excessive and have no relation to compensating defendant/respondent County of Nassau (the "County") for the cost of reviewing their application.

By way of background the fees required for plaintiffs' application ("Fees") originated as a rule-making act of the NCPC, adopted by the NCPC pursuant to §1610(g)(1) of the Nassau County Charter, and then sent to defendant/respondent Nassau County Legislature ("County Legislature") for its approval. The Fees were adopted by the County Legislature by Ordinance No. 46-2009, which was subsequently amended by Ordinance No. 176-2015 (the "Ordinance"), which raised the Fees.

Plaintiffs assert that the Fees are illegal and unconstitutional on the basis that the Fees: (1) are an unauthorized tax intended to generate revenue to offset the County's general governmental expenses, (2) were adopted and approved by NCPC and the County Legislature by the adoption of an "ordinance," and not a "local law," in violation of the Municipal Home Rule Law ("MHRL"), (3) as charged by both NCPC and DPW are duplicative since DPW performs the administrative tasks of the NCPC, and (4) insofar as they relate to SEQRA review are preempted by state law. Plaintiffs now move for summary judgment.

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing entitlement to judgment as a matter of law (*see Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Only when the movant satisfies its *prima facie* burden will the burden shift to the opponent "to lay bare his or her proof and demonstrate the existence of triable issues of fact" (*Alvarez*, 68 NY2d at 324; *see also Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Legislative enactments and municipal ordinances are entitled to an "exceedingly strong presumption of constitutionality" *Lighthouse Shores v Town of Islip*, 41 NY2d 7, 11 [1976]). Although the presumption is rebuttable, the party challenging the legislation has the initial burden of demonstrating the statute's invalidity "beyond a reasonable doubt" (*LaValle v Hayden*, 98 NY2d 155, 161 [2002]).

Plaintiffs first argue that the Fees are an illegal and unauthorized tax since they are unrelated to the actual costs associated with reviewing plaintiffs' application, and are instead used to fund the County's general budget.

It is well-settled that a municipality may charge a reasonable fee to cover the administrative costs associated with the issuance of a license or permit, as well as for any associated inspections and regulation that may be required, however, any such fee must be related to the cost of the service provided (*see Matter of Torsoe Bros. Constr. Corp. v Board of Trustees of Inc.*, 49 AD2d 461, 464-5 [1975]). Fees cannot be used "for revenue raising purposes or to offset the cost of general government functions" (*Id* at 465). Fees "'should be assessed or estimated on the basis of reliable factual studies or statistics'" (*Jewish Reconstructionist Synagogue, Inc. v Roslyn Harbor*, 40 NY2d 158, 163 [1976], quoting 9 McQuillan, Municipal Corporations, § 26.36, p 89). The municipality, however, need not show an "[e]xact congruence" between its expenses and the fees charged (*see Orange & Rockland Utilities, Inc. v Clarkstown*, 80 AD2d 846, 847 [1981] [plaintiff failed to establish that a fee was excessive even where Town did not provide a cost analysis study with respect to the cost of inspection and regulation where the evidence presented demonstrated that those additional costs existed]).

In support, plaintiffs contend that neither the NCPC nor the County Legislature has ever set forth a rationale to justify the amounts of the Fees, or their increase in 2015 pursuant to the Ordinance. Plaintiffs point to DPW's Staff Summary, submitted in support of the Ordinance, where the DPW noted that the increased fees would bring an "increase in revenue." Plaintiffs further note that at the opening of the session to adopt the Ordinance, the Presiding Officer of the County Legislature gave remarks in which she discussed the pressure exerted upon the County by the Nassau Interim Finance Authority ("NIFA"), the state financial control board that monitors the County's budget and fiscal stability. The Presiding Officer stated that NIFA had threatened to enact cuts to the County's budget unless the County Legislature increased revenue and, as such, she announced the planned passage of new fees to stave off action by NIFA.

However, plaintiffs' arguments ignore that DPW noted that the increased fees would "better account for the actual time spent by staff in reviewing applications and conducting necessary administrative tasks." Additionally, the preamble to the Ordinance acknowledges that the fees the County charges "no longer cover the costs required to administer and process the services for which they are charged" and that the County needs "to fix such fees so that they cover the administrative costs associated with the operation of services of the departments . . ." Plaintiffs have thus failed to establish that the Fees are simply meant to raise revenue to fund the County's general budget.

Although plaintiffs argue that the Fees are excessive, they present no evidence of what Defendants' costs are for the services provided, or what a reasonable cost would be (*see New York Tel. Co. v City of Amsterdam*, 200 AD2d 315 [1994][plaintiffs established fees were unreasonable by demonstrating through an expert affidavit that the costs associated with a routine excavation are dramatically less than the charges that would be imposed under defendant's ordinance]). While defendants do not present any evidence of any findings or reports from the NCPC or DPW related to the creation and adoption of the

Fees, which is "the preferred method of determining whether fees are reasonable," they need not do so (*Orange & Rockland Utilities, Inc.* at 847). Defendants further submit evidence of fees charged by other municipalities, the Town of Huntington and The Town of Smithtown, which charge similar fees. While plaintiffs maintain that there is no evidence that these fees are reasonable, they do not present any evidence to the contrary.

Nor do plaintiffs dispute defendants' contention that it is impossible at this juncture to determine if the fees are excessive as plaintiffs' application is still being processed. Defendants assert that plaintiffs' application has been delayed by the ongoing public health emergency, and it simply cannot be determined how much the County has, and will be required to expend, in the future. Thus, plaintiffs cannot prove that the fees charged for the completion of the process are excessive as it is still ongoing.

Plaintiffs next contend that the Ordinance was illegally enacted as the MHRL requires that fees be adopted by way of a "local law" and not an "ordinance." In support, plaintiffs rely on MHRL § 10, which states in relevant part that "every local government . . . shall have power to adopt and amend local laws . . . relating to . . . [t]he fixing, levy, collection and administration of local government rentals, charges, rates or fees . . . on local property in connection therewith and charges thereon." The MHRL, however, is an authorization to act by local law to enact fees, not a restriction to act by other authorized means. MHRL § 10 begins by noting that "[i]n addition to powers granted in the constitution, the statute of local governments or in any other law . . . (ii) every local government, as provided in this chapter, shall have power to adopt and amend local laws not inconsistent with the provisions of the constitution or not inconsistent with any general law . . ." The Statute of Local Governments §10 provides in relevant part that each local government has "1. [t]he power to adopt, amend and repeal ordinances, resolutions and rules and regulations in the exercise of its functions, powers and duties . . . 5. [t]he power to fix, levy, impose, collect and administer rents, charges, rates and fees, penalties and rates of interest thereon . . ." Thus, the County is entitled to enact fees by ordinance.

Plaintiffs further argue that the Ordinance is invalid because it originated as a resolution adopted by the NCPC. Plaintiffs maintain that since there is no language in County Charter §1610(g) that authorizes the NCPC to use its rule-making power to impose fees, it cannot do so. However, the fact that the NCPC is not expressly authorized to establish a fee schedule does not mean that it cannot. As the Court of Appeals has recognized, "[t]he power to regulate subsumes the concomitant power to license and to set fees reasonably related to the cost of licensing" and this power "may be implied" (*Suffolk County Builders Ass'n, Inc. v Suffolk County*, 46 NY2d 613, 619 [1979]).

Plaintiffs next argue that since the fees include charges by both NCPC and DPW, they are duplicative since DPW performs the administrative tasks of the NCPC. Contrary to plaintiffs' position, Real Property Law §334-a, outlines separate duties and responsibilities for the NCPC and DPW. For instance, the NCPC cannot approve a map submitted in support of a subdivision application until DPW "has approved plans for grades of the streets, avenues, roads or highways shown on such map, and the drainage thereof" (RPL §334-a[7]). Thus, plaintiff fails to establish that the fees charged by NCPC and DPW are duplicative.

Lastly, plaintiffs argue that the fees defendants charge for SEQRA review are preempted by state law.

SEQRA is a statute codified at Article 8 of the Environmental Conservation Law and implemented through regulations promulgated at Part 617 of the New York Codes, Rules and Regulations (NYCRR). SEQRA review is a process required of state and local "agencies" by statute. The regulations permit a lead agency "to charge a fee to the applicant in order to recover the actual costs of either preparing or reviewing the draft or final EIS" (6 NYCRR 617.13[a]). Plaintiffs argue that the fees defendants charge for SEQRA review have no reference or relation to the SEQRA fee structure set forth at Part 617.13 of the SEQRA regulations, and are thus preempted (*see* 6 NYCRR § 617.13). Plaintiffs maintain that a lead agency cannot set a flat "per acre" fee and require such fee merely to file a report, before the agency undertakes any form of review.

Initially, it should be noted that plaintiffs do not submit any authority in support of their position. Additionally, 6 NYCRR § 617.13 provides that in cases involving residential projects, "the fee charged by an agency may not exceed two percent of the total project value" and provides the parameters for calculating such value. Here, plaintiffs do not state what the total project value is, or otherwise demonstrate that the fees are excessive, or unrelated to defendants' cost in performing the SEQRA review.

Accordingly, it is ordered that the motion is denied.

Any request for relief not expressly granted herein is denied.

This constitutes the decision and order of the Court.

ENTERED
Sep 15 2021
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Dated: August 27, 2021

DICCIA T. PINEDA-KIRWAN, J.S.C.