

Matter of Walsh v Town of Northumberland Planning Bd.

2023 NY Slip Op 33689(U)

October 20, 2023

Supreme Court, Saratoga County

Docket Number: Index No. EF20231097

Judge: Richard A. Kupferman

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In the Matter of
ROBERT WALSH,

**DECISION, ORDER &
JUDGMENT**

Petitioner,

Index No.: EF20231097

-against-

TOWN OF NORTHUMBERLAND PLANNING
BOARD, IRONY ALLIANCE, LLC, and GEORGE
STORY,

Respondents,

Appearances:

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KUPFERMAN, J.,

This CPLR Article 78 proceeding challenges a determination of the respondent town planning board which granted site plan approval for the construction of a suspension bridge. The petitioner, a nearby property owner, seeks to annul the determination for several reasons based on the Town's Zoning Ordinance, SEQRA, and the General Municipal Law.

Background

This project involves the construction of a suspension bridge to connect private land adjacent to West River Road (County Route 29) to Thompson Island (a private island). The bridge will be used for private pedestrian and ATV use (no automobiles or trucks) to allow safe access to the existing residence and horse farm located on Thompson Island. While the island currently has an operational ferry, the applicants contend that the ferry system has become difficult and unsafe, particularly in the winter, and that the bridge will allow access for emergency responders.

Thompson Island is in the Hudson River. The commercial channel of the river is located east of the island. That channel serves as the route available for general transportation by the public. The applicants do not propose to construct the bridge across that channel. Rather, the bridge will be constructed across the western channel of the river (the west side of the island), which is nearby a dam and seldom used by the public for transportation except for locals who might have small boats and recreational canoes or kayaks.

The bridge application was received by the planning board in March/April 2019. In June 2019, after conducting two meetings to discuss the project, the planning board informed the involved agencies about the proposed action (a type I action) and that it desired to serve as the lead agency under SEQRA. In response, the involved agencies concurred with the planning board's request to serve as the lead agency or did not object. In June 2019, the planning board also referred the matter to the Saratoga County Planning Board ("SCPB"). Later that same month, the SCPB completed its referral review and determined that the subject construction would not have any significant county-wide or intercommunity impact.

During the early stages of this project, the applicants were also seeking to acquire property on the mainland to serve as one of the anchors/ends for the suspension bridge. The applicants

acquired .53 acres of land on the mainland and purported to merge it with the larger island parcel by way of a lot line adjustment, despite the two parcels being separated by the river. This avoided the necessity for a subdivision or area variance. The applicants further requested and received approval for the lot line adjustment from the Town's code enforcement administrator ("CEA"). The petitioner appealed this determination to the Town's zoning board of appeals ("ZBA") and, in support, submitted a letter brief from his legal counsel containing several legal points on eight, single spaced pages.

Meanwhile, the petitioner also appeared before the planning board and objected to the construction of the bridge. In June 2019, for example, the petitioner (through counsel) submitted a lengthy 10-page, single spaced letter detailing numerous alleged defects in the site review application. In addition, in August 2019, the petitioner (through counsel) sent a letter to the Saratoga County Department of Public Works ("DPW"), objecting to the applicants' request for a permit to construct a driveway on the mainland property to access the lot.

Ultimately, the ZBA upheld the CEA's decision, and the DPW issued the driveway permit. The applicants also continued to follow up with various agencies regarding their involvement (or non-involvement) in the project, as required by the planning board. In addition, the planning board conducted additional meetings, required additional submissions, and continued the public hearing.

During this review process, inquiries relative to habitats and wildlife impacts came up negative. The planning board also considered the project's potential impacts on the river environment and local aesthetics and character. This included not only a compatible scale and design (a long, narrow suspension bridge for pedestrian and ATV use only) but included review of detailed geotechnical information relative to the proposed supports and stanchions (none of which were in the Hudson River), and the potential disturbance of historic PCB contamination. It

also included the planning board’s receipt and review of photo simulations, showing the “before and after” of the proposed project, including as seen by river users and other recreational boaters.

At the conclusion of this process, the planning board undertook final SEQRA review of the project at its March 27, 2023, regular meeting. As reflected in the meeting minutes, the planning board conducted an extensive review of part 2 of the Environmental Assessment Form (“EAF”), which catalogs, indexes, and evaluates the significance of any potential environmental impact. Moving to part 3 of the EAF, the planning board considered the significance of the potential impacts and voted unanimously to issue a negative declaration. The planning board also voted unanimously to approve the site plan and issued a detailed written notice of its determination of non-significance.

I.
The Zoning Ordinance

The petitioner seeks to annul the determination of the planning board as contrary to the Town’s Zoning Ordinance. The petitioner contends that there is nothing in the Schedule of Permitted Uses indicating that a suspension bridge is a permitted use. Therefore, the petitioner asserts, the project is not a permissible use, and the planning board’s approval is contrary to the Ordinance and should be annulled. In addition, the petitioner contends that the determination fails to comply with the site review criteria set forth in the Ordinance.

Regarding the first contention, the Court is mindful that the subject use schedules do not reference a suspension bridge as a permitted use. However, this does not end the inquiry. None of the schedules list any similar infrastructure as a permitted use, including driveways and access roads. Nonetheless, one cannot reasonably interpret the Ordinance as prohibiting all such infrastructure simply because it has been omitted from the use schedules.

Indeed, the Ordinance references infrastructure such as driveways and roadways in its various other provisions, indicating that they are anticipated and permitted, while not expressly listed in the use schedules. Based on the plain language, the Court concludes that such necessary and incidental infrastructure is permitted, but not as a scheduled use; rather, such is permitted as an appurtenance or accessory to the land uses specified in the schedules. Similarly, a suspension bridge used to access land is no different than a driveway or access road. The bridge provides access to the underlying use and does nothing more than connect two parts of a larger, consolidated parcel. Based on these considerations, the planning board was authorized to issue the site plan approval for the bridge.

Turning to the remaining challenges under the Zoning Ordinance, the petitioner asserts that the planning board failed to properly consider various site review criteria. The record, however, supports the planning board's conclusion that the application for site plan review reasonably complied with the subject criteria (see Town Zoning Ordinance Article X[E]; see also Article VIII). Indeed, the planning board's findings are supported by the photo simulations, geotechnical studies, reports on PCB issued by consultants, and the correspondence from the various agencies, among other things, which indicated the absence of any legitimate concern. To the extent that the petitioner asks this Court to disregard the conclusions reached by the planning board after reviewing these materials, "it is not the role of the courts to second-guess reasoned administrative determinations that otherwise find support in the record" (Matter of Edscott Realty Corp. v Town of Lake George Planning Bd., 134 AD3d 1288, 1290 [3d Dept 2015]).

Accordingly, the planning board complied with the Zoning Ordinance.

II. SEORA

Regarding the petitioner's SEORA challenges, the Court rejects the petitioner's contention that the planning board failed to timely make its determination of significance. The regulations provide that a lead agency "must determine the significance of the action within 20 calendar days of its establishment as lead agency, or within 20 calendar days of its receipt of all information it may reasonably need to make the determination of significance, whichever occurs later" (6 NYCRR § 617.6 [b][3][ii]; see also 6 NYCRR 617.1 [c]; 617.6 [b][1][ii]). This provision, however, is directory only and does not specify a penalty for any untimeliness (see Nicklin-McKay v Town of Marlborough Planning Bd., 14 AD3d 858, 861 [3d Dept 2005]; Seaboard Contracting & Material, Inc. v Department of Environmental Conservation, 132 AD2d 105, 108 [3d Dept 1987]). Thus, even assuming for the sake of argument that any alleged delay occurred (which is not the case), this would be irrelevant.

Further, the record does not support the petitioner's assertion that the planning board was required to direct an Environmental Impact Statement ("EIS") (and issue a positive declaration) at the early stages of the application process rather than request additional information from the applicant. An EIS is required only "when an agency action may have a significant effect on the environment" (Matter of Village of Ballston Spa v City of Saratoga Springs, 163 AD3d 1220, 1222-1223 [3d Dept 2018] [internal quotation marks and citations omitted]; see ECL 8-0109; 6 NYCRR 617.7). Where, as here, the planning board lacked sufficient information to determine the project's significance, it properly requested additional information to make its determination. Indeed, a determination of significance should be based on a thorough investigation of the problems involved rather than from generalized concerns or the presumption associated with type I actions (see 6 NYCRR 617.4 [a][1]; 617.7 [b][3], [c]; Matter of Village of Ballston Spa, 163

AD3d at 1222-1223; see also Matter of Merson v McNally, 90 NY2d 742 [1997]; Matter of Heights of Lansing, LLC v Village of Lansing, 160 AD3d 1165, 1167 [3d Dept 2018]).

Turning to the hard look standard, the planning board was required to “thoroughly analyze the identified relevant areas of environmental concern to determine if the action may have a significant adverse impact on the environment” (6 NYCRR 617.7 [b][3]; see H.O.M.E.S. v New York State Urban Dev. Corp., 69 AD2d 222, 232 [4th Dept 1979]). This standard is “viewed in light of a rule of reason, realizing that not every conceivable environmental impact, mitigating measure or alternative must be identified and addressed before the substantive dictates of SEQRA are satisfied” (Matter of Gabrielli v Town of New Paltz, 116 AD3d 1315, 1318 [3d Dept 2014] [internal quotation marks and citations omitted]; see Neville v Koch, 79 NY2d 416, 425 [1992]). “The degree of detail - the reasonableness of an agency’s action - will depend largely on the circumstances surrounding the proposed action” (Neville, 79 NY2d at 425). Moreover, a court neither can, nor will, “evaluate data de novo, weigh the desirability of any particular action, choose among alternatives or otherwise substitute [its] judgment for that of the agency” (Matter of Save the Pine Bush, Inc. v Town of Guilderland, 205 AD3d 1120, 1123 [3d Dept 2022] [internal quotation marks and citations omitted]; see Akpan v Koch, 75 NY2d 561, 570 [1990]).

Here, the administrative record establishes that the planning board carefully evaluated the application and its potential impacts over the course of the project. During this time, the planning board: (1) received and reviewed the application and part I of the EAF; (2) received and reviewed environmental, geotechnical, and engineering studies and analyses of the bridge project and/or its potential environmental effects; (3) held a series of public meetings and a public hearing on the application; (4) considered public oral and written comments on the application; (5) engaged an independent engineering consultant to evaluate and assess the potential environmental impacts;

(6) considered comments from a variety of federal, state, and local agencies; and (7) conducted an extensive review of and completed parts 2 and 3 of the EAF.

The petitioner's numerous assertions about alleged potential impacts are insufficient to establish a SEQRA violation (see Matter of Heights of Lansing, LLC, 160 AD3d at 1167 [“generalized community objections or speculative environmental consequences are not sufficient to establish a SEQRA violation” (internal quotation marks and citation omitted)]). For example, the petitioner asserts that there will be aesthetic impacts, yet he relies on his own subjective analysis. The planning board was free to disregard his subjective opinion and instead reach its own determination based on the visual impact assessment in the record (see Matter of Save the Pine Bush, Inc., 205 AD3d at 1123). The petitioner also proclaims that the river is so contaminated that this project threatens to release PCB contamination into the river, yet there is not a shred of actual proof, or any credible expert opinion, even suggesting as much (see Matter of Heights of Lansing, LLC, 160 AD3d at 1167). In fact, the agency whose business it is to cleanup and manage such hazardous wastes, the New York State Department of Environmental Conservation, deferred to the planning board. So did the U.S. Army Corps of Engineers. On top of all that, a third-party engineering firm confirmed the absence of impact based on objective data and a reasoned analysis.

The planning board also properly exercised its discretion in rejecting the petitioner's speculative concerns regarding traffic and parking. The planning board visited the site location, reviewed photographs and a driveway sketch/analysis, and considered the DPW's approval of the permit application for the driveway. The driveway permit in fact contains a general term prohibiting the driveway from being placed at a location where the lack of sight distance in either direction is a hazard.

Accordingly, the planning board complied with SEQRA.

III. General Municipal Law § 239-m

The petitioner also contends that the planning board violated the General Municipal Law by failing to provide a “full statement . . . including a completed [EAF]” to the SCPB when the SCPB conducted its review in 2019 (see General Municipal Law § 239-m [1][c]). In particular, the petitioner contends that the determination should be annulled because the planning board did not provide, and the SCPB did not rely upon, those portions of the EAF completed in March 2023 (parts 2 and 3) or any of the materials the planning board received in 2022 and 2023.

Before taking final action on certain proposed actions, the town’s planning board is required to “refer the same” to the SCPB absent an agreement that the proposed actions “are of local, rather than inter-community or county-wide concern” (General Municipal Law § 239-m [2], [3][c]).¹ Upon receiving a referral, the SCPB is required to “review any proposed action referred for inter-community or county-wide considerations . . . [and] recommend approval, modification, or disapproval, of the proposed action, or report that the proposed action has no significant county-wide or inter-community impact” (General Municipal Law § 239-m [4][a]).

The SCPB has “thirty days after receipt of a full statement of such proposed action, or such longer period as may have been agreed upon . . . to report its recommendations If [the SCPB] fails to report within such period, the [planning board] may take final action on the proposed action without such report” (General Municipal Law § 239-m [4][b]). The term “full statement of such proposed action” means “all materials required by and submitted to the [the planning board] as an application on a proposed action, including a completed [EAF] and all other materials required by

¹ General Municipal Law § 239-m applies to proposed actions requiring site plan approval for real property located within 500 feet of, among other things, “the boundary of any existing . . . county or state park or any other recreation area” or “the right-of-way of any existing . . . county or state parkway, thruway, expressway, road or highway” (General Municipal Law § 239-m [3]).

[the planning board] in order to make its determination of significance pursuant to [SEQRA] and its implementing regulations” (General Municipal Law § 239-m [1][c]). “Notwithstanding ..., [the planning board] may agree with the [SCPB] as to what shall constitute a ‘full statement’ for any or all of those proposed actions which [the planning board] is authorized to act upon” (General Municipal Law § 239-m [1][c]).

Based on its plain language, the statute does not appear to expressly require a “full statement” in cases such as this one, where a county planning board receives a referral and reports that “the proposed action has no significant county-wide or inter-community impact.” The language of the statute in fact requires a local agency to only “refer” the matter to the county planning board. Noticeably absent from this portion of the statute (subdivision 2) is any language expressly requiring the referral or provision of a “full statement” (see General Municipal Law § 239-m [2]). Although a subsequent portion of the statute (subdivision 4) expressly references the provision of a “full statement,” such language directly relates to the time in which a county planning board is required to provide its “recommendations” (i.e., “recommend approval, modification, or disapproval, of the proposed action”) (General Municipal Law § 239-m [4]). This portion of subdivision 4 requiring a “full statement” is by its terms inapplicable where, as here, the county planning board does not render any recommendations, but rather reports that “the proposed action has no significant county-wide or inter-community impact” (General Municipal Law § 239-m [4]). This interpretation of the statute is further consistent with the language authorizing a local agency and county planning board to agree upon and limit the necessity and contents of a “full statement” (see General Municipal Law § 239-m [1][c], [3][c]).

In any event, even assuming for the sake of argument that the statute required a “full statement” in this case, the record indicates that it was in fact provided in 2019. Contrary to the

petitioner's contention, parts 2 and 3 of the EAF were completed by the planning board (rather than the applicant) and therefore are not part of the "full statement" (see Matter of Batavia First v Town of Batavia, 26 AD3d 840, 841-842 [4th Dept 2006]). Similarly, after being provided the referral and having issued its report, the SCPB did not determine the referral to be deficient in any respect. The planning board also accepted the SCPB's report as final and complete. Under the circumstances presented, the planning board made a "full statement" of its proposed action in accordance with General Municipal Law § 239-m (see Matter of Calverton Manor, LLC v Town of Riverhead, 160 AD3d 833, 835 [2d Dept 2018]; Matter of William Kollmer Contr., Ltd. v Town of Huntington, 2001 NY Misc LEXIS 1391, *11-12, 2001 NY Slip Op 30080[U], *5-6 [Sup Ct, Suffolk County 2001]; see also General Municipal Law § 239-m [1][c], [3][c]).

Further, there were no changes or revisions made after 2019 regarding any county-wide or inter-community impacts. To the contrary, the proposed changes involved purely local concerns, just as the original proposal. As such, the planning board was not required to provide the SCPB with supplemental materials to satisfy its obligations under General Municipal Law § 239-m (Matter of Calverton Manor, LLC v Town of Riverhead, 160 AD3d 842, 845 [2d Dept 2018] ["Where changes are made to a proposed action following referral, a new referral is not required if the particulars of the [changes] were embraced within the original referral" (internal quotation marks and citations omitted)]).

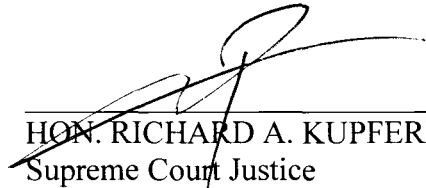
Accordingly, the record establishes that the planning board complied with the General Municipal Law.

The parties' remaining contentions have been considered and do not alter this outcome. It is therefore,

ORDERED, ADJUDGED, and DECREED, that the petition is **DENIED** and the proceeding is **DISMISSED**.

This constitutes the Decision, Order & Judgment of the Court. The Court is hereby uploading the original Decision, Order & Judgment into the NYSCEF system for filing and entry by the County Clerk. The Court further directs counsel to serve notice of entry of this Decision, Order & Judgment in accordance with the Local Protocols for Electronic Filing for Saratoga County.

Dated: October 20, 2023
at Ballston Spa, New York



HON. RICHARD A. KUPFERMAN
Supreme Court Justice

Enter.

Papers Considered:
NYSCEF Document Numbers 1-22