Ross v Village of Fayetteville
2023 NY Slip Op 35336(U)
July 10, 2023
Supreme Court, Onondaga County
Docket Number: Index No. 010160/2022
Judge: Danielle M. Fogel
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At a Term of the Supreme Court, held in and for the County of Onondaga, at 401 Montgomery Street, Syracuse, New York 13202 on March 15, 2023.

PRESIDING: HON. DANIELLE M. FOGEL
JUSTICE OF THE SUPREME COURT

MARGUERITE A. ROSS,

Petitioner,

v.

VILLAGE OF FAYETTEVILLE,
VILLAGE OF FAYETTEVILLE PLANNING BOARD,
FOUBU ENVIRONMENTAL SERVICES, LLC, and
NORTHWOOD REAL ESTATE VENTURES, LLC,

Respondents.

DECISION AND ORDER ON PETITION

Index No.: 010160/2022

As relevant to this proceeding, on November 22, 2021, respondent Northwood Real Estate Ventures ("Northwood") submitted a site plan and application for a special permit to the Village of Fayetteville Planning Board to develop the premises known as 547 East Genesee Street, Fayetteville, NY (the "Property") to reuse and redevelop the existing non-conforming structure on the property into a grocery store (the "Project"). There is no dispute that the subject Property is a thirty-acre lot which is partially zoned industrial and partially zoned single-family residential, and the lot is bordered by other industrial, commercial, and residential properties. There exists a 130,000 square foot dormant building on the Property, which has previously been interpreted as a pre-existing non-conforming building which may permissibly be downsized without the need for a variance. Prior proceedings related to the variance application for this Property which were submitted by a separate entity, Millstone Development Group, LLC, and involved a larger, different project (the "Millstone Project"), are not relevant to this court's review of the issues before it on this petition.

Following submission of Northwood's application, the Village of Fayetteville's Planning Board (the "Board") determined that the Project was a Type 1 action under New York State Environmental Quality Review Act ("SEQRA") and designated itself as lead agency under SEQRA. The Board did not conduct a coordinated review. A public hearing on the application was held on August 15, 2022 and September 12, 2022, and a negative declaration was issued on September 12, 2022. Following the negative declaration, the Board approved the special permit for the Project on November 7, 2022. The site plan for the Project was subsequently approved on December 5, 2022.

Petitioner, a bordering residential neighbor, brings the instant petition pursuant to CPLR Article 78, New York State Village Law §7-712-c and §7-725-b(9), the New York State Open Meetings Law, the Village of Fayetteville (the "Village") Zoning Code ("Zoning Code"), and SEQRA to annul the Board's special permit, negative declaration, and site plan approval and for an alleged violation of the Open Meetings Law.

I. Special Permit Approval

Plaintiff's first cause of action is for annulment of the special permit issued for the Project pursuant to the Village Law and Zoning Code because the Board's action was arbitrary, capricious, unlawful, and an abuse of discretion. There is no dispute here that the Zoning Code allows grocery stores in the Industrial District subject to the issuance of a special permit. Petitioner's arguments relate solely to the application of the special permit test and the Board's findings, or alleged lack thereof. First, petitioner alleges that the Board failed to issue findings in support of their decision to grant a special permit, which alone requires annulment. Second, petitioner alleges that the

Project does not satisfy the requisite elements for a special permit under Zoning Code §187-42(A)(3)—specifically, that the building shall not exceed 10,000 square feet—and, thus, the Project does not satisfy all elements set forth in that statute, which it must. Third, petitioner argues that Project does not satisfy all elements of the special permit test under Zoning Code §187-41(a)(3), which requires the Project to satisfy each subsection of the Code. Fourth and finally, petitioner alleges generally that the applicant failed to submit sufficient documentation in support of its application under Zoning Code §187-41(A)(1), which requires annulment.

On an application for a special use permit, "the applicant need only show that the use is contemplated by the ordinance and that it complies with the conditions imposed to minimize anticipated impact on the surrounding area," (*N. Ridge Enterprises, Inc. v Town of Westfield*, 87 AD2d 985, 986 [4th Dept 1982], *affd, Matter of*, 57 NY2d 906 [1982]). The Board shall "grant a special use permit unless it has reasonable grounds for denying the application." (*Id.*). Upon this court's review of the Board decision, "[a] reviewing court may not substitute its judgment for that of a local zoning board . . . , 'even if there is substantial evidence supporting a contrary determination.'" (*Matter of Expressview Dev., Inc. v Town of Gates Zoning Bd. of Appeals*, 147 AD3d 1427, 1428-29 [4th Dept 2017] (internal citations omitted)).

First, with regard to whether the Board issued findings, "the fact that respondent did not include specific factual findings in its decision does not require annulment of respondent's determination inasmuch as 'the record as a whole addresses the applicable considerations or otherwise provides a basis for concluding that there was a rational basis for [respondent's] determination.'" (*Matter of Rex v. Zoning Bd. of Appeals of Sennett,* 195 AD3d 1398, 1399 [4th Dept 2021] (internal citations omitted)). Upon a review of the record as a whole, including the evidence and information submitted to the Board, the meeting minutes, the findings and conclusion articulated during the public hearing, and the Board resolution, the court finds that the Board's decision addressed the applicable considerations and has a rational basis.

Second, with regard to petitioner's claim that a special permit may only issue upon compliance with Zoning Code §187-41(A)(2) which requires that the building not exceed 10,000 square feet, this argument fails. The building that is the subject of this Project has already been determined to be a pre-existing, non-conforming structure, which exempts the building from the 10,000 square foot requirement. To read the code any other way would defeat the purpose of the pre-existing non-conforming use provision.

Third, with regard to the special permit test under Zoning Code §187-41(a)(3), petitioner argues that the applicant was required to meet each of the requirements found in this subsection, which petitioner argues it did not. Petitioner disputes that the Project satisfies any of the requirements, arguing that the Project does not meet the building size requirements (as set forth above), that it will have an adverse impact on the neighborhood, that it does not include adequate open space, drainage facilities, or landscaping, and will have severe adverse traffic impacts. To the extent petitioner relies on the Board's findings related to the prior Millstone Project, this is without merit because the two projects are substantially different. Moreover, petitioner does not dispute that a grocery store is a permitted use in the Industrial District, and "[t]he classification of a particular use as permitted in a zoning district is 'tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood." (*Matter of Residents Involved In Community Action (RICA) v Town/Vil. of Lowville Planning Bd.*, 61 AD3d 1422, 1423 [4th Dept 2009]). The remaining objections amount to no more than a disagreement with the Board's determination, which as stated above, is adequately supported by the extensive record. Though petitioner may disagree with the Board's determination, this does not mean that the Board failed to consider each subsection of Zoning Code §187-41(a)(3) or that its decision was arbitrary. Accordingly, this argument fails.

Fourth and finally, with regard to the documentation submitted in support of its application under Zoning Code §187-41(A)(1), the court finds that the Applicant's submissions provided sufficient information regarding the Project. This argument is therefore without merit.

II. The Board's SEQRA Declaration

Petitioner's second cause of action is to annul the Board's negative declaration under SEQRA on the basis that the Board: (1) failed to conduct a coordinated review under the statute; (2) issued an illegal conditioned negative declaration; (3) failed to take the requisite "hard look"; and (4) because the negative declaration deviated from its prior positive declaration for an alleged similar project, the Board's negative declaration for this Project was arbitrary and capricious. Petitioner also claims that the Board should have prepared a full Environmental Impact Statement ("EIS").

With regard to petitioner's first argument that the Board should have conducted a coordinated review, petitioner claims that the review was impermissibly segmented from the review of environmental cleanup of the Property and from the required widening of East Genesee Street. Petitioner identifies the Zoning Board of Appeals ("ZBA") as an involved agency because it had issued an approval for the Project. No other alleged involved agency is identified by petitioner. While the petitioner is correct that Type 1 actions are generally subject to coordinated reviews, the ZBA was not an "involved agency" within the meaning of SEQRA because it merely issued an interpretation of the code with regard to whether the subject nonconforming structure could be reduced in size. (*See* Record 00001). The ZBA's interpretation is not a "decision to fund, approve, or undertake an action." (6 NYCRR 617.2(t)). Thus, the ZBA did not need to be a part of a coordinated review under SEQRA.

To the extent petitioner also argues that New York State Department of Transportation ("NYSDOT") was an "involved agency" that should have been included in a coordinated review, the court views the NYSDOT's involvement in approving a highway work permit needed to expand the roadway as a ministerial act that is not subject to SEQRA review. (*See* 6 NYCRR 617.2(x); *Neville v Koch*, 79 NY2d 416, 426 (1992) ("actions requiring SEQRA review do not include 'ministerial acts'"). Thus, the NYSDOT did not need to be included in a coordinated review. At the time of oral argument, plaintiff conceded that the Department of Environmental Conservation was not an "involved agency." Because there were no other "involved agencies" that should have been included in a coordinated review, the Board was not required to conduct a coordinated review of this Type 1 action.

Second, petitioner argues that the Board issued an illegal conditional negative declaration for this Type 1 action because it relied on future potential NYSDOT approval of mitigation measures. To determine whether a negative declaration in a Type 1 action has been impermissibly conditioned, the court must conduct a twofold inquiry: "(1) whether the project, as initially proposed, might result in the identification of one or more 'significant adverse environmental effects'; and (2) whether the proposed mitigating measures incorporated into part 3 of the EAF were 'identified and required by the lead agency' as a condition precedent to the issuance of the negative declaration." (*Matter of Merson v McNally*, 90 NY2d 742, 752-53 [1997]).

Here, there were two general areas identified in Part 2 of the EAF that presented a potential moderate to large environmental impact: traffic and remediation/hazardous waste. In Part 3 of the EAF, the Board ultimately determined that the action would not have a significant environmental impact and made findings with regard to the potential moderate impacts identified in Part 2. With respect to traffic, the Board considered the Traffic Impact Study submitted as well as the NYSDOT's position that that proposed mitigation measures—including road widening to construct a turn lane and installation of a traffic light—will adequately address potential impacts. These mitigation measures were not identified and required by the lead agency, but rather were developed and proposed by the applicant as part of the open and deliberative environmental review process. (*See Matter of Merson v McNally*, 90 NY2d 742 [Ct App 1997]). As such, the subject mitigation measures cannot be said to equate with a conditional negative declaration.

With regard to the potential moderate impacts related to remediation on the Property, these actions were subject to the Brownfield Program and exempt from SEQRA review. (*See* 6 NYCRR Part 375).

Third, petitioner claims that the Board failed to take a hard look and thoroughly analyze potentially significant environmental impacts presented by the Project and that an EIS should have been required because the Project had at least one significant adverse impact. (6 NYCRR §617.4(a)(1)). "It is well settled that '[j]udicial 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 for its determination.'" (*Davis v Zoning Bd. of Appeals of City of Buffalo*, 177 AD3d 1331, 1332 [4th Dept 2019] (citations omitted)). As the Fourth Department observed in *Matter of Town of Marilla v Travis*, 151 AD3d 1588, 1591 [4th Dept. 2017], where the "EAF was properly completed," and the agency "followed the procedures required by SEQRA," the court's "review of the substance of the agency's determination is limited." The Court of Appeals has cautioned that "[w]hile judicial review must be meaningful, the courts may not substitute their judgment for that of the agency for it is not their role to 'weigh the desirability of any action or [to] choose among alternatives'" (*Matter of Merson v McNally*, 90 NY2d 742, 751-52 [1997] (citations omitted)).

On this record, it is clear that the Board "identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination" in the Board resolution. (*Edwards v Zoning Bd. of Appeals of Town of Amherst*, 163 AD3d 1511, 1513 [4th Dept 2018] (citations omitted)). The Board issued a negative declaration and appropriately determined an EIS was not required, and the record demonstrates that the Board "made a thorough investigation of the problems involved and reasonably exercised its discretion." (*Matter of Chinese Staff v Burden*, 19 NY3d 922, 924 [2012] (citations omitted)). The Court is limited in its review of this determination and finds adequate support in the record that the decision was not arbitrary and capricious and was supported by substantial evidence.

Fourth, petitioner argues that the Board deviated from its prior determination on the Millstone Project—which allegedly presented identical environmental harms—and thus the Board determination on the instant Project is arbitrary and capricious because the Board failed to adhere to its prior precedent. This argument fails because it is clear on this record that the Millstone Project was significantly different from this Project and involved not only a grocery store, but an assisted living facility as well as a third building for anticipated medical, retail, or office use. (*See* R. 745-748).

III. Site Plan Approval

Petitioner's third cause of action is to annul the Board's site plan approval because the Project does not meet the standards for approval under Zoning Code §187-42 and because the Board failed to issue findings in support of its decision. Here, this courts review is "limited to the issue 'whether the action taken by the [Planning Board] was illegal, arbitrary, or an abuse of discretion.'" (*Matter of Dietrich v Planning Bd. of Town of W. Seneca*, 118 AD3d 1419, 1420 [4th Dept 2014] (citations omitted)). The court finds that, as with the special permit application, there is substantial evidence in the record to support the Board's approval of the site plan and that the decision has a rational basis. Further, the Board resolution contains sufficient findings to support the decision, and even if it did not, "the record as a whole addresses the applicable considerations or otherwise provides a basis for concluding that there was a rational basis for the Planning Board's determination." (*Id.* at 1421 (citations omitted)).

IV. Open Meetings Law

Petitioner's fourth and final cause of action is for an alleged violation of the Open Meetings Law for failure to post documents considered or proposed in connection with approval of the Project to the Village website, including the SEQRA resolution, and thus the approvals granted were in violation of the Open Meetings Law. Accordingly, because the approvals were adopted in violation of Public Officers Law §103(e), they must be annulled and vacated. Petitioner also requests reasonable attorneys' fees pursuant to Public Officers Law §107(2). In opposition, Respondent Village of Fayetteville argues that posting the draft resolutions was not practicable because they were not finalized, remained confidential attorney work product, and the decisions to discuss and vote on the resolutions were made during the meetings, not beforehand.

The Open Meetings Law provides that "any proposed resolution . . . that is scheduled to be the subject of discussion by a public body during an open meeting shall be made available, upon request therefor, to the extent practicable at least twenty-four hours prior to the meeting during which the records will be discussed." (Public Officers Law § 103(e)). The Public Officers Law provides an exception for "any matter made confidential by federal or state law," which would include attorney-client communications. (Public Officers Law § 108(3); *see Matter of Brown v*

Feehan, 125 AD3d 1499 [4th Dept 2015]). Pursuant to Public Officers Law §107, the court "has 'the power, in its discretion, upon good cause shown,' to void any action taken by a public body in violation of the Open Meetings Law . . . but '[a]n unintentional failure to fully comply with the notice provisions . . . shall not alone be grounds for invalidating any action taken at a meeting of a public body.'" (*Save Monroe Ave., Inc. v Town of Brighton*, 2023 NY Slip Op 03116 [4th Dept June 9, 2023] (internal citations omitted)).

This court is unpersuaded that the Board's failure to post a draft resolution that was reviewed and decided upon at a subsequent meeting constitutes a violation of Public Officers Law §103 (e). (*See, e.g., Matter of Braunstein v Bd. Of Zoning Appeals of Town of Copake*, 100 AD3d 1091 [3d Dept 2012]). Nonetheless, assuming *arguendo* a violation of this section, inasmuch as the alleged violation did not deprive petitioner of a meaningful involvement in the proceedings, there is no evidence any alleged violation was intentional by the Board, and because petitioner is not the prevailing party in the underlying proceeding and has failed to demonstrate "good cause," the court in its discretion declines to award petitioner any remedies for this alleged violation and declines to invalidate any action taken by the Board related to the resolution.

Based on the foregoing, it is hereby

ORDERED that petitioner's request for relief is **DENIED** and the petition is **DISMISSED.**

Dated: July 10, 2023

ENTER

Honorable Danielle M. Fogel
Justice of the Supreme Court