Evans v Planning Bd. of the Town of Shelter Is.
2024 NY Slip Op 35266(U)
May 7, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 630299/2023
Judge: James F. Quinn
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INDEX No. 630299/2023

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 41 - SUFFOLK COUNTY

PRESENT:

Hon. JAMES F. QUINN
Acting Justice of the Supreme Court

MOT. DATE 01/10/24
MOT. SUBMIT DATE 04/02/24
Mot. Seq. #001 – Mot D

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GRACE EVANS, RICHARD MYERS, JOHN EVANS, 5 CHEQUIT AVENUE, LLC, THE SHELTER ISLAND HEIGHTS PROPERTY OWNERS CORPORATION, LOIS DRAEGIN,

Petitioners,

- against -

PLANNING BOARD OF THE TOWN OF SHELTER ISLAND, CHEQUIT AVENUE, LLC,

Respondents.

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules, and for a Declaratory Relief

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DECISION AND ORDER

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Upon the E-File document list numbered 1-13 and 17-30 and 36-41 read on the Notice of Petition of Petitioners Grace Evans, Richard Myers, John Evans, 5 Chequit Avenue, LLC, The Shelter Island Heights Property Owners Corporation, and Lois Draegin, seeking an order and judgment pursuant to Article 78 of the CPLR, to review, set aside and annul the Determination of the Respondent Planning Board of the Town of Shelter Island, Resolution #25-2023, dated October 10, 2023, and filed with the Town Clerk on October 30, 2023, upon the grounds that the Determination of said Board under review is illegal, arbitrary and capricious, and unsupported by substantial evidence and contrary to law, it is hereby

ORDERED, that the Petitioners Grace Evans, Richard Myers, John Evans, 5 Chequit Avenue, LLC, The Shelter Island Heights Property Owners Corporation, and Lois Draegin, seeking an order and judgment pursuant to Article 78 of the CPLR, to review, set aside and annul the Determination of the Respondent Planning Board of the Town of Shelter Island, Resolution #25-2023, dated October 10, 2023, and filed with the Town Clerk on October 30, 2023, upon the grounds that the Determination of said Board under review is illegal, arbitrary and capricious, and unsupported by substantial evidence and contrary to law is hereby ***granted in part*** as explained herein***;*** and it is further

ORDERED, that the Respondents' classification of this project as a Type II SEQRA project and not a Type I SEQRA project requiring an Environmental Review as required by the State and Town Codes for new residential construction in a coastal flood plain neighborhood for property specifically located in a "Special Flood Hazard Area" a/k/a FEMA Flood Zone is not supported by substantial evidence and contrary to law; and it is further

ORDERED, that the Court hereby annuls Town Board Resolution #25-2023 and directs that this matter be remanded back to the Town Board or such Town Governing Authority as determined by the Town Laws then existing at the time of this Decision and Order, and such reviewing Authority is directed to comply with the mandates of the New York State Environmental Quality Review Act (SEQRA) Type I and also required by Town Code §60-12(B)(4) and (7) for new residential construction in a "Special Flood Hazard Zone" and conduct an environmental review for the Board's consideration before the granting or denial of any building permits, and take such further action after receipt and review of said environmental report in compliance with State and Local Law; and it is further

ORDERED, that no further action on the Town permits previously issued shall be undertaken until there is compliance with this Court's determination; and it is further

ORDERED, that Petitioners' counsel is hereby directed to serve a copy of this Decision and Order with Notice of Entry by overnight mail, return receipt requested, on all Respondents' counsel forthwith; and it is further

ORDERED, that, if applicable, within thirty (30) days of the entry of this Decision and Order, Respondents' counsel is also hereby directed to give notice to the Suffolk County Clerk as required by CPLR 8019(c) with a copy of this Decision and Order, and pay any fees should any be required.

This is an Article 78 proceeding commenced by the adjacent property owners of 7 Chequit Avenue which is the subject property of these proceedings.

One of the Respondents is Chequit Avenue, LLC, which is an entity owned and controlled by the Shepherd family which owns 7 Chequit Avenue, Shelter Island. Petitioner Shelter Island Property Owner Corporation is a not-for-profit corporation which owns all the streets, roads and infrastructure to provide the Heights residents with potable drinking water, sewage treatment, road maintenance, and owns the ferry company, which provides daily ferry service to and from Shelter Island.

The Town Planning Board is vested with all authority to implement the Town of Shelter Island municipal town code and currently to conduct wetlands applications.

At issue is the construction of a new 2,187 square feet two (2) story residential building immediately adjacent to an existing one (1) family residence with the size of 2,965 square feet. It is labeled as an accessory apartment but it is complete with bedrooms, kitchen, dining area, etc.

The proposed structure lies within the FEMA Special Flood Hazard Area in the Near Shore and Peninsular Overlay District. Based upon the Affidavits submitted, this area of Shelter Island frequently floods from high tides and rainfall events.

The accessory apartment or addition is described as follows:

> " - On the First Floor, a "Great Room", with, as noted above, dining area and seating for eight persons; a 269 sq. ft. (17.4 sq. ft. by 13 ft.) eat-in kitchen (also variously labeled on the plans as a "kitchenette"; with a desk and a full pantry; a half-bath powder room; covered rear porch, covered entry porch; entry hall with closet; and outdoor shower on a pile foundation; and
>
> - On the Second Floor, a master bedroom with walk-in closet and full bath; a second bedroom with closets; a "den/office", with multiple closets, both of which rooms share a second full bathroom; a full laundry room and space for mechanical equipment."

Petitioners agree that the Town in 1986 enacted the Environmental Quality Review Law §60-3, adopted as a Local Law 1-1986, pursuant to the Municipal Home Rule Law §27, the N.Y.C.R.R. Part 617. Furthermore, the Town Environmental Quality Review Law adopted SEQRA standards and local agency projects.

Town Code §60-12(B)(4) and (7) reads in part:

> "In addition to the above [Type I actions in 6 NYCRR Part 617.4], the following actions shall also be Type I actions in the Town of Shelter Island:
>
> (4) Projects which will introduce or make possible <u>new homes or other facilities for human occupation or habitation</u> in the flood hazard areas of the Town...
>
> (7) Projects which could degrade of despoil the wetlands."

There is no doubt that the property falls within the special flood zone in Shelter Island.

The issue then becomes whether or not the Planning Board or the "local agency" properly classified the property as a Type I or Type II project.

Respondents contend that the proposed construction is minor in nature, is less than 15% of the entire lot and is only an accessory sleeping quarter, and will not require any clearing of natural vegetation and pursuant to a memorandum prepared by an engineering firm hired by the Planning Board, no variances are required.

In a review of the Engineer's Report attached to the Respondents' moving papers, there is no mention that the property lies within Shelter Island's "Special Flood Hazard Area" of the Town nor is there any mention that the property improvement may violate the Town's Environmental Review Law §60-12(B)(4) and (7), or that the property is located within the Shelter Island Heights Historic District, which was listed by the United States Department of the Interior and the National Park Service on the National Register of Historic Places in 1993, and concurrently listed by the New York State Historic Preservation Office on the New York State Historic Register.

There is also no mention or discussion that 7 Chequit Avenue is also located within the Near Shore and Peninsular Overlay District, an environmentally protective and restrictive zoning overlay district on Shelter Island, which prohibits the construction of new dwellings within 100 feet of the tidal wetlands. Town Code §133-12(F)(3).

Allegedly, Petitioners filed the Engineer's Report late bringing up such issues but the Planning Board refused to consider it because it was late.

The Law

Section 617.4 Type I Actions

Currentness

"(a) The purpose of the list of Type I actions in this section is to identify, for agencies, project sponsors and the public, those actions and projects that are more likely to require the preparation on an EIS than Unlisted actions. All agencies are subject to this Type I list.

(1) This Type I list is not exhaustive of those actions that an agency determines may have a significant adverse impact on the environment and requires the preparation of an EIS. However, the fact that an action or project has been listed as a Type I action carries with it the presumption that it is likely to have a significant adverse impact on the environment and may require an EIS. For all individual actions which are Type I or Unlisted, the determination of significance must be made by comparing the impacts which may be reasonably expected to result from the proposed action with the criteria listed in section 617.7(c) of this Part.

(2) Agencies may adopt their own lists of additional Type I actions, may adjust the thresholds to make them more inclusive, and may continue to use previously adopted lists of Type I actions to complement those contained in this section. Designation of a Type I action by one involved agency requires coordinated review by all involved agencies. An agency may not designate as Type I any action identified as Type II in section 617.5 of this Part. (*Own emphasis provided).*

(b) The following actions are Type I if they are to be directly undertaken, funded or approved by an agency:

(1) the adoption of a municipality's land use plan, the adoption by any agency of a comprehensive resource management plan or the initial adoption of a municipality's comprehensive zoning regulations."

General Article 78 Review

"Consideration of the Petition and the arguments for and against begin with the court's recognition that in a CPLR Article 78 proceeding, the Court's review is limited to the arguments and record actually adduced before the agency ***(Kaufmann v Inc. Vil. of Kings Point,*** 52 AD3d 604, 607, 860 NYS2d 573, 576 [2d Dept 2008]). 'A local planning board has broad discretion in reaching its determination on applications ... and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary, or an abuse of discretion' " ***(Fildon, LLC v Planning Bd. of Inc. Vil. of Hempstead,*** 164 AD3d 501, 502-03, 83 NYS3d 505, 507 [2d Dept 2018]). " When reviewing the determinations of a local planning board, courts consider substantial evidence only to determine whether the record contains sufficient evidence to support the rationality of the [b]oard's determination " ***Id.*** Thus, "[i]n applying the 'arbitrary and capricious' standard, a court inquires whether the determination under review had a rational basis" ***(Manning ex rel. Suffolk County Ct. Employees Ass'n v New York State-Unified Ct. Sys.,*** 153 AD3d 623, 624, 60 NYS3d 251, 253 [2d Dept 2017]; *see also* ***Perry v Brennan,*** 153 AD3d 522, 524, 60 NYS3d 214, 217 [2d Dept

2017], *lv to appeal denied sub nom.* ***Perry* v *Patricia A. Brennan Qualified Personal Residence Tr.,*** 31 NY3d 902 [2018] [the sole question before the court under Article 78's arbitrary and capricious standard is whether the determination was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion]). Put differently then, the court will substitute its judgment for that of a planning board only when "the determination was affected by an error of law, or was arbitrary and capricious or an abuse of discretion, or was irrational." Thus review of a planning board's determination, entails consideration of substantial evidence to determine whether the record contains sufficient evidence to support the rationality of the Board's determination ***(Ostojic v Gee,*** 130 AD3d 927, 928-29, 14 NYS3d 117, 119 [2d Dept 2015]). Though, courts are reminded that under instances where the issue involves pure legal interpretation of statutory terms, deference is not required ***(Nowak v Town of Southampton,*** 174 AD3d 901, 106 NYS3d 372 [2d Dept 2019]).

SEQRA Standard

Judicial review of an agency determination under SEQRA is limited to determining whether the challenged determination was affected by an error of law, or was arbitrary and capricious, an abuse of discretion, or the product of a violation of lawful procedure ***(Peterson* v *Planning Bd. of City of Poughkeepsie,*** 163 AD3d 577, 578-79, 80 NYS3d 395, 397 [2d Dept 2018]). Therefore, courts may review the record to determine 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. ***Id.*** It has also been said that for motion courts, "[I]t is not the role of the courts to weigh the desirability of any action or choose among alternatives, but to assure that the agency itself has satisfied SEQRA, procedurally and substantively" ***(St. James Antiochian Orthodox Church* v *Town of Hyde Park Planning Bd.,*** 132AD3d 687, 687-88, 17 NYS3d 481, 483 [2d Dept 2015]; *accord* ***Comm. to Stop Airport Expansion v Wilkinson,*** 126 AD3d 788, 789, 5 NYS3d 274, 276 [2d Dept 2015]).

Literal compliance with the letter and spirit of SEQRA is required, and substantial compliance with SEQRA is not sufficient to discharge an agency's responsibility under the act ***(Stony Brook Vil. v Reilly,*** 299 AD2d 481, 483, 750 NYS2d 126, 128 [2d Dept 2002], *as amended* [Jan. 9, 2003]). Thus, a petitioner prevailing in a proceeding pursuant to CPLR article 78 challenging a SEQRA determination is entitled to have that determination annulled ***(Zutt* v *State,*** 99 AD3d 85, 102, 949 NYS2d 402, 415 [2d Dept 2012]).

SEQRA's procedural requirements are described as follows:

SEQRA "mandates the preparation of an EIS when a proposed project 'may have a significant effect on the environment.'" Because the operative word triggering the requirement of an EIS is 'may', there is a relatively low threshold for the preparation of an EIS" ***(Vil. of Tarrytown* v *Planning Bd. of Vil. of Sleepy Hollow,*** 292 AD2d 617, 619, 741 NYS2d 44, 48 [2d Dept 2002]). In furtherance of and to further "promote the Legislature's goals, and to provide an informational tool to aid in the decision-making process, SEQRA requires agencies to prepare an EIS 'on any *action* they propose or approve which may have a significant effect on the environment." "[SEQRA] broadly defines the term 'action' to include projects or activities that the agency either directly undertakes or funds, policy and procedure-making and *the issuance of permits,* licenses or leases." When undertaking an action, a governmental agency must initially determine whether a proposed action "may have a significant effect on the environment." "If no significant effect is found, the lead agency may issue a 'negative declaration,' identifying areas of environmental concern, and providing a reasoned elaboration explaining why the proposed action will not significantly affect the environment". However, "[i]f the lead agency determines that there may be significant environmental impact, it must see to it that a EIS is prepared, which fully evaluates the potential environmental effects, assesses mitigation measures, and considers alternatives to the proposed action." To assist agencies in determining whether a proposed action may have a significant effect on the environment, SEQRA directs the DEC to promulgate regulations identifying, "[a]ctions or classes of actions that are likely to require preparation of environmental impact statements," and "[a]ctions or classes of actions which have been determined not to have a significant effect on the environment and which do not require environmental impact statements" (ECL 8- 0113[2][c]). In furtherance of this mandate, the DEC classifies actions as Type I, Type II, or Unlisted. "[A] Type I action carries with it the presumption that it is likely to have a significant adverse impact on the environment and may require an EIS" (6 NYCRR 617.4[a][l]). Type II "actions have been determined not to have a significant impact on the environment or are otherwise precluded from environmental review under [SEQRA]" (6 NYCRR 617.5[a]). "[A]ll remaining actions are classified as 'unlisted' actions" ***(see generally Sierra Club v Martens,*** 158 AD3d 169, 174-76, 69 NYS3d 84, 89-90 [2d Dept 2018] [internal citations omitted]) (***Andes v Planning Bd. of the Town of Riverhead,*** 217 A.D.3d 669, 190 N.Y.S.3d 151 [2d Dept 2023]).

In the instant case, Petitioners claim that Respondents "failed to take a hard look" under SEQRA in connection with the review and approval of the Petitioners' application and delegated the responsibility of a SEQRA determination to an engineer for the Town who failed to consider Town Law, the flood zone, and the status of the property as being listed in the National Historic Register.

Nowhere in the record is a negative declaration of the Town identifying environmental concerns and providing a reasonable basis why this project will or will not have a negative impact upon the environment.

Furthermore, the Town Planning Board's arbitrary decision to ignore Town Code §60-12(B)(4) and (7) is without explanation.

By enacting that Town Code it is this Court's opinion that the Town intended to classify such properties to a Type I classification under SEQRA and violated its own mandate of issuing a Wetlands Permit without the benefit of the environmental review.

In the instant case, the Board never considered or addressed the environmental concerns and simply delegated its authority to an engineer who also did not address environmental concerns or impacts.

SEQRA represents an attempt by the New York State Legislature to strike a balance between social and economic goals and concerns about the environment (***Matter of Jackson v New York State Urban Dev. Corp.***, 67 NY2d 400, 414, 503 NYS2d 298 [1986]; see, ECL 8-0103). Its primary purpose is to inject environmental considerations directly into governmental planning, review and decision making at the earliest possible time, so that social, economic and environmental factors are considered together when reaching decisions on proposed activities (see, ECL 8-0103 [7]; ***Matter of Neville v Koch***, 79 NY2d 416, 583 NYS2d 802 [1992]; ***Matter of Coca Cola Bottling Co. v Board of Estimate***, 72 NY2d 674, 536 NYS2d 33 [1988]; ***Matter of Coalition for Future of Stony Brook Vil. v Reilly***, 299 AD2d 481, 750 NYS2d 126 [2d Dept 2002]). To promote the Legislature's goals and assist agency officials in their assessment of environmental factors, SEQRA requires that an environmental impact statement (EIS) be prepared for any government-sponsored or government-approved projects or activities "which may have a significant effect on the environment" (ECL 8-0109 [2]; see, ***Matter of Long Is. Pine Barrens Soc. v Planning Bd. of Town of Brookhaven***, 80 NY2d 500, 591 NYS2d 982 [1992]). Described as the "heart of SEQRA" (***Matter of Jackson v New York State Urban Dev. Corp***., *supra*, at 400, 415, 503 NYS2d 298), the EIS is a detailed statement setting forth, among other things, a description of the proposed action and its environmental setting; the environmental impacts of the proposed action, including both long-term and short-term effects; any adverse environmental impacts which cannot be avoided if the action is implemented; alternatives to the proposed action; and mitigation measures proposed to minimize the environmental impact (ECL 8-0109

[2]; 6 NYCRR 617.9 [b]; *see,* ***Matter of Munash v Town Bd. of Town of East Hampton***, 297 AD2d 345, 748 NYS2d 160 [2d Dept 2002]; ***Matter of Citizens Against Retail Sprawl v Giza***, 280 AD2d 234, 722 NYS2d 645 [4th Dept 2001). There is a relatively low threshold for the preparation of an EIS, as the statute mandates that agencies prepare an impact statement or cause such statement to be prepared when a proposed action "may" have a significant impact on the environment (*see*, ECL 8-0109 [2]; ***Matter of Munash v Town Bd. of Town of East Hampton***, *supra*; ***Matter of S.P.A.C.E. v Hurley***, 291 AD2d 563,739 NYS2d 164 [2d Dept], *lv denied* 98 NY2d 615, 752 NYS2d 1 [2002]; ***Matter of Omni Partners v County of Nassau***, 237 AD2d 440, 654 NYS2d 824 [2d Dept 1997].

The initial step for an agency that receives an application for approval or funding, or that proposes to directly undertake an action, is a determination whether the proposed action falls within the scope of SEQRA. The regulations mandate that as early as possible in an agency's formulation of an action it seeks to undertake, or as soon as an agency receives application for funding or approval of an action, the agency must determine whether the proposed action qualifies as a Type I, a Type II or an Unlisted Action for purposes of SEQRA review (*see*, 6 NYCRR 617.6 [a][1]. If a proposed project is classified as a Type II action, the agency has no further responsibilities under SEQRA (*see*, 6 NYCRR 617.6 [a][l][i]). Otherwise, the agency must make a preliminary classification of the action as either Type I or Unlisted, and begin the process of environmental review by determining, among other things, whether an EAF or a draft EIS should be prepared and, if more than one agency is involved, which agency should act as the lead agency (*see*, 6 NYCRR 617.6). The lead agency, then, must determine the environmental significance of the proposed action by comparing the information contained in the EAF or draft EIS with criteria established by the DEC as indicators of significant adverse impacts on the environment (*see*, 6 NYCRR 617.7 [a], [c]). A lead agency may determine either that the proposed action will not have any adverse environmental impacts or that the identified adverse environmental impacts will not be significant (*see*, 6 NYCRR 617.7 [a][2]), or that the action "may include the potential for at least one significant adverse environmental impact"(*see*, 6 NYCRR 6 17.7 [a][1]). A written determination by the lead agency that a proposed action will not have a significant adverse impact on the environment, known as a "negative declaration," ends the SEQRA process (*see*, 6 NYCRR 617.1 [y], 617.7 [a][2]). On the other hand, if a determination is made that the proposed action may have a significant environmental impact, the lead agency must issue a "positive declaration" and direct the preparation of an EIS (*see*, 6 NYCRR 617.1 [ac], 617.7 [a][l]).

SEQRA's mandate of balancing economic and social interests with environmental protection is effectuated, in part, by requiring strict compliance with the procedural requirements of the act and its implementing regulations (*see,* ***Matter of New York City Coalition to End Lead Poisoning v Vallone***, 100 NY2d 337, 763 NYS2d 530 [2003]; ***Matter of Merson v McNally***, 90 NY2d 742, 665 NYS2d 605 [1997]; ***Matter of Coalition for Future of Stony Brook Vil. v Reilly***, *supra).* Therefore, "actions" undertaken or authorized by an agency without the environmental review required by SEQRA are considered unauthorized and void (*see,* ***Matter of New York City Coalition to End Lead Poisoning v Vallone***, *supra*; ***Chinese Staff & Workers Assn. v City of New York***, 68 NY2d 359, 509 NYS2d 499 [1986]; ***Matter of Tri-County Taxpayers Assn. v Town Bd. of Town of Queensbury***, 55 NY2d 41, 447 NYS2d 669 [1982]; *cf.* ***Matter of King v Saratoga County Bd of Supervisors***, 89 NY2d 341, 653 NYS2d 233 [1996]).

Judicial review of the SEQRA process is limited to whether an agency's determination was made in violation of proper procedures, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion (*see,* ***Akpan v Koch***, 75 NY2d 561, 555 NYS2d 16 [1990]; ***Matter of Coalition for Future of Stony Brook Vil. v Reilly***, *supra*; ***Matter of Silvercup Studios v Power Auth. of State of New York***, 285 AD2d 598, 729 NYS2d 47 [2001]). Courts may review the administrative record to determine 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" (***Matter of New York City Coalition to End Lead***

Poisoning v Vallone, *supra*, *quoting* ***Matter of Jackson v New York State Urban Dev. Corp.***, *supra*; *see*, ***Chinese Staff & Workers Assn. v City of New York***, *supra*). However, "it is not the role of the courts to weigh the desirability of any action or choose among alternatives, but to assure that the agency itself has satisfied SEQRA, procedurally and substantively" (***Matter of Jackson v New York State Urban Dev. Corp.***, *supra*, at 416, 503 NYS2d 298; *see*, ***Matter of Chem. Specialties Mfrs. Assn. v Jorling***, 85 NY2d 382, 626 NYS2d 1 [1995]; ***Matter of WEOK Broadcasting Corp v Planning Bd. of Town of Lloyd***, 79 NY2d 373, 583 NYS2d 170 [1992].

The Court finds that the Planning Board of the Town of Shelter Island never even considered or classified the property for a SEQRA Type I or Type II by issuing a negative declaration. The simple fact is the Respondents failed to address it in any manner even though the property lies within a "Special Flood Hazard Zone", no less take a hard look at the environmental issues, as required by SEQRA.

Accordingly, the Court finds that the Board's decision was violative of the Town Code and SEQRA and hereby annuls the Planning Board of the Town of Shelter Island's decision and directs that this project be classified as a Type I SEQRA property and remands this matter back to the Planning Board of the Town of Shelter Island for further review and determination after classification of the property as Type I property and compels the Respondents to secure an environmental assessment for the Planning Board to consider in its eventual determination.

The foregoing constitutes the ***Decision and Order*** of this Court.

Dated: May 7, 2024
Riverhead, New York

HON. JAMES F. QUINN, A.J.S.C.

X **FINAL DISPOSITION** ___ **NON-FINAL DISPOSITION**