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SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. JEROME C. MURPHY,
Justice.

In the Matter of the Application of

SAVE BAYVILLE NOW INC.,

Petitioner-Plaintiff,

for a Judgment Pursuant to Article 78, of the CPLR, and for additional relief,

- against -

INC. VILLAGE OF BAYVILLE,

Respondent-Defendant.

TRIAL/IAS PART 19
Index No.: 8591-15
Motion Date: 4/22/16
Sequence Nos: 001, 002
MG, MD
DECISION AND ORDER

The following papers were read on this motion:

Sequence No. 1:
Notice of Petition, Verified Petition/Complaint, Verification and Exhibits..... 1

Sequence No. 2:
Notice of Motion to Dismiss, Affirmation, Affidavit in Support of Maria Alfano-Hardy, Affidavit in Support of Bonnie Franson and Exhibits..... 2
Affirmation in Opposition and Exhibits..... 3
Reply Affirmation, Reply Affidavit and Exhibit..... 4
Affirmation in Further Opposition..... 5

PRELIMINARY STATEMENT

In Sequence No. 1, petitioner-plaintiff brings this application for order declaring that Local Law No. 3-2015, Local Law No. 4-2015 and Local Law No. 5-2015 enacted by the Respondent are invalid and that the same be annulled and vacated, together with any and all further relief that this Court deems just and proper.

In Sequence No. 2, respondent brings this application for order pursuant to CPLR §3211(a)((1), (3) and (7), dismissing the petitioner's petition in its entirety and granting the respondents such other and further relief as this Court deems just, proper and equitable.

Petitioner has submitted opposition to this application.

BACKGROUND

On June 22, 2015, the Village of Bayville adopted three local laws which modified the Village Zoning Ordinance, making changes to the restrictions for buildings in the "Business" District. The laws were filed with the New York Department of State on July 2, 2015.

Faced with a significant vacancy rate, reportedly in the range of 40%, within the two locations within the Village zoned for business, the Village authorized the occupancy of ground floor units with residential apartments, reduced from 250' to 50' the distance from a residence in which a use for which a special permit is required may be located, and defined a "residential building" as one containing five (5) apartment units or more. Previously, residential apartments were permitted only on the second floor, and such combined business and residential uses were not permitted within 250' from residentially zoned property.

Petitioner is a civic association consisting of members who reside within the Village of Bayville. They bring this proceeding, arguing that the allowance of up to four residential units per building, at a reduced distance of 50' from residentially zoned properties, will tax already overburdened water and septic systems, exacerbate flooding and flood plain problems, as well as salt water intrusion into drinking water systems. They also contend that the newly enacted laws will increase local traffic, reduce available on-street parking, increase population density, and adversely impact the values of local residences and business properties, and that all of these will directly impact members of petitioner.

Petitioner argues that the Village, as lead agency for the New York State Environmental Quality Review Act ("SEQRA") failed to comply with the numerous requirements of SEQRA, each of which renders the Village SEQRA review and negative declaration defective. They contend that the Village failed to identify the environmental impacts reasonably anticipated from the proposed action, failed to take the requisite "hard look" at those areas of environmental concern, and failed to provide a reasoned elaboration in connection with the basis of its determination. This failure is claimed to be particularly true with respect to traffic and parking, septic system issues, flooding and flood plain issues, population concentration, and negative impact on the value of surrounding properties.

In addition to failing to conduct a significant environmental review, petitioner claims that, in conducting its SEQRA review, engaged in unlawful "segmentation". They assert that, rather than conduct a legally mandated environmental review at the time of enactment of the statutes,

the Village determined, with respect to Local Laws 3 and 4, that "(f)uture site-specific development applications will be subject to site-specific SEQRA review. This, they claim, violates SEQRA.

Their position is that a "negative declaration" under SEQRA will only be valid if the agency has, in reaching its conclusions, properly identified relevant areas of concern, taken a "hard look" at those areas, and made a reasoned elaboration of the basis for its determination. In this case, they claim that the record demonstrates a lack of compliance with SEQRA, and payment of mere "lip service" to them. The Village never undertook the requisite "hard look" and engaged in improper segmentation.

The Village responds with a Motion to Dismiss the petition. In addition to challenging the standing of petitioner, they set forth the various steps which were taken which resulted in the hearing on which date the amendments to the statutes were adopted. Among the documents submitted in support of this motion is the Short Environmental Assessment Form, Part 2 - Impact Assessment (Exh. "F"). This document was prepared by Bonnie Franson, AICP, PP, of H2M Architects and Engineers, the Village Environmental Engineer. She acknowledged that the proposed action would have a significant impact on surface or groundwater quality, as well a s "(s)tructure, sites or districts of historic, archeological or cultural significance to the Village, town, county, state or nation. Notations to these comments were contained in footnotes 1 and 2 as follows:

> (1) the proposed action involves a zoning amendment affecting allowable uses within the Business zoning district. Future sit-specific development would rely on septic systems and would be required to be evaluated by the Nassau County Department of Health. This is no different than any other land use which may occur within the Business district.
>
> (2) The proposed action involves a zoning amendment affecting the Business zoning district. All lands within the Village of Bayville are located in an archaeologically sensitive area, as per the NYS Office of Parks, Recreation, and Historic Preservation maps. Future site-specific development applications will be subject to separate site-specific SEQRA review to assess any potential effects to said resources.

At Part 3 of the Short Environmental Form, Part 3 - Determination of Significance, Ms. Franson checked off that she has " . . . determined, based on the information and analysis above, and any supporting documentation, that the proposed action will not result in any significant

adverse environmental impacts." On the same date, April 27, 2015, the Village issued a Negative Declaration, Notice of Determination of Non-Significance.

Petitioner's claim is that the foregoing determinations simply put off the consideration of an environmental impact of septic systems until applications for future development would require evaluation by Nassau County Department of Health. They also claim that determinations as to whether or not the development in accordance with the changes in the Business District would have a negative archaeological impact were also deferred until the submission of site-specific applications.

In opposition to the motion to dismiss, petitioner asserts that they have standing, because one or more of the members have standing to sue, the interests asserted are germane to the purposes of the association, so as to establish that it is an appropriate representative of those interests, and that participation of individual members is not required to pursue the relief sought.

They challenge the determinations of Ms. Franson, asserting that a mere statement that she "performed the necessary review of the Local Laws under SEQRA", by pointing to the negative declaration, which asserts mere conclusions that the amendments would not impact the environment and would not result in a significant change in land uses presently allowed is insufficient.

To the contrary, they contend that Ms. Franson merely filled out forms, and sent out notices, but failed to make any reference to any steps taken to determine the accuracy of conclusions set forth in the negative declaration, and, merely defers these investigations to a future time, when site-specific applications for development will be made. There are, they claim, no reports or studies as to how many residential applications can be anticipated, the anticipated number of units, or the size of the area any such construction is expected to affect.

DISCUSSION

Standing is a threshold determination that a person should be allowed access to the courts to adjudicate the merits of a particular dispute (*CPD NY Energy Corp. v. Town of Poughkeepsie Planning Board, 139 A.D.3d 942* [2d Dept. 2016] citing *Matter of Association for a Better Long Is., Inc. v. New York State Dept. Of Envtl. Conservation,* 23 N.Y.3d 1 [2014]). Petitioner has the burden of establishing both an injury-in-fact, and that the asserted injury is within the zone of interests sought to be protected by the statute alleged to have been violated, and, in land use matters, petitioner "must show that it would suffer direct harm, injury that is in some way different from that of the public at large." (*Matter of Association for a Better Long Is., Inc.*, ,

supra at 7, quoting from *Society of Plastics Indus. v. County of Suffolk,* 77 N.Y.2d 761, 772—773 [1991]).

In 1987, the Court of Appeals rendered decisions on two matters, entitled *Matter of Sun-Brite Car Wash v. Board of Zoning & Appeals of Town of N. Hempstead,* 69 N.Y.2d 406 [1987]. *Sun-Brite* involved an application to erect a prefabricated metal automatic car wash on property used as a gas station, a nonconforming legal use. The Board of Zoning and Appeals granted the application after the applicant complied with recommendations of the Planning Commission. Sun-Brite Car Wash, a long-term lessee of a car wash across the street, commenced an Art. 78 proceeding to annul the Board's determination.

Supreme Court determined that as a lessee in the immediate vicinity of the affected property, was, as a matter of law, aggrieved within the meaning of Town Law § 267 (7), and therefore had the requisite standing. The Supreme Court vacated the Board's decision on the merits, finding that applicants had failed to demonstrate that the property was unsuitable for a permitted use, or could not yield a reasonable return. On appeal, the Second Department reversed, concluding that Sun-Brite lacked standing to bring the Art. 78 proceeding, because its only substantiated objection was that it would result in competition. The Court of Appeals affirmed.

The second matter dealt with in *Sun-Brite,* was *Allen Avionics, Inc. v. Universal Broadcasting Corp.* Universal Broadcasting purchased a parcel of land from the Village of Mineola. The Village Board of Trustees approved the sale, stipulating that the height of the radio tower which Universal proposed to build, would be limited to 250 feet, that the tower was permissible in the M-1 Light Manufacturing Zone, and that the Village would issue a permit for construction. The application for the issuance of a building permit some two years after the sale was temporarily stayed, pending input from the Environmental Protection Agency and Department of Health, but was eventually issued. Plaintiffs, owners of property adjacent to the parcel, commenced an action seeking to enjoin construction, maintenance and use of the tower, alleging it was dangerous to public health, and to plaintiffs' property, and that radiation emitted from the tower would interfere with plaintiff Allen's business of manufacturing electric parts.

Supreme Court concluded that construction of a 250 foot radio tower was authorized by and conformed to the Mineola Village Code, and required no zoning change or public hearing. Alternatively, the Court determined that even if it were not a permitted use, plaintiff lacked standing because they failed to establish that the tower threatened imminent injury to their

property, or would cause a genuine change to the community, or would increase community hazards. The Appellate Division affirmed on the basis that plaintiffs lacked standing.

The Court of Appeals then proceeded to deal with what they termed the central issue in both cases, standing. They opined that "[s],tanding principles, which are in the end matters of policy, should not be heavy-handed; in zoning litigation in particular, it is desirable that land use disputes be resolved on their own merits rather ahan by preclusive, restrictive standing rules." The Court also recognized that "permitting everyone to seek review could work against the welfare of the community by proliferating litigation, especially at the instance of special interest groups, and by unduly delaying final dispositions." (*Matter of Sun-Brite Car Wash,* supra at 413).

While something more than the interest of the public at large is required to enable a person to seek judicial review, proof of special damage or in-fact injury is not required in every instance to establish that the value or enjoyment of one's property is adversely affected. (*Id.*) (internal citations omitted). The status of neighbor does not automatically provide the entitlement to judicial review. As noted, a petitioner may be so far from the proposed change that the effect is no different from that suffered by the public genera..y. (*Id.* at 414). Even assuming that petitioner qualifies on the basis of proximity, it may be that the interest sought to be protected is one within the zone of interest to be protected by the statute. It is for this latter failure, that Sun-Brite was found to lack standing.

In affirming *Allen,* the Court did so on different ground. Plaintiffs, as adjoining land owners, were members of a group presumptively affected by the change of neighboring property and therefore technically have standing to maintain this action. The Court noted that the Village ordinance recognizes plaintiffs as property owners who must be given notice prior to a hearing on the application for a conditional or special use, and on a zoning change application. But, as noted, an admission ticket to judicial review does not guarantee success on the merits. The Court agreed with the trial judge that the tower was within the broad definition contained in the Mineola Village Code, without limitation as to height, and subject only to the approval of the Board of Trustees. The finding of the Appellate Division, based upon a review of the entire record, including expert testimony, concluded that plaintiffs failed to establish that construction of the tower would result in imminent threat of irreparable injury or result in a diminution of value of plaintiff's property.

In cases such as *CPD N.Y. Energy Corp. v. Town of Poughkeepsie Planning Board,* 139

A.D.3d 942 (2d Dept. 2016), the Court noted that an allegation of close proximity may give rise to an inference of damage or injury which enables a nearby property owner to challenge a zoning board's land use determination without proof of actual injury. But such proximity does not guaranty judicial review in each instance. "Rather, in addition to establishing that the effect of the proposed change is different from that suffered by the public generally, the petitioner must establish that the interest asserted is arguably within the zone of interests the statute protects." (See also, *Ten Towns to Protect Main Street v. Planning Board of the Town of North East,* 29 N.Y.S.3d 189 [2d Dept. 2016]; *Zupa v. Paradise Point Association,* 22 A.D.3d 843,[2d Dept. 2005]; *Matter of Michael Oates v. Village of Watkins Glen,* 290 A.D.2d 758, 761 [3d Dept. 2002]).

The interest asserted by petitioner is determined to be within the zone of interests the statute protects. The State Environmental Quality Review Act ("SEQRA"), adopted in 1975, "represents an effort to strike a balance between social and economic goals and concerns about the environment – defined broadly to include 'land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance, existing patterns of population concentration distribution, or growth, and existing communit or neighborhood character.' " (*Matter of Jackson v. New York State Urban Dev. Corp.,* 67 N.Y.2d 400, 414 [1986], quoting from ECL § 8-0105[6]; see also, 6 NYCRR 617.2[k]).

While the foregoing matters may be interpreted to impose an additional burden upon a petitioner to establish damage different from that suffered by the public at large, this Court determines that the holding of the Court of Appeals in *Sun-Brite,* supra, makes it clear that physical proximity to the subject of a zoning decision is sufficient to grant standing, even in the absence of some form of unique damage or loss of value to their property. Furthermore, *Sun-Brite* espouses the position that challenges to land use decisions should be more open to challenge by those presumptively affected as a result of their proximity.

Thus, the Court determined that, in addition to proximity, a petitioner must establish harm distinct from that of the community at large. In this case, respondent claims that the petitioner has failed to sustain direct harm which is different from the public at large; that petitioner has failed to demonstrate organizational standing by failing to establish that its individual members have standing; that the interests the organization asserts are germane to its purpose; and that individual participation of its members is not required in the action. In addition, respondent contends that the Court must be satisfied that the association is the

appropriate representative of those interests.

Petitioner asserts that it has standing to challenge the actions of the Village of Bayville. It submits a copy of the Zoning Map of the Village of Bayville, on which are identified the residences of four members, whose homes are immediately adjacent to the Business -E District, and two whose homes are within 100' and 150' of the Business - W District. The affidavits of the foregoing members assert that "the proliferation of residential dwelling units within the business zoned properties in the Village will tax already overburdened water and septic systems, exacerbate flooding and flood plain problems, exacerbate existing salt water intrusion problems in connection with the municipal drinking water system, increase local traffic, reduce available on street parking, increase the density of population and result in negative impacts to property values and to their quality of life."

Petitioner further contends that the interests being pursued are germane to petitioner's purposes, which, they assert, is a not-for-profit corporation created to save and preserve the integrity and beautification of the Village.

The threshold issue then, is whether individual members of petitioner themselves have standing, whether the association derives standing from members with standing, whether the petition furthers the purpose of the association, and whether the association is an appropriate entity to represent the interests of the members with standing.

The Court determines that the petitioner meets the Sun-Brite criteria and in this matter qualifies to have a presumption of damage or injury in its favor, without having to plead same. The petitioner has standing since one or more of its members have standing to sue, as their properties are adjacent to the Business Districts, and the interests of petitioner are germane to its purposes and the petition meets all of the required criteria for standing. The Court therefore denies the motion by respondent to dismiss the petition on the ground of lack of standing.

Petitioner also contends that the Village failed to provide notice to the Town of Oyster Bay, on behalf of the unincorporated hamlet of Locust Valley, and the Village of Lattingtown, both of which are within the 500 ft. radius for which notification is required. Village Law § 7-706 b) provides in pertinent part as follows:

> 2. Service of written notice. At least ten days prior to the date of the public hearing, written notice of any proposed regulations, restrictions or boundaries of such districts, including amendments thereto, affecting property within five hundred feet of the following shall be served personally or by mail by the village upon each

person or persons as listed below:

* * *

(b) the boundary of a city, village or town; upon the clerk thereof;

In support of their motion to dismiss the Petition, respondents allege compliance with the notice requirements of Village Law § 7-706 (2), but none of the exhibits ("A", "B", "D" and "J", or the affidavits of Maria Alfano Hardy and Bonnie Franson reflect written notification to the Town of Oyster Bay or the Village of Lattingtown.

Petitioner further asserts that the Village failed to comply with the requirements of 6 NYCRR §617.3(a). As the lead agency, the Village was required to identify areas of environmental concern, analyze them, and take a "hard look" at potential environmental impacts. In this instance, Ms. Franson, on behalf of the Village, identified the potential for an impact upon septic systems, with intrusion into the underground water system which provides domestic water to the Village. But, petitioner contends, no significant analysis of the potential problem was addressed, and, in what it refers to as unlawful segmentation, the consideration of the potential impact was deferred for evaluation on an ad hoc basis as conversion of existing commercial units to residential, or construction of new 2-story residential units up to within 50 ft. of existing residences, actually occurred.

With respect to the failure of the Village to give written notice to the Town of Oyster Bay, as or the Village of Lattingtown, as set forth in Village Law § 7-706 (b), the Court determines that, while such failure may entitle Oyster Bay or Lattingtown to challenge the determination of the Board, petitioner is not entitled to any such benefit, as they were properly noticed.

At the heart of SEQRA is the Environmental Impact Statement ("EIS"), which must be prepared regarding any action that "may have a significant effect on the environment." (*Matter of Jackson,* supra at 416). The Short Environmental Assessment Form prepared on behalf of the Village included the observation that the passage of the proposed zoning ordinances may lead to strains on septic systems, leading to contamination of drinking water, and salt water intrusion into the aquifer. If any action is determined to possibly have a significant effect on the environment, an EIS must be prepared. (ECL § 8-0109[2]), and the Department of Environmental Conservation has adopted regulations governing this process. (6 NYCRR 617.11 — 617.13).

While the Village has acknowledged the potential for environmental damage, it has not

prepared an EIS. Rather, it has deferred consideration of recognized potential environmental damage to be determined on an ad hoc basis as individual applications for development in accordance with the zoning requirements are filed. As a consequence, the determination to amend the zoning ordinance by the inclusion of Local Laws Nos. 3-2015, 4-2015, and 5-2015 was arbitrary, capricious, and not undertaken with regard to the applicable provisions of SEQRA.

Accordingly, the petition is granted and the Court declares that Local Laws Nos. 3-2015, 4-2015, and 5-2015 are annulled and vacated.

This constitutes the Decision and Order of the Court.

To the extent that requested relief is not granted, it is denied.

Dated: Mineola, New York
June 30, 2016

ENTER:

Jerome C Murphy

JEROME C. MURPHY
J.S.C.