

**Open Space Council, IN. v Town Bd. of the Town of
Brookhaven**

2012 NY Slip Op 32156(U)

August 6, 2012

Supreme Court, Suffolk County

Docket Number: 2011-34008

Judge: Jeffrey Arlen Spinner

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SUPREME COURT OF THE STATE OF NEW YORK
IAS PART XXI II COUNTY OF SUFFOLK

PRESENT:

HON. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

COPY

OPEN SPACE COUNCIL, IN. and DIANE SCHNEIDER, for a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

Petitioners,

INDEX NO: **2011-34008**

-against-

MTN SEQ NO: 001-CASEDISP

ORIG MTN DATE: 12/16/11

THE TOWN BOARD OF THE TOWN OF BROOKHAVEN and MARK LESKO, STEVE FIORE-ROSENFELD, JANE BONNER, KATHLEEN WALSH, CONSTANCT KEPERT, TIMOTHY MAZZEI, and DANIEL PANICO, Constituting and in their capacities as the Members of the Town Board of Brookhaven; **THE MEADOWS AT YAPHANK LLC (aka AVR REALTY), ROSE BRESLIN ASSOCIATES LLC and DORADE INC**

FINAL MTN DATE: 07/11/12

Defendants.

UPON the following papers numbered 1-12 read on this petition:

- Petition (Papers 1-2);
- Respondents BROOKHAVENS' Return and Opposition (Papers 3-6);
- Respondents AVR, BRESLIN & DORADES' Answer & Opposition (Papers 7-10);
- Petitioners' Reply (Papers 11-12);

it is,

ORDERED, that the Petition is hereby denied in all respects.

Petitioners move this Court for an Order, , pursuant to CPLR Article 78, annulling Respondents BROOKHAVEN's (TOWN BOARD) Resolutions for rezoning and environmental findings statement.

This matter concerns the development and zoning of a mixed-use planned development district ("PDD") known as the Meadows at Yaphank (Meadows). The site consists of 3 parcels, comprising of 335 acres, located at the northwest corner of the William Floyd Parkway and the Long Island Expressway, in the Hamlet of Yaphank, Town of Brookhaven, County of Suffolk, State of New York.

Prior to its rezoning to a PDD:

(RR)

1. The western 172.20 acre parcel was zoned L-1 Industrial, and was previously used as the Suffolk Downs Race Track, and later operated as a flea market.
2. The eastern 150.17 acre parcel was zoned J-2 Business, and is undeveloped, however it was previously cleared, with partial foundations installed in connection with a 1997 site plan approval for Brookhaven Town Center, and later received site plan approval, in 2007, for an 850,000 square foot retail development known as Brookhaven Walk.
3. The third parcel is the site of the Dorade sewage treatment plant, which currently receives flow from the Whispering Pines/Colonial Woods developments and the Suffolk County Sewer District No. 8.

The proposed project involves the construction of 850 residential units and 1,032,500 square feet of commercial space, to be used for retail, office and private amenities. In addition, the site will also contain public open space and a wastewater treatment plant. The wastewater treatment plant is currently designed to process 140,000 gallons per day, and will ultimately process 450,000 gallons per day.

Petitioner OPEN SPACE COUNCIL, INC. (COUNCIL) is an environmental advocacy group that is concerned with environmental protection, preservation of open space and educating the public in the Town of Brookhaven (BROOKHAVEN). A primary function of the COUNCIL is participation in decisions concerning land use in BROOKHAVEN. Co-Petitioner SCHNEIDER, a member of the COUNCIL, lives within a half-mile of the site of the proposed project. SCHNEIDER alleges that the use and enjoyment of her residence, neighborhood, highways and environment will be adversely impacted by Respondents' proposal.

Respondent TOWN BOARD is established, empowered and created pursuant to New York State law and applicable local law, and individual Respondents LESKO, FIORE-ROSENFELD, BONNER, WALSH, KEPERT, MAZZEI and PANICO are members thereof, and named as Respondents herein in such capacity. Respondents AVR and BRESLIN are, respectively, the applicant and the owners of the proposed site, and have applied to the TOWN BOARD seeking approval for development of the Meadows.

On July 20, 2010, after reviewing and considering the application, the TOWN BOARD, as lead agency acting under SEQRA regulations, adopted a Positive Declaration for the change of zone application for the Meadows project. In its declaration, the TOWN BOARD also determined that a Draft Generic Environmental Impact Statement (DGEIS) was necessary, due to the project's nature and likelihood that the development would have an adverse impact on the environment. In issuing the Positive Declaration, the TOWN BOARD also required a formal scoping process, in addition to a public scoping meeting held on September 2, 2010.

On January 20, 2011, the DGEIS was submitted to the TOWN BOARD, and was accepted as complete on April 12, 2011. Notice of the DGEIS was published in the Environmental Notice Bulletin (ENB) on April 20, 2011. The TOWN BOARD held a public hearing on the rezone application and DGEIS on May 10, 2011, and continued to accept written public and agency comments through June 25, 2011. The comments received in this period were addressed in the Final Generic Environmental Impact Statement (FGEIS), which was adopted on August 16, 2011. Notice of its adoption was published in the ENB and distributed among interested parties.

An additional hearing was held on October 4, 2011, at which time the resolutions for adopting the FGEIS findings and the rezoning were finalized. On this same day, Petitioners submitted a memorandum outlining their objections to the FGEIS findings.

On November 3, 2011, Petitioners filed an Article 78 proceeding to annul the TOWN BOARD Resolutions on the basis that they were “hastily issued”, requesting further consideration in accordance with SEQRA. Petitioners allege the TOWN BOARD failed to consider the pending Preservation and Management Plan for the Carmans River Watershed, for which a committee was formed in October 20, 2010. Petitioners also alleged a failure to consider 26 other projects close to the Carmans River.

The law in the State of New York states that a Court may not substitute its own judgment for that of the reviewing board (see: *Janiak v Planning Board of the Planning Board of the Town of Greenville*, 150 AD2d 574 [2 Dept], *appeal denied*, 76 NY2d 707 [1990]; *Mascony Transport and Ferry Service v Richmond*, 71 AD2d 896 [2 Dept 1979], *aff'd*, 49 NY2d 969 [1980]). Therefore, if the decision rendered by the reviewing board is within the scope of the authority delegated to it, the Court may not interfere and annul it, unless said decision is arbitrary, capricious, or unlawful (see: *Castle Properties Co v Ackerson*, 163 AD2d 785 [3 Dept 1990]). It is, therefore, indisputable that the standard of review for determination of Respondent TOWN BOARD is whether the decision rendered is arbitrary, capricious, and/or unlawful.

Petitioner SCHNEIDER asserts standing to bring the underlying litigation as a resident of the nearby condominium community known as Whispering Pines/Colonial Woods, which shares the Dorade wastewater treatment plant with the parcels of land in this action. The Appellate Division has recognized SCHNEIDER’s standing to bring litigation regarding this plot of land previously, in *Open Space Council v Planning Board*, 245 AD2d 378 (2 Dept 1997). The Court stated that SCHNEIDER’s status as a member of the Petitioner Open Space Council also confers associational standing upon that organization. Therefore, the issue of whether Petitioners SCHNEIDER and the COUNCIL have standing to bring the underlying litigation is already determined by the Appellate Division, and recognized by this Court as settled.

Petitioners allege that the TOWN BOARD did not comply with SEQRA regulations that require a lead agency to “identify all areas of environmental concern, take a complete and ‘hard look’ at such areas, and thereafter, following the identification, analysis, and review of such areas, make a determination which minimizes and avoids adverse environmental effects.” As a basis for this allegation, Petitioners allege that the TOWN BOARD failed to consider a pending environmental plan for the Carmans River watershed. Article 8 of Environmental Conservation Law (ECL) expressly states that, “the policies, statutes, regulations and ordinances of the state and its political subdivisions should be interpreted and administered in accordance with the policies set forth in this article” (NY CLS ECL § 8-0103(6)). The Carmans River Plan cited in the petition has not yet been adopted as a town policy, statute, regulation or ordinance, and therefore is not a binding proposition for which the TOWN BOARD must adhere to in its determination. Therefore, this Court has determined that the TOWN BOARD has complied with SEQRA regulations on this basis.

Petitioners name 26 projects which the TOWN BOARD has failed to consider in its Cumulative Impact Analysis in the FGEIS. TOWN BOARD named 8 projects. pending and concluded, in the vicinity of the proposed area of the PPD in its Cumulative Impact Analysis. Compliance with SEQRA demands "the potential cumulative impact of other proposed or pending projects must be considered pursuant to SEQRA before the action may be approved." *Save the Pine Bush Inc v Albany*, 70 N.Y.2d 193 (2 Dept 1987). The TOWN BOARD provides evidence, through an expert affidavit, clarifying that the 26 projects named by Petitioners are not appropriate for consideration under SEQRA regulations, as they are either finished, have been approved with Negative Declarations, or do not exist on file as a pending application (Voorhis Aff. Ex. E). Therefore, this Court has determined that the TOWN BOARD has not failed to comply with SEQRA regulations.

Petitioners allege the TOWN BOARD failed to take a hard look at the Meadows project and its environmental impacts. SEQRA regulations require a lead agency to prepare a findings statement that addresses environmental impact concerns. The FGEIS in this instance addresses the following:

1. A description of the proposed action and its environment;
2. The potential environmental impact of the project;
3. Any adverse effects that cannot be avoided;
4. Mitigation measures in order to minimize these adverse impacts;
5. Use and conservation of energy sources;
6. Effects on solid waste management; and
7. A management plan for groundwater conservation.

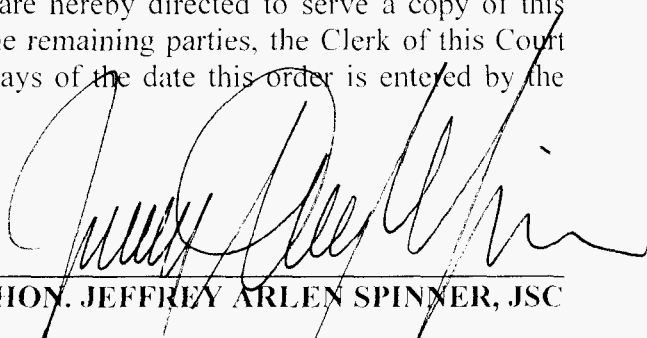
The FGEIS also addresses concerns such as traffic, effects on culture, and effects on the community of the surrounding area. The TOWN BOARD held a formal scoping period that extended well beyond what is required by SEQRA, where public comment was invited and addressed in the formation of the FGEIS. Therefore, this Court has determined that the determination of TOWN BOARD was not arbitrary, capricious, or unlawful.

For all the reasons stated herein above and in the totality of the papers submitted herein, it is, therefore,

ORDERED, that the above referenced petition is hereby denied in all respects, the Petition dismissed and this case is hereby disposed; and it is further

ORDERED, that Counsel for Respondents herein are hereby directed to serve a copy of this order, with Notice of Entry, upon Counsel for all the remaining parties, the Clerk of this Court and the Suffolk County Clerk within twenty (20) days of the date this order is entered by the Suffolk County Clerk.

Dated: Riverhead, New York
August 6, 2012



HON. JEFFREY ARLEN SPINNER, JSC

FINAL DISPOSITION
 SCAN

NON-FINAL DISPOSITION
 DO NOT SCAN

TO:

Neufeld & O'Leary
370 Lexington Ave, Suite 908
New York, NY 10017

Law Offices of Mark A. Cuthbertson
434 New York Ave
Huntington, NY 11743

Certilman Balin Adler & Hyman LLP
100 Motor Parkway, Suite 156
Hauppauge, NY 11788