

Shafranov v Planning Bd. of the Town of Riverhead
2011 NY Slip Op 33480(U)
December 6, 2011
Sup Ct, Suffolk County
Docket Number: 10-27974
Judge: Peter Fox Cohalan
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Upon the following papers numbered 1 to 94 read on these motions to dismiss and cross motion for leave to amend; Notice of Petition and supporting papers ; Notice of Motion / Order to Show Cause and supporting papers 22 - 25; 28 - 43; 44 - 54; 57 - 83; Notice of Cross Motion and supporting papers 84 - 89; Answering Affidavits and supporting papers 26 - 27; 55 - 56; 90 - 91; Replying Affidavits and supporting papers 92 - 94; Other notice of petition and petition, with exhibits 1 - 21; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motions by the respondents for dismissal are consolidated for the purposes of this determination and are considered together with the cross-motion by the petitioners for leave to amend; and it is further

ORDERED that the motion (002) by the respondent Town of Riverhead for an order pursuant to CPLR §3211 (a)(1), (7) and CPLR §7804 (f) dismissing the petition is denied; and it is further

ORDERED that the motion (003) by the respondent Board of Managers of Baiting Hollow Cottage Condominium i/s/h/a Baiting Hollow Cottage Condominium Board of Managers for an order pursuant to CPLR §3211 (a)(1), (2), (7) and CPLR §7804 (f) dismissing the petition is denied; and it is further

ORDERED that the motion (004) by the respondent Victoria Lipouchenko for an order pursuant to CPLR §3211 (a)(1), (7) and CPLR §7804 (f) dismissing the petition is denied; and it is further

ORDERED that the motion (005) by the respondent Planning Board of the Town of Riverhead for an order pursuant to CPLR §3211 (a)(1), (7) and CPLR §7804 (f) dismissing the petition is denied; and it is further

ORDERED that the cross-motion (006) by the petitioners for leave to amend the petition to add Askra Corp. as a respondent is denied.

In this Article 78 proceeding, the petitioners seek a judgment annulling the July 1, 2010 resolution of the Planning Board (hereafter Town Planning Board) of the Town of Riverhead (hereinafter Town) which approved a condominium map (site plan) amendment of the Baiting Hollow Cottage Condominium map depicting the proposed construction at Cottage 12, located at 356 Oakleigh Avenue, Baiting Hollow, New York.

The Baiting Hollow Cottage Condominium (hereinafter Condominium) on Oakleigh Avenue in Baiting Hollow, New York is an unincorporated association organized pursuant to Real Property Law Article 9-b consisting of 35 separate cottages, one duplex cottage, and common areas. The owner of Cottage 12 seeks to renovate the one story cottage to add to the current first floor on the east and south sides and to add a 9 feet by 25 feet deck on the north side. The petitioners, owners of Cottage 17, are adjacent neighbors to the north.

The owner of Cottage 12 notified the Board of Managers of Baiting Hollow Cottage Condominium (hereinafter Condominium Board) of the proposed renovations by letter, and

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submitted architect's plans which were distributed to the Condominium Board members for their review. Petitioner Leonid Shafranov was vice president of the Condominium Board at the time. He expressed his concerns to other Condominium Board members by e-mail about the height and proximity of the proposed construction to his cottage, noting the congestion and suggesting that any expansions occur away from his property. The Condominium Board president, Helen Richichi (hereinafter Richichi), assured the petitioner by e-mail that she had been informed that the height of the peak would be no more than 17 feet from grade level and only 15 to 16 feet from the floor, and that she had measured the distance from Cottage 17 to the proposed deck to be 30 feet at the nearest point. On March 25, 2010 the petitioner notified other Condominium Board members by e-mail that he would be out of the state until April 13 or 14, 2010. Richichi notified the owner of Cottage 12 by letter, dated April 1, 2010, that the Condominium Board had approved the proposed construction. At the Condominium Board meeting on April 25, 2010, the petitioner expressed his disapproval of the project. However, the other members of the Condominium Board reaffirmed their approval, and the petitioner resigned from his post.

The architect, Charles M. Thomas (hereinafter Thomas), applied on May 11, 2010 to the Town Planning Board on behalf of the owner of Cottage 12 for site plan approval of the proposed construction. By memorandum, dated July 1, 2010, the Town Planning Department indicated to the Town Planning Director that the proposed construction appeared acceptable and recommended that, prior to the issuance of a certificate of occupancy, the condominium map be updated to depict the completed improvements. A public hearing was held on July 1, 2010. The petitioner, his daughter Elena Shafranov, Thomas, and Richichi appeared at the hearing.

At the public hearing, Thomas explained that Cottage 12 was approximately 18 feet, 10 inches by 20 feet with a 6 feet by 16 feet porch, and that the proposed construction would add about 6 feet to the east side, 10 feet to the south side, and a 9 feet wood deck to the north side. He and Richichi emphasized that the footprint of the cottage would not be greater than the condominium's maximum allowed 1,700 square feet, that the structure would not be higher than the maximum allowed 25 feet, and that the condominium's required 30 feet distance between cottages would be maintained. The petitioner and his daughter objected that the building plans reviewed by the Condominium Board did not indicate the correct compass directions or height of the proposed structure, that the proposed construction would obstruct their light and subject them to the neighbor's noise, and that the Condominium Board's approval was made without an official Condominium Board meeting and approval of all homeowners. Richichi countered that although the building plans she received lacked compass directions, they nevertheless met all guidelines of the condominium as amended in 2008. She added that there was never any requirement that all homeowners approve a proposed renovation or addition, and that the requisite 4 out of 5 Condominium Board members approved the proposed renovation by e-mail and later at a Condominium Board meeting. Thomas indicated that he would be working with the surveyors of the condominium map, Young and Young, to update it and that the building plans before the Town Planning Board were originals approved by the Condominium Board.

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At the end of the hearing on July 1, 2010, the Town Planning Board voted unanimously to approve the application and by resolution approved an amendment to the condominium map (site plan) to reflect the proposed construction of an addition to Cottage 12 subject to the preparation of a covenant acceptable to the Town Planning Board's counsel giving notice of said amendment to be filed in the Suffolk County Clerk's Office, with a copy to be filed with the Town Building Department, prior to the issuance of a building permit. The resolution also required that an as-built survey be submitted to the Town Planning Board prior to the issuance by the Town Building Department of a certificate of occupancy or certificate of compliance. The Condominium Board submitted a Declaration and Covenant, dated July 15, 2010, signed by Richichi, to be placed on Cottage 12 giving notice of amendments to the condominium map.

The petitioners commenced this proceeding on July 30, 2010. The petition alleges in essence that the building plans submitted to the Condominium Board failed to depict the orientation of improvements or plot distances, that the proposed project was not properly reviewed or approved according to the Condominium's By-Laws and Guidelines for Submitting Cottage Alteration Plans (hereinafter Guidelines) as a prerequisite to review and approval by the Town Planning Board, and that the site plan on which the Town Planning Board based its decision had been altered in violation of Education Law § 7209 rendering its July 1, 2010 resolution arbitrary and capricious.

The Condominium Board now seeks dismissal of the petition pursuant to CPLR §3211 (a)(1), (2), (7) and CPLR §7804 (f) because the proceeding is not ripe for review inasmuch as no application for a building permit has been made nor has an as-built survey been submitted, that the 2008 Declaration amendments replaced the Guidelines, and that the Condominium Board's approval of the project was in accordance with the amended Declaration and is protected by the business judgment rule. The Condominium Board submits Richichi's affidavit, dated January 8, 2011, indicating that the Condominium's Declaration was amended in 2008, nullifying the Guidelines relied on by the petitioners, and submits a copy of said amendment, the Declaration, and the By-Laws.

In considering a motion to dismiss an Article 78 proceeding pursuant to CPLR §3211(a) (7) and CPLR §7804 (f), all of the allegations in the petition are deemed to be true and are afforded the benefit of every favorable inference (see *Matter of Eastern Oaks Dev., LLC v Town of Clinton*, 76 AD3d 676, 678, 906 NYS2d 611 [2nd Dept 2010]; *Matter of Bloodgood v Town of Huntington*, 58 AD3d 619, 621, 871 NYS2d 644 [2nd Dept 2009]). The motion must be determined solely on the allegations contained in the petition (see *Matter of East End Resources, LLC v Town of Southold Planning Bd.*, 81 AD3d 947, 949, 917 NYS2d 315 [2nd Dept 2011]; *Matter of McComb v Reasoner*, 29 AD3d 795, 797, 815 NYS2d 665 [2nd Dept 2006]; *Matter of Long Is. Contrs. Assn. v Town of Riverhead*, 17 AD3d 590, 594, 793 NYS2d 494 [2nd Dept 2005]). The Court must also accept as true all factual submissions made in opposition to the dismissal motion (see *Wohlgemuth v Lang Constr., LLC*, 18 AD3d 650, 795 NYS2d 634 [2nd Dept 2005]).

A motion to dismiss pursuant to CPLR §3211 (a) (1) will succeed only where the documentary evidence that forms the basis of the defense utterly refutes the petitioner's factual allegations conclusively establishing a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]; see *Schetty v Target Corp.*, ___ AD3d ___, 2011 NY Slip Op 07626 [2nd Dept 2011]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*Fontanetta v John Doe 1*, 73 AD3d 78, 86, 898 NYS2d 569 [2nd Dept 2010], citing Siegel, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR C3211:10, at 21–22; see *Springer v Almontaser*, 75 AD3d 539, 540, 904 NYS2d 765 [2nd Dept 2010]). A motion to dismiss for lack of ripeness is properly brought pursuant to CPLR §3211 (a) (2) inasmuch as it implicates the Court's subject matter jurisdiction (see *Matter of New York State Inspection, Sec. and Law Enforcement Empls., Dist. Council 82, AFSCME, AFL-CIO v Cuomo*, 64 NY2d 233, 241 n 3, 485 NYS2d 719, 723 n 3 [1984]).

Where the Court concludes that the papers submitted on a motion pursuant to CPLR §7804 (f) are insufficient to render a determination, the proper procedure is to deny the motion, direct the respondents to submit an answer without prejudice to their right to assert appropriate affirmative defenses, and resolve the issue presented by the motion as part of its ultimate disposition of the proceeding (see *Matter of East End Resources, LLC v Town of Southold Planning Bd.*, *supra*, at 949).

A petitioner may commence an Article 78 proceeding seeking review of an administrative determination only after the determination has become final and binding (see CPLR §217 [1]; *Matter of Surton Constr. Contr. Corp. v New York City School Constr. Auth.*, 81 AD3d 654, 916 NYS2d 157 [2nd Dept 2011]). A determination is "final and binding" when the agency has taken a "definitive position on the issue that inflicts actual, concrete injury" and when the petitioner has exhausted administrative remedies (*Walton v New York State Dept. of Correctional Servs.*, 8 NY3d 186, 194, 831 NYS2d 749 [2007] [internal quotation marks omitted]; see *Matter of Surton Constr. Contr. Corp. v New York City School Constr. Auth.*, *supra*, at 656). Here the Town Planning Board's approval of the amendment to the condominium map (site plan) was a final determination (see Town Code §108-131 [C] [2]; *Matter of Lagin v Village of Kings Point Comm. of Architectural Review*, 62 AD3d 709, 879 NYS2d 491 [2nd Dept 2009]). In addition, the potential harm to the petitioners is not "purely speculative" at this juncture prior to the issuance of a building permit (see *Red Wing Properties, Inc. v Town of Milan*, 71 AD3d 1109, 1111, 898 NYS2d 593 [2nd Dept 2010]; cf. *Matter of Alamit Props., Co. v Planning Bd. of Town of Harrison*, 159 AD2d 703, 553 NYS2d 440 [2nd Dept 1990]). Moreover, the petitioners did not fail to exhaust their administrative remedies by failing to appeal to the Town Zoning Board of Appeals (hereinafter ZBA) inasmuch as the Town Code offers no appeal to the ZBA from the Town Planning Board's grant or denial of a site plan application (see Town Code §§ 108-3 (B), 108-76 (A); *Matter of Woodland Community Assn. v Planning Bd. of Town of Shandaken*, 52 AD3d 991, 860 NYS2d 653 [3rd Dept 2008]). Therefore, the instant proceeding is ripe for consideration.

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Pursuant to Article III, section 4, subsection 9 of the By-Laws, the Condominium Board has broad authority, inter alia, "to adopt and amend rules and regulations governing the operation and use of the condominium's property" (see **Skouras v Victoria Hall Condominium**, 73 AD3d 902, 903, 902 NYS2d 111 [2nd Dept 2010], *lv dismissed* 16 NY3d 729, 917 NYS2d 94 [2011]). The 2008 amendments to the Declaration added dimensional, height, and proximity restrictions to structures but kept previous language that structural alterations required the written consent of the Condominium Board, which was obligated to respond in 60 days or there would be no objection. However, the amendments did not address or alter the Guidelines' list of required documents to be submitted or the Condominium Board's review procedures, but only changed the dimensional requirements in paragraph 2. Thus, the submissions of the Condominium Board fail to demonstrate that the amendments to the Declaration by their terms nullified or replaced the Guidelines or that the Guidelines were revoked by the Condominium Board.

"Where a challenge is made by an individual owner to an action of a condominium board of managers, whether incorporated or not, absent claims of fraud, self-dealing, unconscionability or other misconduct, the court should apply the business-judgment rule and should limit its inquiry to whether the action was authorized and whether it was taken in good faith and in furtherance of the legitimate interests of the condominium" (**Schoninger v Yardarm Beach Homeowners Assn., Inc.**, 134 AD2d 1, 10, 523 NYS2d 523 [2nd Dept 1987]). Here the petitioners have stated a cause of action by alleging that the Condominium Board did not enforce the document submission requirements or follow the review procedure listed in the Guidelines prior to approval of the proposed construction so that their approval is not protected by the business judgment rule (see **Board of Mgrs. of Park Regent Condominium v Park Regent Unit Owners Assoc.**, 58 AD3d 589, 871 NYS2d 373 [2nd Dept 2009]). In addition, because of the failure of the documents submitted by the Condominium Board to refute the petitioners' factual allegations and to conclusively establish a defense as a matter of law, (see **Yusin v Saddle Lakes Home Owners Assn. Inc.**, 73 AD3d 1168, 902 NYS2d 139 [2nd Dept 2010]), the motion by the Condominium Board for dismissal of the petition is denied.

The Town seeks dismissal pursuant to CPLR §3211 (a)(1), (7) and CPLR §7804 (f) because the petition is conclusory and fails to state a cause of action as to how the Town Planning Board's actions were unlawful, arbitrary or capricious, and also because the documentary evidence demonstrates that the site plan application was in compliance with the amended Declaration and that the Town Planning Board resolution was in accordance with state and local laws. The Town Planning Board also requests dismissal for the failure of the petition to state a cause of action and also based on documentary evidence. It incorporates by reference the Town's motion, and submits its certified return.

In opposition to the motions, the petitioners submit an affidavit, dated August 3, 2010, of the surveyor, Howard W. Young, who had prepared the condominium map in 2008 that was submitted with the application as the amended site plan, objecting to the alteration and use of the map as a site plan without his authorization and in contravention of Education Law § 7209.

A local planning board has broad discretion in deciding applications for site plan approvals, and judicial review is limited to determining whether the planning board's action was illegal, arbitrary, or an abuse of discretion (see Matter of Ifrah v Utschig, 98 NY2d 304, 308, 746 NYS2d 667 [2002]; Matter of Fairway Manor, Inc. v Bertinelli, 81 AD3d 821, 822-823, 916 NYS2d 630 [2nd Dept 2011]; see also Town Law § 274-a [2] [a]). "Site plans shall show the arrangement, layout and design of the proposed use of the land on said plan. The ordinance or local law shall specify the land uses that require site plan approval and the elements to be included on plans submitted for approval" (*id.*; Matter of Home Depot, U.S.A. v Town Bd. of Town of Hempstead, 63 AD3d 938, 939, 881 NYS2d 160 [2nd Dept 2009]). The Town Code §108-131 (B) (1) provides that formal application for site plan approval must include "a current survey prepared by a licensed surveyor" and "the site plan (if separate from the survey)." Under Town Code §108-131 (B) (4), "[r]evisions to a site plan ... shall require resubmission of an amended site plan." Town Code §108-132 provides that "[t]o be considered complete, a site plan for which approval is sought shall be dated ..."

It is a violation of Education Law § 7209 for any person, unless he or she is acting under the direction of a licensed professional engineer or land surveyor, to alter an item in any way on plans to which the seal of a professional engineer or land surveyor has been applied.

The petitioners' allegations state a cause of action that the submitted site plan did not satisfy the submission requirements of the Town Code inasmuch as it was not a current survey and the amendments were undated (see generally Matter of Schweichler v Village of Caledonia, 45 AD3d 1281, 1284, 845 NYS2d 901 [4th Dept 2007], *lv denied* 10 NY3d 703, 854 NYS2d 103 [2008]). In addition, their allegations state a cause of action that the Town Planning Board resolution did not have a rational basis inasmuch as it approved the amendment of the condominium map and the proposed construction based on an allegedly illegally altered condominium map. Therefore, the motions by the Town and the Town Planning Board for dismissal are denied.

The respondent, Victoria Lipouchenko (hereinafter Lipouchenko), seeks dismissal based on lack of personal jurisdiction and that she is not a proper party to this proceeding. By her affidavit, she explains that Cottage 12 is owned by a corporation, Askra Corp., of which she is the president and sole shareholder, that she resides at 380 Rector Place, Apt. 12B, New York, New York, and that no attempts were made to personally serve her. She also submits photographs of her small cottage and of the petitioners' much larger cottage, noting that the petitioners have made additions to their cottage that have expanded the structure. The petitioners submit a stipulation, dated November 2, 2010, executed by Lipouchenko's attorney extending time to answer which provides in part that "[r]espondents agree to waive any defenses based upon personal jurisdiction." By said stipulation, Lipouchenko expressly waived the affirmative defense of lack of personal jurisdiction (see Fekete v Camp Skwere, 16 AD3d 544, 792 NYS2d 127 [2nd Dept 2005]; D'Angelo v Picciallo, 262 AD2d 443, 691 NYS2d 329 [2nd Dept 1999]). In addition, Lipouchenko has not submitted a deed evidencing that Askra Corp. owns Cottage 12 demonstrating that it, rather than Lipouchenko, is the proper and necessary party respondent (see generally Presbytery of Hudson Riv. of Presbyterian Church (U.S.A.) v Trustees of First Presbyt. Church and Congregation of Ridgeberry, 72

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AD3d 78, 93, 895 NYS2d 417 [2nd Dept 2010]). Therefore, her dismissal motion is denied, with leave to raise ownership as an affirmative defense in her answer.

The petitioners' cross-motion for leave to amend the petition to add Askra Corp. as a party respondent is denied as untimely pursuant to Town Law § 282 (see Matter of Rose Woods, LLC v Weisman, 85 AD3d 801, 924 NYS2d 574 [2nd Dept 2011]; Matter of Atkins Bros., LLC v Conroy, 31 AD3d 539, 818 NYS2d 562 [2nd Dept 2006]) .

Accordingly, the motions and cross-motion are all denied. The respondents are directed to serve and file their answers to the petition within 10 days of service of a copy of this order with notice of entry. Any party may re-notice this matter for hearing upon appropriate notice pursuant to CPLR §7804 (f).

Dated: DEC 08 2011


J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION