Matter of Oceanside Owners, LLC v Town Bd. of the Town of E. Hampton
2018 NY Slip Op 30495(U)
March 12, 2018
Supreme Court, Suffolk County
Docket Number: 003610-2017
Judge: John H. Rouse
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INDEX NO. 003610-2017

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 12 - SUFFOLK COUNTY

PRESENT:

Hon. John H. Rouse
Acting Supreme Court Justice

MOTION DATE: 12/13/2017
ADJ. DATE: 02/21/2018
Mot. Seq. # 002-MG

MOTION DATE: 08/11/2017
ADJ. DATE: 02/21/2018
Mot. Seq. # 003- ***Adj to 04/18/2018***

In the Matter of the Application of OCEANSIDE OWNERS, LLC,

Petitioner

DECISION & ORDER

-against-

TOWN BOARD OF THE TOWN OF EAST HAMPTON and TOWN OF EASTHAMPTON,

Respondent

TO:

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Upon the reading and filing of the following papers in this matter:

(1)Notice of Petition , Summons, and Verified Petition/Complaint by Tiffany Scarlotto, Esq. For Petitioner, Verified by Jon Krasner, Managing Member of Oceanside Owners, LLC, with Exhibits A-H attached thereto;

(2)Notice of Motion by Respondent dated October 26, 2017, Affirmation in Support by John Denby, Esq. with Exhibits A-E attached thereto; (3) Certified Return by John Denby, Esq. with Exhibits 1-6 attached thereto; (4) Affirmation in Opposition by Tiffany Scarlato, Esq. For

Petitioner affirmed on January 23, 2018; (5) Reply Affirmation by John Denby, Esq. For the Respondent affirmed on February 1, 2018, it is:

ORDERED that the Respondent's motion (Seq. #002) for summary judgment is granted in part and denied in part; and it is further

ORDERED that Respondent is granted partial summary judgment to the extent that: Petitioner's claims founded upon 42 U.S.C. § 1983 are not ripe and are dismissed; the legal notice of the hearing for consideration of the adoption of Local Law #15 was sufficient; the identification of Municipal Home Rule Law § 10 as the source of Respondent's authority for the Respondent to adopt the law was adequate; and the proper purpose of the law was sufficiently identified; and it is further

ORDERED that the Respondent's motion for summary judgment is denied to the extent that: the Petitioner *does* have standing to challenge whether the procedures and considerations required by the State Environmental Quality Review Act were followed and there remains a question of fact and law with respect to whether the adoption of Local Law #15 was Type I action and whether the Respondent engaged in the required review under the State Environmental Quality Review Act; and it is further

ORDERED that the Court will conduct a **conference with counsel** in Part 12, located on the Second Floor of the Annex to the Supreme Court at 1 Court Street, Riverhead, NY, on **April 11, 2018 at 2:30 o'clock** in the afternoon to consider such schedule as may be required to hear and determine remaining questions of fact, and such other matters as may lead to the proper resolution of the petition; and it is further

ORDERED that the **Petition** (Mot. Seq. 003) **is adjourned until April 18, 2018.**

DECISION

Petitioner in this hybrid proceeding brought by Verified Petition is aggrieved by the adoption of a local by Respondent that impaired its application for a special exception permit then pending before the Planning Board of the Town of East Hampton. Petitioner served a verified petition comprised of seventy-two numbered paragraphs which is an amalgam of allegations of fact and conclusions of law. The Respondent has attached to its motion for summary judgment a verified answer in which it only admits paragraphs 1, 3, 13, and 15. Respondent admits: (1) that Petitioner is a limited liability company and owns certain real property; (3) Town of East Hampton is a municipal corporation; (13) it held a public hearing on June 1, 2017 for the consideration of the adoption Local Law #15; and (15) The Respondent, Town Board, by resolution adopted Local Law #15.

The gravamen of Petitioner's complaint is that it had submitted an application to the East Hampton Town Planning Board for a special use permit[1] for a retail use by converting four motel units into a retail use and using the basement of the subject premises for back office operations. At the time this application was made to the Planning Board the proposed use was permitted by a special exception. Petitioner made several appearances before the Planning Board and had an application pending with the Suffolk County Department of Health Services. However, while Petitioner's application with the Planning Board was pending, the Town Board adopted a local law that, changed the existing definition in the zoning code for "FAST FOOD, RESTAURANT and DRIVE IN RESTAURANT" and parsed it into two separately defined uses. The first: Restaurant, Fast-food or Restaurant, Drive-In. The second: Take-Out Food Store. Under the new law Restaurant, Fast-food or Restaurant, Drive-In regulates the sale of food exclusively for off premises consumption; and Take-Out Food Store permits seating for up to sixteen people, but expressly excludes Take-Out Food Stores as a permitted use on property with either a use as a transient motel or a resort use, or as an accessory use to a transient motel or resort. This new law changed the use proposed by the Petitioner to the Planning Board for a use permitted by special exception to a prohibited use.

PETITIONER'S CLAIMS

Petitioner contends this law was adopted to specifically outlaw the special use it sought from the Planning Board, and further that the Planning Board has refused to process its application. Petitioner argues Local Law #15 is invalid because:

1. The Town Board failed to properly designate the proposed action as a Type I action; and

2. The Town Board failed to conduct the required review under the State Environmental Quality Review Act (SEQRA) in the adoption of the Local Law; and

3. The Town Board failed to give adequate notice to the public of the content of Local Law #15 of 2017; and

4. The Town Board failed to identify the proper statutory authority for enacting zoning legislation; and

5. The Town Board failed to articulate any substantial relation to the requirements of Town Law Section 264 to the police power objective of promoting the public health, safety, morals or general welfare in Local Law #15

[1] *Town Law 274-b*

RESPONDENT'S MOTION TO DISMISSS

Respondent moves to dismiss the petition upon its contention that:

A. The matter is not ripe for review; and

B. The Petitioner

1. lacks standing to contest the Town's determination as it does not complain of an environmental injury; and

2. The Respondent conducted the required review.

C. The record reflects that proper notice of the public hearing was published; and

D. The Town, in adopting its local law, referenced Municipal Home Rule Law § 10 as its authority to adopt the law.

A. Respondent's Contention the Proceeding is Not Ripe

Respondent argues that Petitioner's failure to exhaust administrative remedies in that Petitioner could have and Petitioner has not applied for a use variance. *Citing Dick's Quarry, Inc. v. Town of Warwick, 293 A.D.2d 445 (2nd Dept. 2002).*

In *Dick's Quarry* the single claim by Plaintiff was that it was deprived of its "reasonable and legitimate investment expectations" in violation of its constitutional due process rights by the Town's preclusion of the recommencement of mining activities. Respondent is correct that Petitioner-Plaintiff has not exhausted its administrative remedies with respect to its claims that the action of the Town Board denied it of a constitutional rights under color of law, as asserted in Plaintiff's 42 USC § 1983 claim. These claims are not ripe for consideration and are dismissed.

However, the Petitioner's claims with respect to the final action of the Town Board in adopting Local Law #15 are ripe for consideration.

B. 1. SEQR- Standing

Respondent contends that Petitioner has no standing to contest the SEQR process followed because it makes no claim of an environmental injury by the adoption of the subject zoning law. This contention is without merit. As a property owner subject to the zoning change does have standing. *Gernatt Asphalt Prods. v. Town of Sardinia, 87 N.Y.2d 668 (1996).* The Petitioner, at the time the Local Law was being considered had an application pending before the Planning

Board for the very use now prohibited by the local law that is the subject of this proceeding. The ownership of property subject to the law together with a pending application for a use that became prohibited under the law constitutes a concrete plan that is within the zone of interests protected by the courts. *Matter of Association for a Better Long Is., Inc. v. New York State Dept. of Envtl. Conservation, 23 N.Y.3d 1 (2014).* The Petitioner has standing with respect to its claims that it has been injured by the Respondent's alleged violation of SEQR in the adoption of this local law.

B. 2. SEQR-Violation

Petitioner-Plaintiff alleges the Respondent Town erred when it classified the adoption of this zoning law as an Unlisted Action when, in fact, it was a Type I action. Petitioner argues that under 6 NYCRR § 617.4(b)(2) *"the adoption of changes in the allowable uses within any zoning district, affecting 25 or more acres of the district"* are Type I actions and alleges this law satisfies that criterion. The Respondent in its answer denied this allegation and accordingly, this remains a question of fact.

C. Public Notice for Hearing Was Sufficient.

The Respondent published a Notice of Public Hearing, and there is not contention that this notice was not properly published as required by law. Instead, Petitioner contends the substance of the notice of insufficient. *See Municipal Home Rule Law § 20; Exhibit D to petition.* The notice advised the public that the proposed local law was to amend the current definition of "FAST FOOD, RESTAURANT and DRIVE IN RESTAURANT" and created two new definitions for the purpose of permitting a retail store that operates as a fast-food store to have limited seating for up to sixteen people. Petitioner contends the failure to include in the notice the fact that it was eliminating the Petitioner's use which was then subject of a pending application before the Planning Board was an act of legislative legerdemain calculated to thwart Petitioner's pending application without proper notice. The notice published by the Respondent put the public in general, and petitioner in particular, on notice that Respondent was considering a local law that would affect these uses, and advised that the specific text of the local law was available for inspection was available at the Office of the Town Clerk. The Petitioner attended the public hearing and the notice served its purpose. Accordingly, the court concludes as a matter of law the notice requirement was fulfilled.

D. Respondent Identified Municipal Home Rule Law § 10 as the Source for Its Authority to Adopt the Law

The Petitioner contends that Respondent incorrectly cites the Municipal Home Rule Law as the source of its authority to adopt the zoning law at issue in this case, and should have identified Town Law § 264 as the source of its legal authority. Municipal Home Rule Law § 10 identifies the broad authority vested in the Respondent to adopt the local zoning law and reference to this law was correct. The Petitioner's demand that Respondent more specifically identify the source

of its authority as Town Law § 264. While more precise and helpful, Respondent's reference to the Municipal Home Rule Law § 10, under the limited circumstances present, was sufficient.

The foregoing shall constitute the decision and order of the court.

Dated: March 12, 2018

JOHN H. ROUSE, Acting J.S.C.

NON FINAL DISPOSITION