Surrey Lane, LLC. v Planning Bd. of the Town of Southold
2018 NY Slip Op 32406(U)
September 25, 2018
Supreme Court, Suffolk County
Docket Number: 04226/2017
Judge: William G. Ford
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SHORT FORM ORDER **INDEX NO.: 04226/2017**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT

Motions Submit Date: 08/02/18
Mot SCH: 03/26/18
Mot Seq 001 MD
Mot Seq 002 MG; CASE DISP

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SURREY LANE, LLC.,

Plaintiff,

-against-

PLANNING BOARD OF THE TOWN OF SOUTHOLD,

Defendants.

---x

PETITIONER'S COUNSEL:
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On the parties' applications, the following papers were considered:

1. Notice of Petition & Verified Petition dated August 14, 2017 and supporting papers;
2. Notice of Motion to Dismiss & Affirmation in Support dated September 5, 2017 and supporting papers;
3. Affirmation & Memorandum of Law in Opposition to Motion to Dismiss dated September 25, 2017;
4. Reply Affirmation in Further Support of Motion to Dismiss dated October 2, 2017; and upon due deliberation and full consideration; it is

ORDERED that this special proceeding commenced by petitioner's Verified Petition pursuant to CPLR Article 78 seeking a determination vacating, annulling or otherwise setting aside a determination made by respondents the Town of Southold requiring submission of a traffic study for further consideration and review of petitioner's application for a building permit is **denied** as follows.

FACTUAL BACKGROUND& PROCEDURAL POSTURE

The Court summarizes the context and history surrounding this proceeding in the following manner. On July 21, 2016, pursuant to Southold Town Code § 280-13, petitioner Surrey Lane, LLC under applied for a building permit with the Town of Southold Building Department for a winery located at a preexisting vineyard sitting on 43.7 acres at the intersection of Main Road and Lower Road in Southold. By its application, petitioner sought approval of

the winery on 1.8 acres for the production and sale of wine, comprised of a tasting room site. After cursory review, on August 15, 2016, respondent's Building Dept. disapproved the application advising petitioner that it required site plan review. Thus, petitioner submitted its application for approval of its proposed winery for site plan review to the Town on August 29, 2016, which was subsequently amended on September 20, 2016 and December 5, 2016 respectively for curb cuts and employee parking, after the Town held a work session advising petitioner that its application was incomplete, both at that meeting and in writing issued September 15, 2016. Petitioner further states that on September 22, 2016, it supported its application submitting architectural drawings to the Town, which resulted in a "negative declaration" from the Town under SEQRA, 6 NYCRR § 617.5(1)(3), classifying petitioner's proposed land use as a "Type II" action requiring no further environmental impact review. With this determination, respondent Town invited other interested agencies to review and comment on the application.

On November 7, 2016 and December 5, 2016, the Town held public hearings pertaining to petitioner's application. At the culmination of those proceedings, respondent sought an opinion from its Zoning Board of Appeals on the application, seeking clarification of the meaning of the terms "winery," "wine production," and "wine tasting", as well as whether a winery was a permissive and code compliant land use within the Town under Southold Town Code § 280-13A(4). Respondent formalized this request to the ZBA by memorandum issued on January 3, 2017. In response, petitioner filed a written objection to respondent's memorandum, and also sought production of minutes underlying or accompanying its issuance. To date, petitioner argues that failure to produce those minutes constitutes a violation of Public Officers Law by respondent.

Thereafter, petitioner's application again appeared before the Town ZBA's agenda on the Town's request for clarification or opinion on February 2, 2017. Petitioner has alleged further violation of Public Officers Law taking the position that no notice or agenda was made available to the public for this appearance. As a result, litigation ensued between the parties with petitioner's commencement of a prior Article 78 proceeding on February 2, 2017 seeking to vacate, annul or otherwise set aside the Town's issuance of the ZBA memorandum. The parties resolved that proceeding on May 3, 2017 to their mutual satisfaction.

Subsequently, the Town held a final public hearing on petitioner's application on June 5, 2017, although it appears undisputed that a further work session was held on June 26, 2017. That meeting forms the basis of the parties' present dispute. Petitioner argues that for the first time respondent Town required submission of a traffic impact study in connection with its application for site plan review. Without its submission, respondent advised petitioner that its application would not move forward to further review or consideration. As a result, petitioner wrote respondent on July 5, 2017, claiming violations of Public Officers Law. Petitioner then followed up seeking clarification in writing on July 13, 2017 of respondent on specifically what information it sought in the requested traffic study, which resulted in respondent's response on July 14, 2017. Thereafter, petitioner met with respondent's representatives on August 7, 2017 specifically objecting to the traffic study requirement arguing petitioner lacked control over offsite intersections and traffic control. Petitioner stated it was willing to provide information concerning solely Lower Road's intersection with its property's driveway and bus or limousine turning radius, "stacking" and parking and other roadway or vehicle width dimension information. Petitioner claims that despite the respondent representing a further meeting would

be held, none has occurred to date.

SUMMARY OF THE ARGUMENTS

Petitioner commenced this proceeding arguing that respondent's insistence of submission of a traffic study nullifies the negative declaration under SEQRA and is arbitrary and capricious to the extent that it requires submission of information beyond petitioner's direct control. Petitioner further seeks to vacate the referral memorandum to the ZBA as violative of Public Officer Law, as a well as to litigate other violations for respondent's failure to make public hearing or meting minutes available to the public. Petitioner seeks as a remedy attorney's fees, vacatur, and an order compelling retraining of the Town Clerk and respondent's staff of their obligations under Public Officers Law. In response, respondent has moved to dismiss the Petition claiming it is not ripe for judicial review. To that end, respondent argues that its requirement for submission of a traffic impact study is not a final determination within the meaning of CPLR Article 7801, and further does not inflict an actionable concrete or actual injury. Lastly, respondent does not dispute that the meeting minutes petitioner has sought have not yet been produced, but rather argues petitioner has not made a compelling case for sanctions for violations of Public Officers Law.

DISCUSSION

At the outset, generally speaking the law of land use and zoning within the Article 78 realm provides that courts are minded that "the determination of a municipal land use agency must be confirmed if it was rational and not arbitrary and capricious" (***Home Depot, U.S.A. v Town Bd. of Town of Hempstead***, 63 AD3d 938, 938, 881 NYS2d 160, 162 [2d Dept 2009]). Thus, it has been said that "[a] local planning board has broad discretion in deciding applications for site plan approval, and judicial review is limited to determining whether the board's action was illegal, arbitrary, or an abuse of discretion (***Bagga v Stanco***, 90 AD3d 919, 920, 934 NYS2d 493, 494 [2d Dept 2011]; On a challenge such as this, the proper question before the court sitting in review of the local municipal planning board's site plan review determination is "whether the determination was affected by an error of law, or was arbitrary and capricious or an abuse of discretion, or was irrational" (***Zupa v Bd. of Trustees of Town of Southold***, 54 AD3d 957, 957, 864 NYS2d 142, 143 [2d Dept 2008][ruling that the substantial evidence standard of review does not apply to the special proceedings challenging local administrative land use determinations made after informational public hearings, as opposed to a quasi-judicial evidentiary hearing]).

The authority to approve or deny applications for site development plans is generally vested in local planning boards (see 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. The required site plan elements which are included in the zoning ordinance or local law may include, where appropriate, those related to parking, means of access, screening, signs, landscaping, architectural features, location and dimensions of buildings, adjacent land uses and physical features meant to protect adjacent land uses as well as any additional elements specified by the town board in such zoning ordinance or local law" (***Valentine v McLaughlin***, 87 AD3d 1155, 1157, 930 NYS2d 51, 53 [2d Dept 2011]; *accord* ***Greencove Assoc., LLC v Town Bd. of Town of N. Hempstead***, 87 AD3d 1066, 929 NYS2d 325, 327 [2d Dept 2011]).

To determine whether a matter is ripe for judicial review, it is necessary 'first to determine whether the issues tendered are appropriate for judicial resolution, and second to assess the hardship to the parties if judicial relief is denied' "(***E. End Resources, LLC v Town of Southold Planning Bd.***, 135 AD3d 899, 900, 26 NYS3d 79, 82 [2d Dept 2016]). Specifically, the court must determine whether an agency has arrived at a definitive position on the issue that inflicts an actual concrete injury and whether the resolution of the dispute requires any fact-finding, for "[e]ven if an administrative action is final, however, it will still be 'inappropriate' for judicial review and, hence, unripe, if the determination of the legal controversy involves the resolution of factual issues" (***Town of Riverhead v Cent. Pine Barrens Joint Planning and Policy Com'n***, 71 AD3d 679, 681, 896 NYS2d 382, 384 [2d Dept 2010]).

Stated conversely, the agency's administrative determination is nonfinal and not concrete "if the injury is not actual or concrete if the injury purportedly inflicted by the agency could be prevented, significantly ameliorated, or rendered moot by further administrative action or by steps available to the complaining party" (***Ranco Sand and Stone Corp. v Vecchio***, 124 AD3d 73, 81, 998 NYS2d 68, 74–75 [2d Dept 2014], *aff'd*, 27 NY3d 92, 49 NE3d 1165 [2016]). "If the anticipated harm is insignificant, remote or contingent the controversy is not ripe" "A fortiori, the controversy cannot be ripe if the claimed harm may be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party." Well settled law has previously determined that "mere participation in an ongoing administrative process is not, in and of itself, an actual concrete injury" (***Equine Facility, LLC v Pavacic***, 155 AD3d 1033, 1035, 66 NYS3d 521, 523 [2d Dept 2017]).

The courts have determined that two requirements exist for the purposes of "fixing the time when agency action is deemed final and binding. 'First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party' " (***Kaneev v City of New York Envtl. Control Bd.***, 149 AD3d 742, 744, 52 NYS3d 107, 110 [2d Dept 2017]).

CONCLUSION

Here, respondents seek dismissal arguing that the Town Planning Board request of petitioner to submit a traffic impact study to allow for further consideration and ultimate determination of this application for site plan review was an interim decision, but not a final determination that inflicted actual or concrete injury on the petitioner (*see e.g.* ***One Niagara LLC v City of Niagara Falls***, 78 AD3d 1554, 1555, 910 NYS2d 820, 821 [4th Dept 2010][standing for the proposition that letters to applicant did not constitute a final determination for purposes of CPLR 7801 because the municipality did not reach a definite position on the applicant's eligibility for site plain approval]). Petitioner counters arguing that for all practical purposes respondent has arrived at a final position on the application since it has advised it will not move forward with it without submission of the requested traffic study.

There is some logic to this interpretation at first blush. However, the law is clear that respondent must have arrived at a final and concrete position, up or down on the site plan review application. That has not occurred here, with both parties essentially agreeing that petitioner's application remains in administrative limbo until the traffic study is completed and submitted for review. Petitioner argues that it is unfair to saddle it with the costs attendant and cites to local

politics concerning attempted moratoriums of expansion and approval of new wineries within the Town given recent events and developments. This notwithstanding however, respondent correctly points out that petitioner's estimation of costs of undertaking the study are wholly speculative at this juncture. Furthermore, respondent's own code expressly permits the consideration of traffic safety and congestion as an appropriate measure of consideration for site plan review and approval. Thus, this court cannot determine the matter to be arbitrary and capricious on that basis alone. But more importantly, since respondent's Planning Board has not arrived at a final position on the application under review, petitioner cannot claim an actionable or concrete injury, rendering the instant proceeding unripe and not presently justiciable. This is particularly the case, where as here, further proceedings, i.e. submission and review of the demanded traffic study, may render this proceeding and related contentions wholly academic or moot in the future. Therefore, for that reason, respondent's motion to dismiss is **granted** and the Petition is **dismissed**.

Accordingly, the Court does not review or take any position concerning petitioners remaining contentions alleging violations of Public Officers Law to the extent they arise from, are part and parcel or inextricably intertwined or otherwise arise out of this nonjusticiable proceeding.

The foregoing constitutes the decision and order of this Court.

Dated: September 25, 2018
Riverhead, New York

WILLIAM G. FORD, J.S.C.

___X___ **FINAL DISPOSITION** _____ **NON-FINAL DISPOSITION**