Matter of Village of W. Hampton Dunes v New York State Dept. of State
2018 NY Slip Op 33668(U)
May 10, 2018
Supreme Court, Albany County
Docket Number: 906239-17
Judge: Michael H. Melkonian

ORIGINAL

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of
VILLAGE OF WEST HAMPTON DUNES,

Petitioner-Plaintiff,

For an Order and Judgment Pursuant to Article 78 of the Civil Practice Law and Rules and CPLR § 3001,

-against-

THE NEW YORK STATE DEPARTMENT OF STATE,

Respondent-Defendant.

AMENDED DECISION AND ORDER

(Supreme Court, Albany County, Special Term, February 2, 2018)
Index No. 906239-17
(RJI No. 01-17-ST9047)

(Acting Justice Michael H. Melkonian, Presiding)

APPEARANCES: Joseph W. Prokop PLLC
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MELKONIAN, J.:

Petitioner the Village of West Hampton Dunes ("petitioner" or the "Village") commenced the instant CPLR Article 78 proceeding to review a determination of respondent New York State Department of State ("respondent" or the "State") dated May 22, 2017, which denied its request for an exemption from the provisions of the Uniform Code (2015 International Fuel Code § 61) with regard to underground liquid propane storage tanks that 72 town residents use for heating fuel and are located on their properties within the Village. The Village claims that the determination of the State is arbitrary, capricious and lacks a rational basis. Petitioner also seeks a declaratory judgment pursuant to CPLR § 3001, a preliminary injunction and a permanent injunction. The State opposes the petition and cross-moves to dismiss pursuant to CPLR §§§ 3211(a)(2)(3) and (7) alleging that the Court does not have subject matter jurisdiction, the petitioner lacks capacity to sue, standing and failure to state a cause of action. The Village opposes the cross-motion to dismiss.

The Village was incorporated in 1993. It is located on a barrier island in the Town of Southampton off the southern shore of Suffolk County, Long Island, New York. The Village is approximately two miles in width and is bordered by Moriches Bay to the north of Dune Road and the Atlantic Ocean to the south. In the late 1980's and early 1990's, approximately 240 homes were washed away into the ocean as a result of government-caused erosion. The federal, state and county governments improperly installed a groin project that

created and accelerated the erosion that caused the loss of the homes and a 1-mile breach in the barrier island.

In 1984, Village residents commenced a class action for the loss of their homes in federal court (Rapf v Suffolk County et al, 84 Civ 1478, U.S. District Court, Eastern District of New York). In 1994, a Stipulation of Settlement and Consent Judgment was attained and the defendants were required to fill the breach and restore the barrier island. On December 5, 1994, the Court approved the Stipulation of Settlement, issued a Final Judgment and Consent Order and dismissed the class action. The Court retained continuing jurisdiction.

Currently, there are approximately 360 building lots in the Village, which includes 320 single family residential structures. All of the homes in the Village are built on raised pilings with no permanent structure beneath them. Approximately 160 homes have underground liquid fuel storage tanks that supply heat and hot water for the homes. The Village claims that 72 of the homes have underground tanks that do not meet the setbacks as required by 2015 International Fuel Code § 61. The International Fire Code is part of the NYS Fire Prevention and Building Code (the "Uniform Code") and dictates the appropriate placement of liquefied petroleum ("LP") gas containers in relation to buildings, public ways and lot lines of adjoining properties. The Uniform Code requires certain setbacks in the placement of the LP gas containers.

In a letter to the State dated April 12, 2017, the Village sought an exemption for the homes that do not meet the setback requirements of the Uniform Code for underground

propane storage containers. The Village contends the limited setbacks were established by the Rapf settlement. The letter states that an "application could be made as a Village-wide request for a variance waiver, either administratively, or formally, through the New York State Department of State variance process." In an e-mail dated May 22, 2017, the State informed the Village that it "has no authority to grant an 'exemption' from any provision or requirement of the Uniform Code. Therefore, your request for an exemption must be, and is, denied." The State also informed the Village that:

> The Department of State respectfully disagrees with your suggestion that the "Rapf stipulation" in any way "supersedes" all or any part of the Uniform Code. Owners of properties in the Village are required to comply with the Uniform Code and the Village is required to enforce the Uniform Code. The Village must take appropriate steps to have the owners on non-compliant properties bring their properties into compliance or apply for and obtain a variance.

The Village treated this notice from the State as a final determination and commenced this CPLR Article 78 proceeding on September 22, 2017.

The Village maintains due to the unique conditions of the Village, the Uniform Code requirements do not apply to the underground LP tanks and the Village should be exempt form the setback provisions of the Uniform Code. The Village requests that the Court find that the Stipulation of Settlement and Consent Judgment in the Rapf proceeding supercedes the requirements of the Uniform Code. The Village also claims it is entitled to a declaratory judgment finding the setback requirements do not apply to the Village. The Village maintains that its property owners are entitled to an exemption from the provisions of the

Uniform Code. The Village contends it is entitled to a preliminary and permanent injunction as the Village property owners will be irreparably harmed if the injunctive relief is not granted. The Village alleges it has a likelihood of success when considering the balancing of the equities. The Village further alleges it has the capacity to sue the State pursuant to Village Law § 1-102. The Village also claims it has the capacity to commence this action under the doctrine of *Parens Patriae*. Alternatively, the Village claims that the State has the authority to grant the Village's request for an exemption as a "routine case" pursuant to 19 NYCRR § 1205.6.

In opposition to the petition and in support of the cross-motion to dismiss, the State maintains the Village does not have the capacity or the standing to commence or maintain this action against the State of New York as the Village is the agency responsible to enforce the Uniform Code. The State claims that the Village and its landowners have failed to exhaust their administrative remedies. The State contends the Stipulation of Settlement and Consent Judgment in Rapf does not exempt the Village or its residents from the requirements from the Uniform Code. In addition, the State argues the Village is not entitled to a preliminary injunction.

The judicial standard of review of administrative determinations pursuant to CPLR Article 78 is whether the determination is arbitrary and capricious, and a reviewing court is therefore restricted to an assessment of whether the action in question was taken "without sound basis in reason and . . . without regard to the facts" (see, CPLR § 7803; Matter of Pell

v Board of Education, 34 NY 2d 222 [1974]). The test usually applied in deciding whether a determination is arbitrary and capricious or an abuse of discretion is whether the determination has a rational or adequate basis (Matter of Peckham v Calogero, 12 NY3d 424 [2009]). The reviewing court in a proceeding pursuant to CPLR Article 78 will not substitute its judgment for that of the agency unless it clearly appears to be arbitrary, capricious or contrary to the law (Paramount Communities, Inc v Gibraltar Cas Co., 90 NY2d 507 [1997]).

"When the judgment of the agency involves factual evaluations in the area of the agency's expertise and is supported by the record, such judgment must be accorded great weight and judicial deference." Matter of Flacke v Onondaga Landfill System, 69 NY2d 355 (1987). Moreover, in order to maintain the limited nature of review, it is incumbent upon the court to defer to the agency's construction of statutes and regulations that it administers as long as that construction is not irrational or unreasonable (Matter of 427 W. 51 St. Owners Corp. v Division of Hous. and Community Renewal, 3 NY3d 337 [2004]; Lorillard Tobacco Co. v Roth, 99 NY2d 316 [2003]).

The first issue the Court must consider is whether the Village has the capacity to commence this combined action and whether the Court has jurisdiction to hear this matter. Capacity to sue is a threshold matter that concerns a litigant's power to appear and bring its grievance before the court (Silver v Pataki, 96 NY2d 532 [2001]). As municipalities are political subdivisions of the State, they ordinarily lack the capacity to contest State decisions that "affect them in their governmental capacity or as representatives of their inhabitants"

(Matter of County of Nassau v State of New York, 100 AD3d 1052 [2nd Dept. 2012], leave denied 20 NY3d 1092 [2013]). Governmental entities created by legislative enactment, such as towns and villages, are artificial creatures of statute and lack any inherent or common-law right to sue (Community Bd. 7 of Borough of Manhattan v Schaffer, 84 NY2d 148 [1994]). A municipality's right to sue, if it exists at all, must be derived from the relevant enabling legislation or some other concrete statutory predicate (Village of Chestnut Ridge v Town of Ramapo, 45 AD3d 74 [2nd Dept. 2007], leave denied 12 NY3d 793 [2009]).

Village Law § 1-102 provides that a Village has the power to "sue and be sued" in any action or proceeding in any court. However, a Village does not have the "authority to bring suit against the state itself" (Town of Riverhead v New York State Bd. of Real Prop. Servs., 7 AD3d 934 [3rd Dept. 2005], aff'd 5 NY3d 36 [2005]). Although there are four exceptions to this rule, the petitioner has not demonstrated any exceptions in this proceeding (City of New York v State, 86 NY2d 286 [1995]). Since the Village is a creature of the State, it cannot sue its creator. After a review of the record, the Court concludes that the Village indeed lacks the capacity to commence and maintain this action against the State (Town of Verona v Cuomo, 136 AD3d 36 [3rd Dept. 2015]; Matter of Graziano v County of Albany, 3 NY3d 475 [2004]).

The Village's claim that it has capacity to commence this action pursuant to the doctrine of *parens patriae* is misplaced. The concept of *parens patriae* is a judicial recognition of the inherent power of the state to prevent injury to those who, for whatever

reason, cannot protect themselves (Mormon Church v United States, 136 US 1 [1890]). The state may bring suit to protect the welfare of any substantial segments of its population (People v New York City Transit Auth., 59 NY2d 343 [1983]). However, when the State does bring suit, it must be for redress for wrongs done to the interests of the people as a whole and not merely to vindicate the individual or private interests of certain citizens (State v McLeod, 12 Misc3d 1157(a) [2006]).

The Village claims it has a quasi-sovereign intentest in this matter as it is charged with administering and enforcing the Uniform Code in the Village. The Village is not entitled to the doctrine of *parens patriae* as it seeks to advocate for 72 Village residents in order to by-pass the required State variance procedures relating to underground gas tanks. The Village has not proven a quasi-sovereign interest distinct from that of a particular party and injury to a substantial segment of the Village population (People ex rel Spitzer v Grasso, 11 NY3d 64 [2008]).

The Village maintains it has standing in this matter as it is charged with administering the Uniform Code pursuant to 19 NYCRR § 1203. The Village contends it is an aggrieved party as a result of the State's failure to grant its exemption request. The State claims the Village has not demonstrated it has sustained an injury in fact and therefore lacks standing.

In deciding the issue of standing, the Court must first determine whether the individual party seeking relief sustained an injury (Mahoney v Pataki, 98 NY2d 45 [2002]). An injury in fact must be based on more that conjecture or speculation (Village of Woodbury

v Seggos, 154 AD3d 1256 [2017]). Standing is a threshold determination and the burden of establishing standing to raise a claim is on the party seeking review (Society of Plastics v County of Suffolk, 77 NY2d 761 [1991]). To establish standing in an action against a government body, the petitioners must show that they "will actually be harmed by the challenged administrative action" and that the harm is different from that of the public at large (Save the Pine Bush, Inc. v City of Albany, 13 NY3d 297 [2009]; Matter of Transactive Corp. v New York State Dept. of Social Servs., 92 NY2d 579 [1998]). In addition, to have standing to commence an action, petitioners must demonstrate an actual legal stake in this outcome and an injury in fact worthy and capable of judicial resolution (Mittlemark v County of Saratoga, 85 AD3d 1359 [3rd Dept. 2011]; Aiardo v Town of East Greenbush, 64 AD3d 849 [3rd Dept. 2009]).

The petitioner has failed to sufficiently demonstrate that it sustained "special damage," different in kind and degree from the community in general (Matter of Fund for Lake George, Inc. v Town of Queensbury Zoning Bd. of Appeals, 126 AD3d 1152 [3rd Dept. 2015]). Petitioner has not shown it would suffer direct injury different from that suffered by the public at large and the injury asserted falls within the zone or interests to be protected by the statute or constitutional guarantee (Eastview Properties, Inc. v Town of Chester Planning Board, 138 AD3d 838 [2nd Dept. 2010]; Matter of Dairylea Coop. v Wakley, 38 NY2d 6 [1975]). From the facts presented, the Court finds that petitioner does not have standing to commence this proceeding as it has failed to articulate an injury in fact (New York State

Association of Nurse Anesthetists v Novello, 2 NY3d 207 [2004]). As a result, the petition is denied.

The Court has reviewed the parties remaining contentions and concludes they either lack merit or are unpersuasive given the Court's determination (Hubbard v County of Madison, 71 AD3d 1313 [3rd Dept. 2010]).

Accordingly, the petition is denied and the cross-motion to dismiss the petition is granted.

This constitutes the Decision and Order of the Court. This Decision and Order is returned to the attorneys for the respondent. All other papers are delivered to the County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provision of this rule with regard to filing, entry and Notice of Entry.

SO ORDERED

ENTER

Dated: Troy, New York
May 10, 2018

MICHAEL H. MELKONIAN
Acting Supreme Court Justice

Papers Considered:

1. Amended Notice of Petition dated August 8, 2017;
2. Verified Petition dated August 8, 2017, with exhibits annexed;
3. Notice of Cross-Motion dated November 21, 2017;
4. Affirmation of Austin Thompson, Esq., dated November 21, 2017, with

exhibits annexed;

5. Respondent's Memorandum of Law dated November 21, 2017;
6. Affidavit of Gary Vegliante dated December 27, 2017, with exhibits annexed;
7. Petitioner's Memorandum of Law dated December 28, 2017;
8. Affidavit of Gary Vegliante dated January 23, 2028; and
9. Respondent's Memorandum of Law dated January 26, 2018.