Eiseman v Incorporated Vil. of Bellport
2020 NY Slip Op 31941(U)
June 10, 2020
Supreme Court, Suffolk County
Docket Number: 3374-2018
Judge: William G. Ford
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SHORT FORM ORDER

INDEX NO.: 3374-2018

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

PRESENT:

HON. WILLIAM G. FORD
JUSTICE of the SUPREME COURT

Motion Submit Date: 01-10-19
Conference Held: 10-16-19
Motion Seq #: 001 - MotD

JANE EISEMAN, LANCE SNEAD, & BOUY 2, LLC; and on behalf of Others Similarly Situated;

Plaintiffs-Petitioners,

-against-

The INCORPORATED VILLAGE OF BELLPORT, Raymond Fell, Robert Rosenberg, Michael Ferrigno, Joseph Gagliano & Steven Mackin, in their official capacities as the BOARD OF TRUSTEES OF THE INCORPORATED VILLAGE OF BELLPORT

Defendants-Respondents.

PETITIONERS' ATTORNEY:
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RESPONDENTS' ATTORNEY:
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Bellport, New York 11713-2739

Read on the petitioners' hybrid special proceeding/ declaratory judgment action, the Court considered the following: Plaintiffs'/Petitioners' Summons and Notice of Petition, dated June 21, 2018, with Verified Complaint and Petition, and supporting papers; Respondents' Verified Answer with Objections in Point of Law, dated November 28, 2018, with Administrative Return and supporting papers; Petitioners' Affirmation in Reply, dated June 25, 2019, and supporting papers; and upon full consideration of the foregoing; it is

ORDERED that, the Complaint/Petition (hereinafter "petition") (seq. #001) by the Plaintiffs/Petitioners (hereinafter "petitioners") in this hybrid declaratory judgment/special proceeding, which seeks, *inter alia*, an order annulling and declaring void Local Law No. 3,[1] which created Chapter 25 [Neighborhood Preservation], Article I [Rental Registration] (hereinafter "Rental Law"), of the Village Code of the respondent, Incorporated Village of Bellport ("Village"), which was adopted on February 26, 2018 by Resolution of the respondent, Board of Trustees of the Village ("Board"), is hereby decided to the extent and for the reasons set forth herein; and it is further

[1] Although introduced as Local Law No, 1 of 2018, by the time it was adopted, it was designated as Local Law No. 3 of 2018.

ORDERED that the petitioners' First Cause of Action (Violation of Municipal Home Rule Law, Village Law & General Municipal Law), is granted to the extent that the Court hereby declares, pursuant to CPLR §3001 and §7803(3), that the Village's Rental Law was adopted in violation of GML §239-m(2), in that respondents failed to submit the final version of the Rental Law to the Suffolk County Planning Commission for review and recommendation prior to the Law's adoption by resolution of the Board on February 26, 2018 and, therefore, said Rental Law is null and void and the Board's determination to adopt the Resolution was made in violation of a lawful procedure and the Resolution is, likewise, null and void; however, all other claims for relief therein are denied; and it is further

ORDERED that petitioners' Second Cause of Action (Violation of Open Meetings Law), is hereby denied for failure to establish that respondents violated Article 7 of the Public Officers Law, known as the Open Meetings Law; and it is further

ORDERED that the petitioners' Third Cause of Action (Limitation of Number of Rentals), is hereby granted, inasmuch as the petitioners have established that the Rental Law is arbitrary and capricious and unconstitutional, and the Court hereby adjudges, pursuant to CPLR §7803(3), that the Board's determination of adopting the Rental Law by Resolution on February 26, 2018, was arbitrary and capricious in nature, as well as unconstitutional, and said Rental Registration Law is null and void; and it is further

ORDERED that the petitioners' Fourth Cause of Action (Pre-Existing, Non-Conforming Use), is hereby denied, as moot, inasmuch as the Court has declared the subject Rental Registration Law null and void; and it is further

ORDERED that the petitioners' Fifth Cause of Action (Money Had and Received) and Sixth Cause of Action (Unjust Enrichment) are decided to the extent that said Causes of Action are hereby severed pursuant to CPLR §603 and the parties are directed to appear before the undersigned for a **Preliminary Conference to be held on August 13, 2020, at 9:30 a.m.**, so as to enter into a discovery schedule pertaining to all claims related to these Causes of Action, unless said Claims are settled prior thereto; and it is further

ORDERED that counsel for the petitioners shall forthwith serve a copy of this Decision and Order upon all counsel for the respondents via facsimile transmission and certified mail (return receipt requested), as well as upon the Calendar Clerk of the Court, and shall promptly thereafter file the affidavit of such service with the Suffolk County Clerk; and it is further

ORDERED that, if applicable, within 30 days of the entry of this Decision and Order, petitioners' counsel shall also give notice to the Suffolk County Clerk, as required by CPLR §8019(c), with a copy of this Decision and Order, and pay any fees should any be required.

FACTUAL BACKGROUND AND PROCEDURAL POSTURE

Pursuant to notice published by the Village in the Long Island Advance, a public hearing was held in the Village of Bellport on January 22, 2018, the purpose of which was to discuss a proposed draft of a rental registration law. Such proposed law would require Village residents who wish to rent their properties, to complete and submit an application to include those properties on a Village rental registry. At the hearing, public commentary was heard and recorded in favor of and against the proposed

draft rental law ("draft version"). Thereafter, pursuant to another published notice, on February 12, 2018, the Board held a work session, which was also opened to the public for additional comments about the draft version of the rental law. Thereafter, the Board made changes to the draft version, resulting in a newly proposed version of the rental law, which was the topic of discussion at the next public hearing on February 26, 2018. At this hearing, public commentary concerning the newly proposed final version was heard and recorded. At the close of the hearing, a motion was made by the Board for a Resolution to adopt the newly proposed final version. By Resolution of the Board on February 26, 2018, this final version (the Rental Law) was adopted by the Board over various objections.

It is from the adoption of the Rental Law that the petitioners, Village of Bellport residents, filed this hybrid Article 78 and declaratory judgment proceeding, challenging the Board's adoption of such Rental Law. The petitioners' First Cause of Action alleges that the respondents failed to follow lawful procedure by violating New York's Municipal Home Rule Law, Village Law and General Municipal Law. The Second Cause of Action alleges that the respondents failed to follow lawful procedure by violating Article 7 of the New York's Public Officers Law, commonly known as the Open Meetings Law. The Third Cause of Action alleges that the Board's determination to adopt the Rental Law was arbitrary and capricious, as is the Rental Law, itself. The Fourth Cause of Action alleges that if the Rental Law is upheld, the petitioners and others similarly situated, are entitled to an order granting them pre-existing, non-conforming use status. The Fifth and Sixth Causes of Action essentially allege that the rental registration fees paid by Village residents pursuant to the Rental Law were wrongfully collected by the Village because the Rental Law was wrongfully adopted by the Board and should be declared void.

STANDARD OF REVIEW

In a proceeding pursuant to CPLR Article 78, the judicial standard of review of an administrative determination is "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion . . ." (CPLR §7803[3]). A board's determination must be afforded great deference, and judicial review is generally limited to ascertaining whether the board's action was illegal, arbitrary and capricious, or an abuse of discretion (*see* ***Cradit v Southold Town Zoning Board of Appeals***, 179 AD3d 1058, 117 NYS3d 675 [2d Dept 2020]; ***Rada Corp. v Gluckman***, 171 AD3d 1189, 99 NYS3d 342 [2d Dept 2019]; ***Matter of Bartolacci v Village of Tarrytown Zoning Bd. of Appeals***, 144 AD3d 903, 41 NYS3d 116 [2d Dept 2016]). Generally, a determination of a village board will be sustained if it has a rational basis and is not arbitrary and capricious (*see* CPLR §7803[1], [3]; ***Matter of Sasso v Osgood***, 86 NY2d 374, 633 NYS2d 259 [1995]; ***Matter of Nowak v Town of Southampton***, 174 AD3d 901, 106 NYS3d 372 [2d Dept 2019]; ***Matter of 278, LLC v Zoning Bd. of Appeals of the Town of E. Hampton***, 159 AD3d 891, 73 NYS3d 614 [2d Dept 2018]; ***Matter of Conway v Van Loan***, 152 AD3d 768, 58 NYS3d 598 [2d Dept 2017]; ***Matter of Halperin v City of New Rochelle***, 24 AD3d 768, 809 NYS2d 98 [2d Dept 2005]).

Where a rational basis for the board's determination exists, a court may not substitute its own judgment for that of the board, even if a contrary determination is supported by the record (*see* ***Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead***, 98 NY2d 190, 746 NYS2d 662 [2002]; ***Matter of Route 17K Real Estate, LLC v Zoning Board of Appeals of Town of Newburgh***, 168 AD3d 1065, 93 NYS3d 107 [2d Dept 2019]; ***Matter of 278, LLC v Zoning Bd. of Appeals of the Town of E. Hampton***, 159 AD3d 891, 73 NYS3d 614 [2d Dept 2018]; ***Matter of Conway v Van Loan***, 152 AD3d 768, 58 NYS3d 598 [2d Dept 2017]; ***Matter of Roberts v Wright***, 70 AD3d 1041, 896 NYS2d

124 [2d Dept 2010]). However, although an administrative agency's determination is entitled to deference, such determination is not entitled to unquestioning judicial deference, since the ultimate responsibility of interpreting the law is with the court (*see* ***Ogden Land Development, LLC v Zoning Bd. of Appeals of Village of Scarsdale***, 121 AD3d 695, 994 NYS2d 148 [2d Dept 2014]; ***Nilsson v Dept. of Environmental Protection of City of New York***, 28 AD3d 773, 814 NYS2d 677 [2d Dept 2006]).

A village's local law affecting real property is unreasonable, under police power and due process analysis, if it encroaches on the exercise of private property rights without substantial relation to a legitimate governmental purpose, which is to further the public health, safety, morals or general welfare of the village (*see* ***Fred F. French Investing Co., Inc. v City of New York***, 39 NY2d 587, 385 NYS2d 56 [1976]). A village ordinance enacted under the police power must bear a reasonable connection to the public health, comfort, safety and welfare of the village (*see* ***D'Angelo v Cole***, 67 NY2d 65, 499 NYS2d 900 [1986]). Such ordinance, on similar police power analysis, is unreasonable if it is arbitrary, or if there is no reasonable relation between the end sought to be achieved by the regulation and the means used to achieve that end (*see* ***Fred F. French Investing Co., Inc. v City of New York***, 39 NY2d 587, 385 NYS2d 56 [1976]). In order to sustain a due process challenge, a petitioner must overcome the strong presumption of constitutionality that applies to legislative acts (*see* ***Timber Point Homes, Inc. v County of Suffolk***, 155 AD2d 671, 548 NYS2d 250 [2d Dept 1989]). While the presumption is rebuttable, the unconstitutionality must be demonstrated beyond a reasonable doubt (*see* ***Robert E. Kurzius, Inc. v Inc. Village of Upper Brookville***, 51 NY2d 338, 434 NYS2d 180 [1980]; ***Joel v Village of Woodbury***, 138 AD3d 100, 831 NYS3d 83 [2d Dept 2016]).

DISCUSSION

Petitioners' First Cause of Action:

In their First Cause of Action, petitioners seek a declaration that the respondents adopted the subject Rental Law in violation of Municipal Home Rule Law §20(4) and §20(5), New York Village Law §2-2100 and §7-706(1), and General Municipal Law §239-m(2).

As set forth in its title, General Municipal Law (GML) §239-m deals with "Referral of certain proposed city, town and village planning and zoning actions to the county planning agency." Requirements in the statute are imposed upon a referring body, such as the Bellport Village, before "final action" may be taken by such referring body. As applicable here, GML §239-m(2) mandates that "[i]n any . . . village which is located in a county which has a county planning agency . . . each referring body shall, before taking final action on proposed actions included in [GML §239-m(3)], refer the same to such county planning agency or regional planning council." Pursuant to GML §239-m(3)(a)(ii), a village board's "adoption or amendment of a zoning ordinance *or local law*" is one of the proposed actions subject to such referral requirements, if that ordinance or local law applies to real property listed in §239-m(3)(b) (emphasis added). As set forth in GML §239-m(3)(b)(i), real property within five hundred feet of "the boundary of any city, village or town is one such category of property. In sum, before a village board takes final action to adopt or amend a zoning ordinance or local law affecting real property located within five hundred feet of another city, village or town, the board must first refer that ordinance or local law to the Suffolk County Planning Commission.

It is undisputed that the respondents did not submit the final version of the Rental Law to the

Suffolk County Planning Commission prior to it being adopted by Resolution of the Board on February 26, 2018. Here, the respondents argue that since they referred the original draft of the Rental Law to the County Planning Commission, there was no need to refer the final version of the Law to the Commission before it was adopted. In support of this argument, respondents submit the November 28, 2018 affidavit of MaryLou Bono, Village Building Department Administrator.

According to Ms. Bono, on December 21, 2017, she emailed the draft version of the proposed rental law to Andrew Freleng of the Suffolk County Planning Commission. In her affidavit, Ms. Bono contends that sometime thereafter (date not specified), she spoke with Mr. Freleng and was informed that if the final version of the law was less restrictive than the original, it was up to the Village Attorney to decide whether or not the final version must be referred back to the Commission. This contention, however, is belied by a December 28, 2017 letter from Mr. Freleng to Ms. Bono, which was annexed to respondents' answer, in which Mr. Freleng states: "*Please note that pursuant to New York State General Municipal Law section 239 and Article XIV of the Suffolk County Code, prior to final approval, this action must be referred to the Suffolk County Planning Commission for review*" (emphases added). On this issue, respondents' conclusory contentions in opposition, based upon hearsay conversations, are without any evidentiary value. Indeed, the determination of whether or not there was compliance with statutory mandates is determined by factual, admissible evidence of such compliance, not merely by telephonic information, nor by counsel's own self-serving decision that there was is no need to resubmit the changes and final version to the Planning Commission.

The referral requirements of GML §239-m are intended to facilitate regional review of amendments to local ordinances by requiring the local municipality to refer its proposed amendments to the County Planning Board (*see* ***Gernatt Asphalt Products, Inc. v Town of Sardinia***, 87 NY2d 668, 642 NYS2d 164 [1996]; ***Benson Point Realty Corp. v Town of East Hampton***, 62 AD3d 989, 880 NYS2d 144 [2d Dept 2009]). Notwithstanding the respondents' belief to the contrary, sending the original draft of the proposed rental law to the Planning Commission did not obviate the need for a new referral of the final version of, pursuant to GML §239-m, before the Rental Law was adopted by the Board on February 26, 2018 (*see* ***Calverton Manor, LLC v Town of Riverhead***, 160 AD3d 842, 76 NYS3d 72 [2d Dept 2018]). Indeed, under the statute, the Board was madanted, "*before taking final action*," to refer the final version to the Suffolk County Planning Commission" (GML §239-m[2] [emphases added]; *see also* §239-m[3]).

Where changes are made to a proposed action following referral, a new referral to the Planning Commission is required, unless the particulars of the new version were embraced within the original referral, or if the amendment as adopted is not substantially different from the originally referred draft (*see* ***Calverton Manor, LLC v Town of Riverhead***, 160 AD3d 842, 76 NYS3d 72 [2d Dept 2018]). Here, the particulars of the final Rental Law were not embraced in the original draft, but instead included substantial modifications which warranted a new referral (***id***; ***LCS Realty Co. Inc. v Inc. Village of Roslyn***, 273 AD2d 474, 710 NYS2d 605 [2d Dept 2000]).

For example, the original draft included nearly 9 pages of text, whereas the final version has 7 pages. The draft version included 12 subsections, whereas the final version has 9 subsections. Several terms defined in Sec. 25-3 of the draft were omitted from Sec. 25-3 of the final draft, including: "Code Enforcement Officer;" "Conventional Bedroom;" "Dwelling Unit;" and "Kitchen." Also, by definition of "Short Term Rental" ("[a]ny rental occupancy ... less than sixteen [16] consecutive days"), the draft version essentially permitted an unlimited number of rentals, provided such rentals were for a period of

less than 16 days. The term, "Short Term Rental," however, was omitted from the final version. Furthermore, pursuant to Sec. 25-4(B) of the final version, it is unlawful for rental-registered homeowners to rent their residence more than 5 consecutive times during the Seasonal Period (the definition of which also changed in the final version). No such restriction existed in the draft version. Since the particulars of the final version were not embraced within the original referral, and since the final version as adopted is, in fact, substantially different from the referred draft, the respondents were required to refer the substantially modified final version to the Suffolk County Planning Commission (*see* ***Calverton Manor, LLC v Town of Riverhead***, 160 AD3d 842, 76 NYS3d 72 [2d Dept 2018]; ***LCS Realty Co. Inc. v Inc. Village of Roslyn***, 273 AD2d 474, 710 NYS2d 605 [2d Dept 2000]).

Inasmuch as the respondents failed to comply with the legislative mandate of GML §239-m, and do not dispute failing to submit the final version of the Rental Law to the Planning Commission, a jurisdictional defect exists, which renders the Law's adoption invalid (*see* ***24 Franklin Ave. R.E. Corp. v Heaship***, 139 AD3d 742, 30 NYS3d 695 [2d Dept 2016]; ***Annabi v City Council of City of Yonkers***, 47 AD3d 856, 850 NYS2d 625 [2d Dept 2008]; ***Eastport Alliance v Lofaro***, 13 AD3d 527, 787 NYS2d 346 [2d Dept 2004]; ***Burchetta v Town Bd. of Town of Carmel***, 167 AD2d 339, 561 NYS2d 305 [2d Dept 1990]; ***Old Dock Associates v Sullivan***, 150 AD2d 695, 541 NYS2d 569 [2d Dept 1989]).

Notwithstanding the foregoing, petitioners' additional First Cause of Action claims, that the respondents violated Municipal Home Rule Law (MHRL) and New York Village Law (VL), are without merit. MHRL §20(4) states, in relevant part, that no "local law shall be passed until it shall have been in its final form and either (a) upon the desks or tables of the members at least seven calendar days, exclusive of Sunday, prior to its final passage. . . . For purposes of this subdivision, a proposed local law shall be deemed to be upon the desks or tables of the members if: it is set forth in a legible electronic format by electronic means, and it is available for review in such format at the desks of the members" (MHRL §20[4]). In this regard, the respondents submit the November 28, 2018 affidavit of John Kocay, Bellport Village Clerk. In his affidavit, Mr. Kocay avers that in addition to emailing the final version of the Rental Law to all Board members on February 15, 2018, he placed a copy of the final version on the Mayor's and Trustees' desks on February 16, 2018, more than 7 calendar days before the final version was adopted on February 26, 2018. Therefore, the respondents satisfied the requirements of the statute. Likewise, contrary to the petitioners' contentions, the record reveals that public notice of the February 26, 2018 hearing was published in the Long Island Advance on February 15, 2016, more than 10 days before the hearing, thereby satisfying the strictest publication time requirements of MHRL §20(5).

As for petitioners' claims that respondents violated Article 7 of the New York Village Law, respondents argue in opposition that the Village Law is not applicable here, since their Rental Law is not a zoning law to which New York Village Law applies. In parts pertinent to this proceeding, VL §7-706(1) states that no "regulations, restrictions or boundaries shall become effective until after a public hearing in relation thereto, at which the public shall have an opportunity to be heard. At least ten days notice of the time and place of such hearing shall be published in a paper of general circulation in such village." Similarly, in relevant part, VL §21-2100 requires: (1) "[a]ny notice of a hearing, not otherwise specifically required by law shall be given . . . by publication of such notice in the official newspaper of the village or if there be none, in a newspaper of general circulation in the village wherein the hearing is to be held. (2) [s]uch hearing shall be conducted not less than seven days after publication of such notice."

Notably, Article 7 of the New York Village Law comes under the title of "Building Zones."

Furthermore, in the Village of Bellport Code, the Zoning Laws are set forth in Chapter 21 of the Code, whereas its Rental Law is found in Chapter 25 of the Code, entitled "Neighborhood Preservation." Even if New York Village Law is applicable here, however, the record establishes that the Village's February 13, 2018 notice of the February 26, 2018 public hearing was published in the Long Island Advance on February 15, 2016, more than 10 days before the hearing, thereby satisfying the publication notice requirements of VL §7-706 and §2-2100.

Based upon the foregoing, the petitioners' First Cause of Action is granted, to the extent that the Rental Law was adopted in violation of GML §239-m(2) and, therefore, said Rental Law is null and void. Likewise, the Board's determination to adopt the Resolution was made in violation of a lawful procedure. Accordingly, the adopted Resolution is also null and void. Petitioners' additional claims for relief based upon alleged violations of the Municipal Home Rule Law and Village Law, as set forth in the First Cause of Action, are belied by the record evidence and are denied as without merit.

Petitioners' Second Cause of Action:

In their Second Cause of Action, petitioners seek a declaration that the respondents failed to follow a lawful procedure by failing to comply with Article 7 of the Public Officers Law, known as the Open Meetings Law, §104(1), §107(1) and §107(2).

Open Meetings Law §104(1) requires, in pertinent part, that "[p]ublic notice of the time and place of a meeting scheduled at least one week prior thereto shall be given or electronically transmitted to the news media. . . ." In relevant part, OML §107(1) states that "if a court determines that a public body failed to comply with this article, the court shall have the power, in its discretion, upon good cause shown, to declare that the public body violated this article and/or declare the action taken in relation to such violation void . . . An unintentional failure to fully comply with the notice provisions required by this article shall not alone be grounds for invalidating any action taken at a meeting of a public body." In pertinent part, OML §107(2) provides that "[i]f a court determines that a vote was taken in material violation of this article, or that substantial deliberations relating thereto occurred in private prior to such vote, the court shall award costs and reasonable attorney's fees to the successful petitioner, unless there was a reasonable basis for a public body to believe that a closed session could properly have been held."

Petitioners allege that the respondents failed to provide notice of the February 26, 2018 public hearing in violation of OML §104(1). Petitioners also allege that the Mayor and members of the Board held meetings and engaged in substantial deliberations with private parties afer the January 22, 2018 public hearing was closed. According to the petitioners, these meetings resulted in substantial modifications to the original draft version of the proposed rental law, the final version of which was ultimately adopted by Resolution of the Board on February 26, 2018. According to petitioners, this constituted a material violation of OML §107(1) and (2).

As previously noted, the record establishes that Village's February 13, 2018 notice of the February 26, 2018 public hearing was published in the Long Island Advance on February 15, 2018. Therefore, contrary to petitioners' claims, respondents' compliance with OML §104(1) has been established. Petitioners' assertions regarding respondents' alleged violations of OML §107(1) and (2) are also without merit. The purpose of the Open Meetings Law is to prevent municipal governments from debating and deciding in private what they are required to debate and decide in public (*see* ***Gernatt Asphalt Products, Inc. v Town of Sardinia***, 87 NY2d 668, 642 NYS2d 164 [1996]). The statute was

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enacted to open the decision-making process of elected officials to the public while at the same time protecting the ability of the government to carry out its responsibilities (*see* ***Matter of Gordon v Village of Monticello***, 87 NY2d 124, 637 NYS2d 961 [1995]; ***Goetschius v Board of Educ. of Greenburgh Eleven UFSD***, 244 AD2d 552, 664 NYS2d 811 [2d Dept 1997]). The party claiming that the ordinance was adopted in violation of the Open Meetings Law has the burden of showing good cause warranting judicial relief (*see* ***New York Univ. v Whalen***, 46 NY2d 734, 413 NYS2d 637 [1978]; ***Thorne v Village of Millbrook Planning Bd.***, 83 AD3d 723, 920 NYS2d 369 [2d Dept 2011]).

Upon this record, it is apparent that conversations between the Mayor and the Village residents occurred off-the-record after the January 22, 2018 public hearing was closed; however, it is not unreasonable to expect that residents of a small Village may speak to their resident Mayor and/or resident Board Members outside the setting of a public hearing about ongoing public issues affecting their Village. The record shows that any such conversations after the January 22, 2018 was closed, as well as any conversations by the Mayor and the Board during the February 12, 2018 work session, were ultimately raised publicly by the Mayor and the Board during the public portion of the February 12, 2018 work session and during the February 26,2018 public meeting, each of which was properly noticed. Furthermore, the petitioners have not shown that "a vote was taken in *material violation* of this article, or that *substantial deliberations* relating thereto occurred in private prior to such vote" in violation of OML §107(2) (emphasis added). Accordingly, the petitioners have failed to establish their burden of showing any good cause warranting a finding that the respondents violated the Open Meetings Law (*see* ***New York Univ. v Whalen***, 46 NY2d 734, 413 NYS2d 637 [1978]; ***Thorne v Village of Millbrook Planning Bd.***, 83 AD3d 723, 920 NYS2d 369 [2d Dept 2011]). Therefore, the petitioners' Second Cause of Action is hereby denied, as is any claim for attorneys' fees.

Petitioners' Third Cause of Action:

The petitioners' Third Cause of Action seeks a declaration that the 5-Rental Limitation, as set forth in final version of the Rental Law adopted on February 26, 2018, is without rational support and carries no legitimate governmental health, safety, or welfare concern and violates the Due Process requirements of the New York Constitution, and that, therefore, the Rental Law is void.

As adopted by the Board on February 25, 2018, Rental Law, Sec. 25-1, states the Legislative intent as follows:

> The intent of this chapter is to preserve the aesthetic integrity of our residential neighborhoods, prevent neighborhood blight, protect residential property values, encourage residential property maintenance and enhance the quality of life in our residential neighborhoods. . . . [Rental] registration will further enable the village to adequately control the proliferation of rentals and manage the effect of same on village amenities. The board finds that current Code provisions are inadequate to halt the proliferation of such conditions and that the public health, safety, welfare and good order governance of the Village of Bellport will be enhanced by enactment of the regulations set forth in this article, which regulations are remedial in nature and effect.

In relevant part, Sec. 25-4 of the Rental Law states:

(a) It shall be unlawful and a violation of this article and an offense within the meaning of the Penal Law of the State of New York for any owner to permit any tenant(s), to take up residence by a rental occupancy in any dwelling unit without the owner's first having completed and filed with the building department a rental registration form approved by the building inspector, and bearing the signature of the owner acknowledging the requirements of such registration. Failure or refusal to file a rental registration hereunder shall be deemed a violation.

(b) During the seasonal period[2], despite having a valid rental registration on file, its shall be unlawful and a violation of this article and an offense within the meaning of the Penal Law of the State of New York for any owner to permit any tenant(s), to take up residence by rental occupancy in any dwelling unit more than five (5) separate times during the seasonal period.

(1) It shall be an affirmative defense to a violation of subsection (a) of this section that the rental occupant or occupants is/are immediate family members[3] of the owner of the subject premises, as defined in this chapter.

(2) Rebuttable presumption of rent. Any dwelling, dwelling unit, or any other premises subject to this chapter shall be presumed to be rented for a fee and a charge made if said premises are not occupied by the legal owner thereof.

The Court agrees with the petitioners that the 5-Rental limitation as set forth in Sec. 25-4(b) of the Rental Law is arbitrary. The arbitrary nature of the 5-Rental limitation is particularly evident from the following question and answer exchange between a Village resident and the Mayor, as recorded at the February 26, 2018 public hearing (*see* pp. 135, line 16 - 136, line 16):

Ms. Hannon: . . . If you would please explain to me and everybody here what was the reasoning behind five different rentals for that particular season? Why five rentals whether

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[2] Sec. 25-3(a) defines "seasonal period" as the period "between the Friday before Memorial Day weekend and the Sunday after Labor Day."

[3] Sec. 25-3(a) defines "immediate family" as "[p]ersons related to the family of the owner of a dwelling unit, to include: The owner's spouse, children, parents, grandparents, grandchildren or their functional equivalent, and no others." Sec. 25-3(a) also defines "family" as "[o]ne (1) or more persons related by blood, adoption, marriage or domestic partnership, living and cooking together as a single housekeeping unit, including household servants. A number of persons, but not exceeding three (3), living and cooking together as a single housekeeping unit, though not related by blood, adoption or marriage, shall be deemed to constitute a family. In no case shall a lodging house, boarding house or dormitory be classified or construed as a single housekeeping unit or the occupants thereof be construed as a "family." Petitioners challenge the constitutionality of the respondents' definition of "family" and "immediate family" as found in Sec. 25-3(a). The Court sees no need to opine on these issues, given the ultimate declaration that the Rental Law in this proceeding is null and void.

it's a day, a week, or a month? If you will tell me.

Mayor Fell: Well, we picked - - we looked at the number five and we just thought that if someone rented five times within that period . . . that would give enough spaced out time that there wouldn't be someone there every weekend. Although with this there could be someone there for five weeks in a row, but then there wold be no more rentals for that period of time. . . . We talked about three rentals, five rentals, eight rentals, and we're going to try five and see how it works. We'll look at it again in October next year or November and see, you know, where we made mistakes and where we're going to correct. . . .

Where, as here, a mayor involved in creating and implementing a village ordinance admits that a restriction set forth therein was selected arbitrarily, and was not the result of a scientific or any other type of study, the ordinance is arbitrary and unconstitutional (*see* ***McClure v Board of Trustees of Village of Saltaire***, 121 AD2d 699, 504 NYS2d 173 [2d Dept 1986]). Likewise, where the Village is unable to justify the limitations set forth in an ordinance, the ordinance is arbitrary (***id.***).

Based upon the record evidence, the subject Rental Law, and the limitations imposed therein, are arbitrary and capricious and not adequately connected to its stated Legislative intent. The Legislative intent set forth in Sec. 25-1 attempts to remedy a purported pre-existing problem that the Board has not articulated or identified. For example, on this record there is no evidence of any board "findings" which show that before the Rental Law was adopted, a need existed to "halt the proliferation of rentals," nor that "the current Code provisions [were] inadequate to halt the proliferation of such conditions" (Sec. 25-1). Even if there had been such evidence, there is no showing of how implementation of this Rental Law and its 5-Rental limitation (as opposed to any other measure) will "curb such conditions and that the public health, safety, welfare and good order governance of the Village of Bellport will be enhanced by [its] enactment. . ." (Sec. 25-1). Accordingly, there is no evidence that the newly adopted Rental Law is in any way "remedial in nature and effect," as purported in Sec. 25-1.

The arbitrary and capricious nature of the Rental Law is also evidenced in the record of the public hearing on February 26, 2018, during which the following questions and answers between petitioners' counsel and the Mayor ensued (pp. 151, line 11 - 152, line 10):

Mr. Snead: . . . I'm looking at the summary [Sec. 25-1, Legislative Intent] and it indicates that the purpose of this proposal is to prevent neighborhood blight. Can you explain to me how this document or this proposal is to prevent neighborhood blight?

Mayor Fell: I'm not going to explain it - -

Mr. Snead: Can you explain it to me?

Mayor Fell: Yes, but I'm not going to - -

Mr. Snead: . . . How does it protect residential property values?

Mayor Fell: I'm not going to explain any of that.

Mr. Snead: Okay. How does it help you manage the effects of village amenities?

Mayor Fell: I'm not going to answer that either.

Mr. Snead: Have you anywhere identified how that happens?

Mayor Fell: No.

Notwithstanding the Mayor's refusal to address these issues, the February 26, 2018 transcript also shows that, immediately after this and other challenges made by Mr. Snead, the Mayor attempted to call for a motion to close the hearing when he was interrupted by a resident. The Mayor permitted the resident to speak and the following exchange ensued (see pp.159, line 22 - 160, line 21):

Resident: I'm standing here terrified that you're going to vote on this.

Mayor: That's up to the other trustees.

Resident: . . . and it seems to me that that what was raised this evening are a couple of things that really do need to be rewritten. And so, I would just urge you to please not vote on this tonight. I ask all of you to just fix those couple of things that were very clearly pointed out that are just not right. They don't work.

Thereafter, Deputy Mayor Joseph Gagliano expressed his concerns, as a Board Member, about voting on the Rental Law as ultimately adopted. Such concerns were expressed as follows (p.161, line 7-13; pp.163, line 18 - 164, line 1):

Bd. Member: . . . In consideration of what we're hearing this evening, there are things I would like to give answers to and clarify from a technical point. I'd would [sic] like us to consider to put this on hold until we get those answers clarified.

. . . I believe that we should give merit to looking into some of the issues that were raised this evening as we have been listening to the people. I came here prepared to vote in favor of this, but I think things were brought up tonight that we should look into and review, so we're not going in a direction that could be challenge [sic].

Given his stated concerns, Deputy Mayor Galgano abstained from voting on the Resolution to adopt the Rental Law in its current form. In addition, another Board Member (unidentified) voted "No" on the Resolution. Notwithstanding the objections from Deputy Mayor Gagliano, as well as from another Board Member, other Village residents and Mr. Snead, the Mayor and other Board Members adopted the Resolution, thereby enacting the Village Rental Law in the form challenged as arbitrary and capricious by the petitioners in this proceeding.

The rental presumption provision and related penalty aspects of Sec. 25-2 of the Rental Law are also arbitrary in nature. This Rental Law would subject owners of homes in the Village to criminal penalties merely for non-occupancy of their homes for any reason, even if those homeowners never rent their homes to anyone. For example, Sec. 25-2 of the Rental Law states, in relevant part, that "[a]ny

dwelling unit subject to this article shall be *presumed to be rented* for a fee and a *charge made* if said premises are not occupied by the legal owner thereof" (emphasis added). Despite legitimate absences from their homes, homeowners who never rent their homes are, nevertheless, presumed to be renting for a fee in violation of the Rental Law, simply for being away from their homes for various reasons, including extended vacations, business trips, "snow-birding," illnesses, and the like. Under these scenarios, pursuant to Sec. 25-9(a), non-violating homeowners could be subject to criminal prosecution for "presumed" violations of the Rental Law, which are punishable by "a fine of not less than $500.00 and not more than $5,000.00 for a conviction of a first offense, and by a fine not less than $1,000.00 and not more than $10,000.00 for a conviction of a second or more offense within a five-year period."

Given its arbitrary provisions an unsubstantiated purported Legislative intent, the Rental Law is unreasonable under a police power and due process analysis, since it encroaches on the exercise of private property rights without substantial relation or reasonable connection to the legitimate governmental purpose of furthering the public health, safety, morals or general welfare (*see* ***D'Angelo v Cole***, 67 NY2d 65, 499 NYS2d 900 [1986]; ***Fred F. French Investing Co., Inc. v City of New York***, 39 NY2d 587, 385 NYS2d 56 [1976]). Likewise, it is unreasonable because it is arbitrary and bears no reasonable relation between the end sought to be achieved by the Law and the means used to achieve that end (***id.***; *see also* CPLR §7803; ***Cradit v Southold Town Zoning Board of Appeals***, 179 AD3d 1058, 117 NYS3d 675 [2d Dept 2020]; ***Rada Corp. v Gluckman***, 171 AD3d 1189, 99 NYS3d 342 [2d Dept 2019]). When asked at the February 26, 2018 hearing about the basis for the 5-rental limitation, the Mayor essentially admitted to the arbitrariness in choosing such limitation.

The Rental Law is also unconstitutional, inasmuch as the respondents failed to substantiate any of the reasons put forth in the Legislative Intent as the grounds for implementing the Rental Law (*see* ***McClure v Board of Trustees of Village of Saltaire***, 121 AD2d 699, 504 NYS2d 173 [2d Dept 1986]). When given an opportunity at the February 26, 2018 hearing to substantiate the basis for the purported Legislative intent, the Mayor refused to answer questions related to the Sec. 25-1 stated Legislative intent regarding how the proposed Rental Law will help "prevent neighborhood blight," "protect residential property values," or "manage the effects of village amenities."

Notwithstanding the strong presumption of constitutionality that applies to legislative acts, based upon the foregoing, the petitioners have rebutted such presumption and have established, upon the record evidence, that the subject Rental Law is arbitrary, capricious and unconstitutional (*see* CPLR §7803[3]; ***Cradit v Southold Town Zoning Board of Appeals***, 179 AD3d 1058, 117 NYS3d 675 [2d Dept 2020]; ***Ogden Land Development, LLC v Zoning Bd. of Appeals of Village of Scarsdale***, 121 AD3d 695, 994 NYS2d 148 [2d Dept 2014]; ***Timber Point Homes, Inc. v County of Suffolk***, 155 AD2d 671, 548 NYS2d 250 [2d Dept 1989]; ***Joel v Village of Woodbury***, 138 AD3d 100, 831 NYS3d 83 [2d Dept 2016]). Therefore, the Third Cause of Action is granted and the Board's determination of adopting the Rental Registration Law by Resolution on February 26, 2018, was arbitrary and capricious in nature and said Rental Registration Law is, itself, null and void.

Petitioners Fourth Cause of Action:

The petitioners' Fourth Cause of Action states that in the event any portion of the Rental Law is declared valid, petitioners ask the Court to declare that each of the petitioners' properties is a pre-existing, non-conforming use, and that each of their properties is grandfathered from having to comply with requirements of the Rental Law. Since the Court has declared the subject Rental Law null and void, this cause of action is denied as moot.

Fifth and Sixth Causes of Action:

In petitioners' Fifth Cause of Action (Monies Had and Received) and Sixth Cause of Action (Unjust Enrichment) the Court is requested to declare that the Village is not entitled to retain any fees paid by the petitioners in compliance with the Rental Law. Section 25-5(a) of the Rental Law requires that "[a] nonrefundable bi-annual registration fee as set from time to time by resolution of the board of trustees shall be paid, upon filing an application for a rental registration." At the time the Rental Law was adopted in February 2018, a fee of $250.00 was required to be paid by the applicant upon the filing of a rental registration application.

In relevant part, CPLR §603 states that "[i]n furtherance of convenience . . . the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue." Inasmuch as the Court has declared the Rental Law null and void under petitioners' First and Third Causes of Action, all claims made by petitioners under the Fifth and Sixth Causes of Action, regarding rental registration fees paid pursuant to Sec. 25-5 of the Rental Law, are hereby severed as plenary in nature, and shall proceed as such pursuant to CPLR §603 (*see* ***Roanoke Sand & Gravel Corp. v Town of Brookhaven***, 24 AD3d 783, 809 NYS2d 95 [2d Dept 2005]; ***Corporate Property Investors v Board of Assessors of County of Nassau***, 153 AD2d 656, 545 NYS2d 166 [2d Dept 1989]). Accordingly, the parties are directed to appear before the undersigned for the Preliminary Conference as scheduled herein, to enter into a discovery schedule pertaining to all claims related to these Causes of Action, unless such claims are settled prior thereto.

CONCLUSION

Based upon the foregoing, petitioners' First Cause of Action is granted to the extent set forth herein (*see* GML §239-m[2]; ***Calverton Manor, LLC v Town of Riverhead***, 160 AD3d 842, 76 NYS3d 72 [2d Dept 2018]; ***LCS Realty Co. Inc. v Inc. Village of Roslyn***, 273 AD2d 474, 710 NYS2d 605 [2d Dept 2000]). Petitioners' Third Cause of Action is also granted for the reasons stated herein (*see* ***Ogden Land Development, LLC v Zoning Bd. of Appeals of Village of Scarsdale***, 121 AD3d 695, 994 NYS2d 148 [2d Dept 2014]; ***Nilsson v Dept. of Environmental Protection of City of New York***, 28 AD3d 773, 814 NYS2d 677 [2d Dept 2006]). For the reasons set forth herein, petitioners' Second and Fourth Causes of Action are denied. Petitioners' Fifth and Sixth Causes of Action are severed as plenary in nature, and the parties shall appear before the undersigned for the Preliminary Conference scheduled above (*see* CPLR §603; ***Roanoke Sand & Gravel Corp. v Town of Brookhaven***, 24 AD3d 783, 809 NYS2d 95 [2d Dept 2005]; ***Corporate Property Investors v Board of Assessors of County of Nassau***, 153 AD2d 656, 545 NYS2d 166 [2d Dept 1989]). Unless otherwise granted herein, the remaining claims and contentions of the parties are denied, as without merit.

Petitioners are hereby **directed** to settle judgment on notice in a manner consistent with the provisions of this Decision and Order.

This constitutes the Decision and Order of this Court.

Dated: June 10, 2020
Riverhead, New York

WILLIAM G. FORD, J.S.C.

___ **FINAL DISPOSITION** _X_ **NON-FINAL DISPOSITION**