SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF COLUMBIA

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In the Matter of the Application of

CHATHAM NEIGHBORS FOR TRANQUILITY, GARY KATZ, LESLIE KATZ, TERRY LASKY, PATRICIA LASKY, BRIAN SCHWAB, VASILIKI DASKALOUDI, JEFFREY DAMIA, JEANNE DAMIA

Petitioners,

for a Judgment pursuant to CPLR Article 78 and CPLR 3001

DECISION/ORDER

-against-

Index No. 9909-050
R.J.I. No. 10-05-0233
John G. Connor, J.S.C.

BOARD OF APPEALS OF THE TOWN OF CHATHAM, BUILDING INSPECTOR SIMONSMEIER, QUESTATERRA, LLC and PS/21, INC.

Respondents.

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APPEARANCES:

Petitioners: Law Office of Marc S. Gerstman

Respondents: Lombardi, Reinhard, Walsh & Harrison, P.C.
For Questaterra, LLC and PS/21, Inc.

Tal G. Rappleyea, Esq.
For Town of Chatham Board of Appeals and Building Inspector Walter Simonsmeier

Connor, J.

Petitioners commenced this CPLR Article 78 proceeding alleging the determination of the Respondent Zoning Board of Appeals (ZBA) of the Town of Chatham was arbitrary, capricious, irrational, illegal and an abuse of discretion. Petitioners request that 1) the special use permit and variance issued on May 2, 2005 be vacated and annulled; 2) declare the determination of the Town of Chatham's ZBA is in violation of the permitted usage of the H-1 and RL-2 zones; 3) that the Respondents failed to acknowledge and implement the Town's Comprehensive Plan; and 4) request a preliminary injunction. Respondents oppose the motion and allege Petitioners lack standing, the statute of limitations expired, the granting of the special permit and variance was not arbitrary and capricious and oppose the application of a preliminary injunction.

Respondents Questaterra, LLC and PS 21, Inc. are owners (Owners) of real property located on Route 66, Town of Chatham, Columbia County. On August 16, 2001 the Owners applied for a building permit for the construction of a performing arts center (Project). The Project initially consists of a tent seating 225 persons with parking for 170 vehicles and a permanent facility seating 405 persons with parking for 215 spaces. The parcel consists of 107.2 acres of which 4.71 will be utilized for the Project. The remaining 95 % of the underdeveloped land will remain as open

space. The Town Code Enforcement Officer denied the building permit application and determined that a Special Use Permit was required for recreation use along with a height variance. Notice was given to those neighboring landowners located within 500 feet of the proposed Project. All of the Petitioners reside at least 1,000 feet from the parcel and therefore did not receive notice.

A SEQRA review was conducted and a Positive Declaration was issued on November 14, 2001. A Draft Environmental Impact Statement (DEIS) was adopted on December 19, 2001. After more than two years, the DEIS was deemed complete for review in April 2004. A comment period of 86 days along with a Public Hearing was completed and on April 22, 2004 the DEIS was accepted as complete. The Final Environmental Impact Statement (FEIS) was accepted by the ZBA on January 27, 2005. After a period for additional comment, the ZBA issued a Findings Statement on April 28, 2005. The ZBA conducted a public hearing and adopted and filed a Resolution granting the Special Permit and area variance for the Project on May 2, 2005.

Petitioners allege the issuance of the special use permit and variance are in violation of the Town Code and the Town's Comprehensive Plan which was adopted in 1971. Petitioners allege special use permits for the RL-2 zone include "recreational facilities and recreational buildings" (see, Town Code § 180-13). Petitioners allege

the term "recreational facility" does not authorize the construction of a performing arts center. Petitioners allege the special use permit must conform with the predominantly agricultural nature of the RL-2 district. Petitioners allege the H-1 zone lists permitted uses which include "nonprofit recreation areas" (see, Town Law § 180-10). Petitioners allege the Town's Comprehensive Plan is intended to preserve the small village low density character of the hamlets in the Town of Chatham. Petitioners contend the building of a performing arts center will result in impacts inconsistent with the overall character of the H-1 zone and the 'nonprofit recreation area" use in that zone. Petitioners concede the Comprehensive Plan requires the development of recreation facilities in the Town. However, petitioners aver the Comprehensive Plan does not include a performing arts center as a component of the recreation plan for the Town.

Petitioners contend that during the application process, Petitioners' attorney sought to have the ZBA issue a determination finding that the Project was not a permitted use or a permitted use by special permit in the RL-2 or H-1 zones. In August 2004, Petitioners were advised that the ZBA would not issue advisory opinions. The Town Enforcement Officer also stated in September 2004 that he stated the reasons for the issuance of the special permit in August 2001 and that he did not

intend to revisit this issue. Petitioners allege the Town claims that any appeal to the ZBA in late 2004 would be considered untimely.

Respondents allege the approval of the Project by the ZBA after a favorable SEQRA review was not arbitrary and capricious. Respondents alleged the RL-2 and H-1 zones allowed the permitted special use. In addition, the Respondents contend they complied with the Town's Comprehensive Plan. The Respondents admit the Plan is outdated as it was enacted in 1971. However, the Respondents took into consideration the Plan's finding of a strong public desire and need for additional recreational uses. It established as one of its goals the creation of "a wide variety of recreational and cultural opportunities" particularly near the five hamlets (see, 1971 Comprehensive Plan VI 6-11). Respondents allege the Project is a low density, low intensity use utilizing only 4.71 acres of the total 107.2 site. Respondents contend the Respondents considered the community character, recreational uses, visual impacts of the area, noise levels caused during construction by vehicles, and by concerts in the tent, the impact of vehicles and occupants in the parking lots, along with other issues in making the determination and issuing the special permits and variance.

Respondents allege Petitioners lack standing in this Article 78 proceeding. Standing is a threshold determination and the burden of establishing standing to raise a claim is on the party seeking review (see, Society of Plastics v. County of Suffolk,

77 N.Y. 2d 769). "In order for Petitioners to establish standing to challenge the enactment of a local zoning law, they have the burden of coming forward with probative evidence to demonstrate that they will suffer direct harm different from that of the public at large which falls within the zone of interest sought to be promoted by the Town's zoning laws" (McGrath v. Town Board of the Town of North Greenbush, 254 A.D. 2d 614). A Petitioner must allege in detail how it will sustain an injury-in-fact by the challenged action (see, Mobil Oil Corp. v. Syracuse Industrial Dev. Agency, 76 N.Y. 2d 428). To establish standing, an Article 78 Petitioner must show injury-in-fact, and such injury must fall within the zone of interests to be protected by the statutes of ordinances at issue (see, Center Square Association, Inc. v. City of Albany Board of Zoning Appeals, 9 A.D. 3d 651)

Proximity to the site will not confer standing. Standing does not vest solely upon nearness of Petitioner's land to the proposed project; rather the owner was required to show specific harm that he would sustain separate from any general public harm (see, Oates v. Village of Watkins Glen, 290 A.D. 2d 758). In order for Petitioners to establish standing they must demonstrate that they are in close enough proximity to the land under consideration and that the effect of the proposed change is more than that suffered by the public generally (see, Rosch v. Town of Milton Zoning Board of Appeals, 142 A.D. 2d 765). In order to establish standing to pursue

a claim, a Petitioner is required to establish a specific injury "in some way different from the public at large" (see, Save Our Main Street Buildings v. Green County Legislature, 293 A.D. 2d 909, lv. den., 98 NY 2d 609). Standing cannot be based merely on a general claim that "a project would indirectly affect traffic patterns, noise levels, air quality and aesthetics throughout a wide area" (Matter of Oates v. Village of Watkins Glen, supra at 760-761; Society of Plastics, supra at 775).

All Petitioners reside at least 1,000 feet from the Project perimeter and even a greater distance from the Project structures. None of the Petitioners' properties adjoin or are contiguous to the lands of the Owners. Petitioners allege they have standing in this action and allege they would sustain injury due to 1) adverse impacts to peace and tranquility and changes in character of the community; 2) impacts from traffic and noise; 3) the height variance impacts their view and the potential for contamination of drinking water from petroleum emissions. On May 30, 2005 and June 30, 2005 noise tests was conducted at the property of Petitioners Lasky by the Owners. Music was played on the Project site and the Laskys allege they could hear the music playing on their property. The Laskys allege that although the music was not loud, it was disturbing.

Courts have held that "standing principles, which are in the end of matters of policy, should not be heavy-handed; in zoning litigation in particular, it is desirable

that land use disputes be resolved on their own mentis rather than by preclusive restrictive standing rules" (Sun-Brite Car Wash, Inc. v. Board of Zoning & Appeals of Town of N. Hempstead, 69 N.Y. 2d 406). Courts have also recognized standing when a party alleges an adverse impact on a scenic view from his or her residence (see, Save Our Main Street Buildings v. Greene County Legislature, supra at 908-909). A landowner has standing to challenge the issuance of negative declarations by Town Planning Board pursuant to SEQRA even though landowner did into live in the town but alleged he lived in the immediate vicinity of the project and it affected his scenic view (see, Matter of Steele v. Town of Salem Planning Bd., 200 A.D. 2d 870. lv. denied 83 N.Y. 2d 757). This Court determines Petitioners have standing as they allege they would sustain injury with their existing views from their respective properties." [A]esthetic or quality of life type of injuries have consistently been recognized by the Courts as a basis for standing" (Matter of Committee to Preserve Brighton Beach & Manhattan Beach v. Planning Commission of the City of New York, 259 A.D. 2d 26).

Respondents allege the complaint must be dismissed as the statute of limitations expired. In response to the Owners' application for a building permit on August 16, 2001, the Town Code Enforcement Officer denied the application and determined that a special use permit was required along with a height variance. The

review process for this Project went on for over four years with many hearings, comment periods and the finalization of the SEQRA process. A proceeding pursuant to CPLR Article 78 must be commenced within sixty days after the determination to be reviewed becomes final and binding upon the Petitioner (see, CPLR § 217; Zoning Ordinance of Chatham Article VII; Town Law §§ 274-a, 274-b). An Article 78 proceeding may be used only to challenge a final determination (see, CPLR 7801(1); Mahoney v. Pataki, 261 A.D.2d 898). For a determination to be final upon the Petitioner it must be clear that the Petitioner seeking review has been aggrieved by it (Matter of Martin v. Ronan, 44 N.Y. 2d 374). A SEQRA determination is usually considered to be a preliminary step in the decision making process and, therefore, is not ripe for judicial review until the decision making process has been completed (Young v. Board of Trustees of the Village of Blasdell, 221 A.D. 2d 975).

The determination of the Code Enforcement Officer in granting a special use permit was not the final administrative action in this proceeding. The final determination was on May 2, 2005 when the Town Zoning Board of Appeals approved the variance application to the Zoning Ordinance of the Town Code. That is the date when the proceeding became final and subject to the commencement of an Article 78 action within the appropriate statute of limitations. The petition is deemed timely.

It is well established that the very limited standard which governs judicial review of administrative determinations pursuant to Article 78 is whether the determination was arbitrary and capricious, and that 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" (Matter of Pell v. Board of Education, 34 N.Y. 2d 222, 231; Kenton Associates, Ltd. v. Division of Housing and Community Renewal, 225 A.D. 2d 349). Moreover, in order to maintain the limited nature of this review, it is incumbent upon the Court to defer to the agency's construction of the statutes and regulations that it administers as long as that construction is not irrational or unreasonable (Matter of Metropolitan Assocs. Ltd. Partnership v. New York State Division of Housing & Community Renewal, 206 A.D. 2d 251). The reviewing Court in a proceeding pursuant to CPLR Article 78 will not substitute its judgment for that of the local Town Board unless it clearly appears to be arbitrary, capricious, or contrary to the law (Matter of Unal v Peterson, 261 A.D. 2d 551; Matter of Baker v . Brownlie, 248 A.D. 2d 527).

Local boards have broad discretion in considering applications and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary or an abuse of discretion. (Ifrah v. Utschig, 98 N.Y. 2d 304; Matter of Sasso v. Osgood, 86 N.Y. 2d 374). Moreover, in order to maintain the limited nature of this

review, it is incumbent upon the Court to defer to the agency's construction of the statutes and regulations that it administers as long as that construction is not irrational or unreasonable (Salvati v. Eimicke, 72 N.Y. 2d 784). A Board's determination may not be set aside in absence of illegality, arbitrariness or abuse of discretion, and such determination will be sustained if it has a rational basis and is supported by substantial evidence (SoHo Alliance v. New York City Board of Standard and Appeals, 95 N.Y. 2d 437). The reviewing Court in a proceeding pursuant to CPLR Article 78 will not substitute its judgment for that of the local Board unless it clearly appears to be arbitrary, capricious, or contrary to the law (Massa v. City of Kingston, 235 A.D. 2d 947). Also, the Court must give deference to factual evaluations within an agency's area of expertise (Matter of City of Rensselaer v. Duncan, 266 A.D. 2d 657).

The decision of the ZBA to grant a variance for the construction of the performing arts center was not arbitrary or capricious. This application has been pending for over four years and has been subject to much scrutiny. Petitioners' claims that the Respondent did not comply with the Town's Comprehensive Plan is unfounded. The Plan encouraged and sought a strong need for "a wide variety of recreational and cultural opportunities" in the hamlets that comprised the Town. The Plan should be utilized as a guideline in developing a recreation scheme for the Town

of Chatham. The Town of Chatham and Columbia County have experienced many changes since the Plan was adopted in 1971. The DEIS stated that "The Town of Chatham is currently in the process of preparing a new comprehensive Plan and should not consider its current master plan (which is greater that 24-years old) an appropriate tool for measuring smart growth in the community".

The DEIS and FEIS concluded that there would be no adverse traffic impacts, no adverse noise impacts, no adverse visual impacts from the variance granted and no possibility of contamination of drinking water from petroleum emissions from vehicles. The ZBA determined that the variance would not be a detriment to the nearby properties because the variance did not change the character of the community and its impact is negligible. The ZBA concluded that there would be no undesirable change in the character of the neighborhood as a result of the variance. This Court is satisfied that the Respondents and the ZBA studied this variance application for many years and took the required "hard look" at the project and is in conformity with the NYS Environmental Quality Review Act. The Respondents conducted a full SEQRA review resulting in a positive declaration of the Project. Respondent have adequately demonstrated that the Project would exist in harmony with the other permitted usages in the RL-2 and H-1 zones. The determination of the zoning board to grant a variance had a rational basis and was supported by substantial evidence (Curigliano v. Zoning

Board of Appeals of City of New Rochelle, 18 A.D. 3d 750). Petitioners' application to vacate the decision of the ZBA is denied (Matter of Pecoraro v. Board of Appeals of Town of Hempstead, 2 N.Y. 3d 608). The Court concludes the decision of the ZBA and the Respondents to issue a variance to the Zoning Ordinance for this Project was not arbitrary or capricious and had a rational basis. Petitioner's application for a preliminary injunction is denied

Accordingly, the Article 78 petition is dismissed in its entirety. All papers shall be forwarded to the attorney for the Respondent Owners for filing and service. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

SO ORDERED.

Dated: December 12th, 2005
Hudson, New York

John G. Connor

JOHN G. CONNOR
Justice of the Supreme Court

Papers Considered:

Order to Show Cause dated May 31, 2005; Verified Petition dated May 31, 2005 with exhibits annexed; Affidavit of Gary and Leslie Katz dated May 30, 2005; Affidavit of Patricia and Terry Lasky dated May 30, 2005; Affidavit of Brian Schwab and Vasiliki Daskaloudi dated May 30, 2005; Affidavit of Jeffrey Damia and Jeanne Damia dated May 30, 2005; Affidavit of Marc S. Gertsman, Esq. dated May 31, 2005; Petitioners' Memorandum of Law dated May 31, 2005; Respondent Owners Verified Answer dated June 17, 2005; Affidavit of Brandee Nelson dated June 16, 2005 with exhibit annexed; Affirmation of Mary Elizabeth Slevin, Esq. undated; Affidavit of Scott P. Longstreet, Esq. dated June 17, 2005 with exhibits annexed; Respondent Owners memorandum of law dated June 17, 2005; Verified Answer of the Board of Appeals of the Town of Chatham Building Inspector Walter Simonsmeier dated June 21, 2005; Affidavit of Walter Simonsmeier dated June 17, 2005; Affidavit of David Everett dated June 22, 2005 with exhibits annexed; Reply Affidavit of Terry C. Lasky dated July 19, 2005; Reply Affidavit of Patricia Lasky dated July 19, 2005; Reply Affidavit of Marc S. Gertsman, Esq. dated July 21, 2005 with exhibits annexed; Petitioners' Memorandum of Law dated July 21, 2005.
Record submitted August 1, 2005.