

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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In the Matter of the Application of
GREENVILLE FIRE DISTRICT and BOARD OF
COMMISSIONERS OF THE GREENVILLE FIRE DISTRICT,

DECISION & ORDER

Petitioners,

Index No. 17-62209

For a Judgment Pursuant to Article 78 of the
Civil Practice Law and Rules

- against -

THE ZONING BOARD OF APPEALS OF THE TOWN OF
GREENBURGH, FORMATION-SHELBOURNE SENIOR
LIVING SERVICES, LLC and ALFRED H. KRAUTTER,

Respondents.

-----X
CACACE, J.

The following papers, numbered one (1) through eight (8) were read upon review of the instant amended verified petition for relief pursuant to article 78 of the Civil Practice Law and Rules (CPLR).

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Upon the foregoing papers, it is ordered as follows:

Procedural and Factual Background

The petitioners bring this proceeding by an amended verified petition submitted pursuant to article 78 of the CPLR, seeking (1) an order of this Court reversing, annulling and setting aside the Conditioned Negative Declaration (CND) adopted by the respondent Zoning Board of Appeals of the Town of Greenburgh (hereinafter, the ZBA) under article 8 of the Environmental Conservation Law, commonly referred to as the New York State Environmental Quality Review Act (hereinafter, SEQRA), on April 20, 2017 (hereinafter, the challenged CND decision) with regard to the proposed development of “The Solana Senior Living” assisted living facility (hereinafter, the Solana)¹ upon the property located at 448 Underhill Road in the Village of Scarsdale of the State of New York (hereinafter, the subject property), and (2) an order of this Court reversing, annulling and setting aside the decision reached by the respondent ZBA on July 13, 2017 which granted an area variance from Section 285-10(A)(4)(f)(1) of the Zoning Ordinance of the Town of Greenburgh (hereinafter, the Town Code) to decrease the required minimum lot area for the proposed development of the Solana upon the subject property from 4.00 to 3.79 acres, and granted a second area variance from Section 285-10 (A)(4)(f)(14) of the Town Code to increase the required minimum distance between the Solana and a state or county right-of-way from the required 200 to 6,025 feet (hereinafter, the challenged variance decision).

The petitioner Greenville Fire District is a duly constituted fire district situated within the Town of Greenburgh, whereas the petitioner Board of Commissioners of the Greenville Fire

¹As referenced within the challenged decision, the development of the proposed Solana assisted living facility would involve the construction of a four-story, eighty (80) unit, 59,097 sq. ft. structure with 56 off-street parking spaces upon the subject property.

District is the duly constituted governing body of the Greenville Fire District (hereinafter, collectively referred to as the GFD), which bears fire fighting and emergency service responsibilities for a geographic area situated entirely within the Town of Greenburgh. In substance, the petitioners jointly oppose the development of the subject property as an assisted living facility, and through the instant proceeding they have collectively challenged the respondent ZBA's initial issuance of the CND, as well as its subsequent decision to grant the two above-referenced area variances sought by respondent Formation-Shelbourne Senior Living Services, LLC (hereinafter, Formation-Shelbourne) in its capacity as the contract vendee of the subject property, with the support of respondent Alfred H. Krautter (hereinafter, Krautter) in his capacity as the contract vendor of the subject property.

Specifically, the operation of the Solana facility which is proposed for development upon the subject property is a permitted use of same upon the issuance of a Special Permit by the Town Board of the Town of Greenburgh (hereinafter, the Town Board) pursuant to Section 285-10(A)(4)(f) of the Town Code, which provides the authority for the issuance of such a Special Permit so long as specific criteria are satisfied, which include, *inter alia*, the requirements that the lot size be no less than four (4) acres (*see* Section 285-10[A][4][f][1]), and that the lot site be located within 200 feet of, and have access to, a state of county right-of-way (other than parkways or interstate highways) which must be direct or via a side street by other than a circuitous route (*see* Section 285-10[A][4][f][14]). Consequently, as the subject property is merely a 3.79 acre parcel, and as it is located 6,025 linear feet from the nearest conforming right-of-way, that being Central Avenue via Underhill Road, respondent Formation-Shelbourne sought to obtain variances from these two non-conforming elements of the subject property.

Pursuant thereto, respondent Formation-Shelbourne submitted its application seeking the above-referenced area variances on April 5, 2016 as a precedent step toward its anticipated efforts to obtain from the Town Board a Special Permit authorizing the proposed development and use of the subject property as an assisted living facility pursuant to Section 285-10A of the Code. Upon its consideration of respondent Formation-Shelbourne's variance applications, the respondent ZBA conducted public hearings thereupon on May 19, 2016, June 16, 2016, August 11, 2016, September 14, 2016 and November 17, 2016, which included the comments of interested members of the community in attendance. During a regularly scheduled ZBA meeting held on June 22, 2017, the respondent ZBA completed its consideration of respondent Formation-Shelbourne's two area variance applications and rendered the challenged variance decision upon taking and recording the vote of its members in attendance to approve the area variances sought. The minutes taken during the ZBA meeting on June 22, 2017, which included, *inter alia*, each attending ZBA member's name and respective vote upon respondent Formation-Shelbourne's two area variance applications for the subject property, and a decisional statement communicating the approval of same (hereinafter, the draft minutes), were subsequently filed with the Town of Greenburgh Town Clerk (hereinafter, the Town Clerk) on June 27, 2017. Thereafter, a document entitled "Certification of Decision" which memorialized the challenged variance decision in writing, including respective factual findings and legal conclusions, was filed with the Town Clerk on July 13, 2017. Subsequent to the issuance of the challenged variance decision on June 22, 2017, as well as the filing of the draft minutes from that ZBA meeting with the Town Clerk on June 27, 2017, and the filing of the Certification of Decision on July 13, 2017, the petitioners commenced this proceeding upon the filing of the instant CPLR

article 78 petition on August 11, 2017. Thereafter, the petitioners filed an amended petition on October 2, 2017 to supersede the previously filed CPLR article 78 petition without seeking leave of the Court pursuant to CPLR 3025(a).

In addition to the need for respondent Formation-Shelbourne to obtain a Special Permit from the Town Board in connection with its proposed development of the Solana facility upon the subject property, said respondent also needed to obtain site plan approval, as well as steep slope and wetland/watercourse permits from the Planning Board of the Town of Greenburgh (hereinafter, the Planning Board), which required SEQRA review. Initially, following respondent Formation-Shelbourne's filing of applications seeking the above-referenced permits and site plan approval on February 19, 2015, the Town Board announced its intent to be Lead Agency for the SEQRA review by resolution dated May 13, 2015, and later adopted a Negative Declaration thereunder on June 8, 2016. On July 19, 2016, the Town Board rescinded its previously adopted Negative Declaration under SEQRA in a written resolution which provided, *inter alia*, that the responsibility for a "determination of the type, extent, and adequacy of any and all SEQRA studies needed" was being transferred to the respondent ZBA. In response thereto, respondent Formation-Shelbourne commenced a CPLR article 78 proceeding under Westchester County Index No. 2654-2016 on August 18, 2016 to challenge the Town Board's rescission of its previous Negative Declaration under SEQRA, thereby seeking the reinstatement of same.

Although the CPLR article 78 proceeding filed under Westchester County Index No. 2654-2016 was ultimately dismissed by the Decision and Order of the Supreme Court, Westchester County (Zambelli, J.), as filed and entered on October 5, 2017, the respondent ZBA continued acting upon respondent Formation-Shelbourne's pending applications on December

15, 2016, when it declared its intent to be Lead Agency for the SEQRA review required in connection with respondent Formation-Shelbourne's Special Permit application. Thereafter, the respondent ZBA voted to be Lead Agency for SEQRA review and circulated a copy of a Conditional Negative Declaration (CND) on January 26, 2017 to interested parties including the petitioners. Upon reviewing the CND, the petitioners wrote to the respondent ZBA on February 10, 2017, asserting therein that they were "compelled to take issue with the CND insofar as it lacks adequate analysis, is based on erroneous assumptions, and proposes solutions based on unsound footing". In addition, the respondent ZBA entertained public comment concerning the CND from interested members of the community during its regularly scheduled meetings on February 16, 2017 and March 16, 2017, and held the record open for the receipt of additional written submissions until April 18, 2017. Thereafter, during its regularly scheduled meeting held on April 20, 2017, the respondent ZBA voted to approve the CND upon determining that the significant environmental impacts which might result from the proposed development of the Solana facility upon the subject property could be mitigated, and subsequently filed a written document entitled "State Environmental Quality Review CONDITIONED NEGATIVE DECLARATION Notice of Determination" with the Town Clerk on April 24, 2017, which memorialized the challenged CND decision in writing, including respective factual findings and legal conclusions. Subsequent to the issuance of the challenged CND decision on April 20, 2017, as well as the filing of same with the Town Clerk on April 24, 2017, the petitioners commenced this proceeding upon the filing of the instant CPLR article 78 petition on August 11, 2017.

In opposition to the instant amended petition, respondent Formation-Shelbourne filed a

motion seeking the dismissal of same pursuant to CPLR 3211(a)(2), (a)(3) and (a)(7), alleging that (1) the instant petition is untimely because it was not filed within 30 days of June 27, 2017, when the draft minutes taken during the ZBA meeting on June 22, 2017 were filed with the Town Clerk, (2) the petitioners lack capacity to maintain this proceeding, and (3) the petitioners lack standing to maintain the claims raised in this proceeding.

Additionally, and in further opposition to the instant amended petition, the respondent ZBA filed a motion seeking the dismissal of same pursuant to CPLR 3211(a)(1), (a)(3) and (a)(5), alleging that (1) upon the first cause of action challenging the respondent ZBA's variance decision, the instant petition is untimely because it was not filed within 30 days of June 27, 2017, when the minutes taken during the ZBA meeting on June 22, 2017 were filed with the Town Clerk, (2) upon the second cause of action challenging the respondent ZBA's CND decision, the instant petition is untimely because it was not filed within 30 days of April 24, 2017, when the "State Environmental Quality Review CONDITIONED NEGATIVE DECLARATION Notice of Determination" was filed with the Town Clerk, (3) the petitioners lack standing to maintain the claims raised in this proceeding, and (4) the petitioners lack the capacity to maintain this proceeding.

Lastly, and in further opposition to the instant petition, respondent Krautter filed a motion seeking the dismissal of same pursuant to CPLR 3211(a)(2), 3211(a)(3) and 3211(a)(7), alleging that (1) the instant petition is untimely because it was not filed within 30 days of June 27, 2017, when the minutes taken during the ZBA meeting on June 22, 2017 were filed with the Town Clerk, and (2) the petitioners lack standing to maintain the claims raised in this proceeding.

In opposition to the respondents' respective motions to dismiss, the petitioners argue that

(1) the instant petition was timely filed on August 11, 2017 due to the insufficiency of the respondent ZBA's filing of the draft minutes on June 27, 2017 to commence the running of the limitations period on that date, (2) the petitioners have standing, as the harm they are alleged to suffer as a result of the challenged decisions is different than that suffered by the public at large, and because such alleged harm is within the zone of interests to be protected by SEQRA and by those provisions of the Town Code from which the challenged variances were granted, and (3) the petitioners possess the capacity to maintain this proceeding based upon the authorization of their respective Boards of Directors

Discussion/Legal Analysis

Upon consideration of a motion to dismiss brought pursuant to CPLR 3211, it is well-settled that the pleadings are to be liberally construed by the reviewing court, that the alleged facts are to be accepted as true, and every favorable inference possible must be afforded to the petitioner (*see Nonnon v City of New York*, 9 NY3d 825). Furthermore, in connection with the reviewing court's examination of the pleadings upon such a motion, the factual allegations raised therein must be accepted as true and must be viewed in the light most favorable to the petitioner (*see Lawrence v Miller*, 11 NY3d 588; *see also Leon v Martinez*, 84 NY2d 83, 87), as the court's sole inquiry shall concern whether the facts alleged fit within any cognizable legal theory, irrespective of the level of evidentiary support proffered (*see People v Coventry First LLC*, 13 NY3d 758). However, the Court also recognizes that "bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration" (*Lutz v*

Caracappa, 35 AD3d 673, 674, quoting *Daria v Masucci*, 230 AD2d 764, 765).

Upon first considering the respondents' respective pre-answer motions to dismiss the instant proceeding due to the alleged untimely commencement of same by the petitioners, the Court notes that a proceeding seeking review of a determination made by a zoning board of appeals pursuant to CPLR article 78 "shall be instituted within thirty days after the filing of a decision of the board in the office of the town clerk" (Town Law § 267-c[1]). As the respective motions to dismiss filed by the individual respondents challenge the timeliness of the petitioners' commencement of this proceeding which seeks to annul, reverse and set aside both the respondent ZBA's issuance of the herein challenged CND under SEQRA, as well as the respondent ZBA's issuance of the two herein challenged area variances, the Court must initially determine the commencement date of the running of the applicable limitations period with respect to each of these challenged determinations, and then must determine whether the petitioners' commencement of this proceeding was timely within the applicable limitations period. In this regard, as it is undisputed between the parties that the instant proceeding to challenge both of the ZBA's above-referenced determinations was commenced upon the filing of the original notice of petition and verified petition on August 11, 2017, the Court must narrowly direct its focus upon determining when the applicable 30 day limitations period had commenced with respect to each of the respondent ZBA's two challenged determinations.

Turning first to consider the respondent ZBA's challenged CND decision, the respondents' argue that the instant proceeding is untimely as to same because the original petition was not filed until August 11, 2017, well beyond 30 days after the respondent ZBA had filed the written CND decision, entitled "State Environmental Quality Review CONDITIONED

NEGATIVE DECLARATION Notice of Determination”, with the Town Clerk on April 24, 2017. The petitioners oppose dismissal upon the respondents’ timeliness challenge through their argument that the limitations period did not begin to run with respect to the CND decision upon the filing of same with the Town Clerk on April 24, 2017 because it was not ripe for review at that time, and did not become so until the respondent ZBA had resolved respondent Formation-Shelbourne’s two area variance applications upon the filing of its written Certification of Decision with the Town Clerk on July 13, 2017. In support of this proposition, the petitioners argue that the nature of the CND decision, as a SEQRA determination, forestalled the ripeness of same for judicial resolution until the respondent ZBA had rendered a final decision upon the ultimate land use application brought by respondent Formation-Shelbourne, that being the two above-referenced area variance applications.

Although the respondent ZBA argues against the petitioners’ delayed ripeness argument in favor of its own view that the CND decision was ripe for review immediately upon the respondent ZBA’s filing of the written “State Environmental Quality Review CONDITIONED NEGATIVE DECLARATION Notice of Determination” with the Town Clerk on April 24, 2017, the Court notes that in the context of land use applications, initial determinations such as those attendant to the issuance of a negative or positive declaration pursuant to SEQRA, *inter alia*, must oftentimes be made prior to addressing and/or deciding the application for the ultimate land use relief sought. Noting further that such SEQRA determinations are preliminary to the government’s ultimate determination of the land use application under consideration, application of the ripeness rationale to the SEQRA process was clearly and succinctly summarized by the Appellate Division, Second Department in *Matter of Young v Bd. of Trustees of Vil. of Blasdell*,

when it observed that the “SEQRA determination [has] usually [been] considered to be a preliminary step in the decision-making process and, therefore, . . . not ripe for judicial review until the decision-making process has been completed” (*Matter of Young v Bd. of Trustees of Vil. of Blasdell*, 221 AD2d 975, 977, *aff’d* 89 NY2d 846). Consistent therewith, it must be recognized that the government’s issuance of a SEQRA findings statement during the pendency of an ultimate land use application will not be considered ripe for adjudication due to the absence of a resulting injury to the petitioner, unless and until an adverse final determination upon that ultimate land use application is made by the government (*see Matter of Patel v Board of Trustees of the Inc. Vil. of Muttontown*, 115 AD3d 862, 864; *see also Matter of Wallkill Cemetery Assn., Inc. v Town of Wallkill Planning Bd.*, 73 AD3d 1189, 1190; *Matter of Eadie v Town Bd. of Town of N. Greenbush*, 7 NY3d 306, 317; *Matter of Guido v Town of Ulster Town Bd.*, 74 AD3d 1536, 1537; *Matter of Southwest Ogden Neighborhood Assn v Town of Ogden Planning Bd.*, 43 AD3d 1374, 1374-1375).

Consequently, this Court finds that the respondent ZBA’s CND decision, properly characterized as a SEQRA findings statement, was not ripe for judicial review under article 78 of the CPLR when the respondent ZBA filed same with the Town Clerk on April 24, 2017, rather its ripeness for judicial review remained contingent at that time upon an adverse final determination having been made by the respondent ZBA upon the ultimate land use application with which it was connected and associated. In this regard, the Court notes that the petitioners have argued that the ultimate land use application which needed to be resolved before the actual and concrete injury resulting from the adverse CND decision was visited upon them, was the respondent ZBA’s determination of respondent Formation-Shelbourne’s two then-pending area

variance applications. As the Court has rejected the respondents' argument that the limitations period for judicial review of the respondent ZBA's CND decision had commenced on April 24, 2017, owing to the lack of ripeness of same for judicial review at that time, the Court will consider the limitations period applicable to the respondents ZBA's CND decision to have commenced upon the same date as that which applies to the respondent ZBA's determination of respondent Formation-Shelbourne's two area variance applications, as urged by the petitioners. Accordingly, the Court's determination regarding the date of commencement of the applicable 30-day limitations period for the petitioners' challenges to both the respondent ZBA's CND decision and its variance decision specifically rests upon ascertaining the commencement date of the latter decision, and the Court shall conduct its analysis accordingly.

Initially, the Court's scrutiny of the record reveals that it is undisputed between the parties that (1) the respondent ZBA rendered the challenged variance decision upon a majority vote of its members on June 22, 2017, (2) the respondent ZBA filed the draft minutes from its meeting on June 22, 2017, appearing as a two-page document entitled "Meeting Results June 22, 2017", with the Town Clerk on June 27, 2017, and (3) the filed draft minutes contained and reflected the names of each ZBA member in attendance, their respective votes upon the two area variance applications pertaining to the subject property, and a decisional statement communicating the approval of those variance applications. With specific regard to the respondent ZBA's determination granting respondent Formation-Shelbourne's two area variance applications, the respondents contend that the 30-day limitations period established by Town Law § 267-c(1) commenced to run on June 27, 2017 when the draft minutes of the ZBA's meeting of June 22, 2017 were filed in the office of the Town Clerk, whereas the petitioners

argue that the limitations period did not commence until the respondent ZBA filed its written Certification of Decision on July 13, 2017.

Insofar as the commencement of the limitations period is concerned, this Court finds it well-settled that the filing of the minutes of a zoning board meeting with the office of the town clerk commences the running of the limitations period, irrespective of the nature of those minutes as either verbatim, draft or otherwise, so long as the filing sets forth the vote of each ZBA member by name and the ultimate decision reached by the ZBA upon the application (*see Matter of Kennedy v Zoning Bd. of Appeals of Vil. of Croton-on-Hudson*, 78 NY2d 1083, 1084-1085; *see also Matter of 92MM Motel, Inc., v Zoning Bd. of Appeals of Town of Newburgh*, 90 AD3d 663, 664; *Matter of Mosher v Town of Southport Zoning Bd. of Appeals*, 5 AD3d 840, 841; *Matter of Sullivan v Dunn*, 298 AD2d 974; *Matter of Casolaro v Zoning Bd. of Appeals of Vil. of Elmsford*, 200 AD2d 742). Consequently, although the petitioners argue that the draft minutes of the June 22, 2017 meeting which were filed with the Town Clerk on June 27, 2017 are not in the proper format, or otherwise do not contain the necessary information to commence the running of the limitations period, this Court finds that the respondent ZBA's filing of those draft minutes with the Town Clerk was sufficient to commence the running of the limitations period prescribed by Town Law § 267-c(1), as those draft minutes properly reflect the vote of each named member of the ZBA upon respondent Formation-Shelbourne's two area variance applications, and a decisional statement communicating the approval of same by that vote (*see Matter of Kennedy v Zoning Bd. of Appeals of Vil. of Croton-on-Hudson*, 78 NY2d at 1084; *see also Matter of 92MM Motel, Inc., v Zoning Bd. of Appeals of Town of Newburgh*, 90 AD3d at 664; *Matter of Mosher v Town of Southport Zoning Bd. of Appeals*, 5 AD3d at 841; *Matter of Sullivan v Dunn*, 298 AD2d

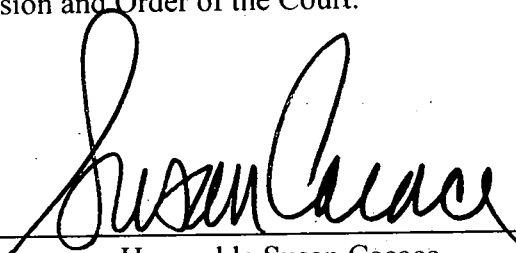
at 976; *Matter of Allens Cr./Corbett's Glen Preservation Group v Town of Penfiled Planning Bd.*, 249 AD2d 921, 922; *Matter of Bauman, Taub & Von Wettberg v Village of Hamilton Zoning Bd. of Appeals*, 202 AD2d 840, 841; *Matter of Casolaro v Zoning Bd. of Appeals of Vil. of Elmsford*, 200 AD2d at 742).

Accordingly, having considered and rejected the petitioners' challenge to the sufficiency of the content of the draft minutes, as filed with the Town Clerk on June 27, 2017, to commence the running of the applicable 30-day statute of limitations period prescribed by Town Law § 267-c(1), this Court finds that the petitioners' commencement of this proceeding on August 11, 2017 was untimely as having been made more than 30 days subsequent to the commencement of the applicable limitations period.

Based upon the foregoing, the respondents' respective motions to dismiss the instant amended verified petition pursuant to CPLR 3211(a)(5) and 7804(f) are granted due to the petitioners' untimely commencement of this proceeding in violation of the applicable 30-day limitations period prescribed by Town Law § 267-c(1), and therefore, this proceeding is hereby dismissed.

The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York
December 7, 2017



Honorable Susan Cacace
Acting Justice of the Supreme Court

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