

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

-----X
In the Matter of RUPCO, INC.,

Petitioner,

DECISION/ORDER

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

Index No. 18-3260
R.J.I. No. 55-18-1389
Richard Mott, J.S.C.

-against-

CITY OF KINGSTON PLANNING BOARD,

Respondent.
-----X

Motion Return Date:

November 19, 2018

Final submission received January 4, 2019

APPEARANCES:

Petitioner:

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Mott, J.

Petitioner (“Rupco”) in this Article 78 proceeding challenges Respondent City of Kingston Planning Board’s (Board) denial of its site plan (SP) and special use permit (SUP) applications (collectively, applications) as arbitrary and capricious and unsupported by substantial evidence, and seeks an order directing approval of approve same, subject to any appropriate conditions. The Board opposes.

Background

Rupco, a not-for-profit affordable housing agency, applied to develop a 14.86-acre site, of which 1.7 acres will be disturbed and approximately nine acres will remain wooded, in this R-6 zoning district which permits multi-family housing, (project). It proposes to create 66 studio and one-bedroom housing units, with common areas for socializing and recreation to benefit vulnerable seniors fifty-five years of age and older facing life challenges, such as chronic homelessness, serious mental illness or substance use disorders or who are veterans with disabilities. The project posits the rehabilitation of an existing vacant historic landmark building to create 34 units and a new construction to house the other 32. It includes 24-hour front-desk staffing, an on-site property manager, licensed practical nurse services and a range of supportive services, including case management and transportation options, with Rupco’s employees to provide maintenance services.

In May 2017, the Board issued a negative State Environmental Quality Review Assessment (SEQRA) declaration (negative declaration) as lead agency following a February 2017 public hearing and with the input of, *inter alia*, the City of Kingston’s (City) Water and Sewer Departments and the Ulster County Planning Board (UCPB) as interested

agencies. The UCPB commended Rupco for its proposal, noting that it addressed a critical housing need identified in the City's Comprehensive Plan (City Plan).

The negative declaration issued contingent upon approval of Rupco's application to the City of Kingston's Common Council's for a zoning change from RR to R-6,¹ and a connection to the city sewer system in accordance with City standards. Upon the UCPB's recommendation, Rupco agreed to extend an internal sidewalk to the recently-created crosswalk at Flatbush and Eastchester Avenues bordering the property, which intersection is controlled by a traffic light.

Thereafter, the Board held three public hearings on Rupco's applications. Public comment was received favoring the project citing, *inter alia*, the recognized need for senior supportive housing, Rupco's positive track record in developing and maintaining affordable housing and the concomitant benefits to the community. Those against cited, *inter alia*, safety and public welfare concerns posed by the project's intended beneficiaries and infrastructure issues relating to sewage discharge, stormwater management, vehicular and pedestrian traffic safety, integration of the project residents into the community and concerns about the disproportionate concentration of affordable housing developments in the City, including three in the immediate area, as opposed to other areas of Ulster County. At the third hearing on August 20, 2018, the Board voted three to two against a previously drafted resolution to approve the applications without stating reasons therefor.

On September 17, 2018, the date the instant petition was filed, the Board voted on a further resolution to deny Rupco's applications, which passed by three to one. At the

¹ The City of Kingston's Common Council approved said change by majority vote and a petition challenge thereto was subsequently annulled by this Court. See, *Rupco v. City of Kingston and City of Kingston Common Council*, Ulster County Index No. 17-2185, Decision and Order, dated December 19, 2017.

direction of the Board's chair, voting members were to provide reasons for their decision and only those who participated in the prior vote denying the applications were allowed to cast votes, resulting in four instead of five total votes, due to the absence of one member.

Those voting no stated continuing concerns about population density, zoning, infrastructure and environmental issues. One member explained that his vote was based upon the same reasons he opposed the negative declaration and another asserted that the project was contrary to the City Plan, because the architecture of the new building was non-traditional and the project location does not promote walkability since pedestrian and bicycle access are precluded due to the lack of sidewalks.² The sole member voting in favor of approving the applications stated that the project complies with the zoning law and that the Board has the power to approve it.

Parties' Contentions

RUPCO claims that the first vote must be annulled as arbitrary and capricious because no reasons were given for the determination and it lacks a basis in substantial evidence. Instead, it insists that the Board improperly succumbed to generalized community opposition to the project's intended beneficiaries. In support, Rupco cites the repeated general public comment asserting that the project's beneficiaries pose a danger to the community.

Further, it maintains that the Board's belated reasons for rejecting the applications are equally infirm, as they rely upon improper considerations and/or contradict the negative declaration's findings that the project conforms to the City Plan and satisfies

² Reference was also made to the project's "suggestion of commercial use", but it is unclear to what this objection refers.

statutory requirements for SPs and SUPs as to compatibility with surrounding structures; parking requirements; pedestrian and vehicular traffic safety despite the absence of sidewalks in the area; stormwater prevention plan (SWPP); and as to water supply and sewage disposal. Rupco specifically cites the Board's conclusions upon its negative declaration that the proposed project will generate reduced traffic as compared to its previous use; that the SWPP, accepted by the NYS Department of Environmental Conservation, will reduce stormwater flow and not cause significant adverse changes in ground or surface water quality or quantity; and, that the sewer connection to the City system as proposed by the City Engineer, is adequate. Finally, Rupco insists that population density is not a consideration under the City of Kingston Zoning Code (Code) and therefore, cannot serve as a basis for denial, although it refers that the negative declaration considers the planned density of the project as being appropriate to the site and without any adverse environmental impact.

In further support, Rupco cites the reports of its engineer, Dennis M. Larios' (Larios), regarding traffic, stormwater management, water supply and sanitary sewer conditions and the City Engineer's finding of ample capacity for the project's estimated 8,170 gallon per day sewer-flow and an adequate connection to the City's sewer system via a pump station, following a site inspection and review of pump-run times and data and maintenance history, noting that all components are in good working order. Moreover, Rupco insists that all the objections as to pedestrian and vehicular traffic safety, sidewalks and sewer and number of housing developments in the area upon which the Board purportedly relies had been voiced and considered at the February 2017 public hearing conducted prior to issuing its negative declaration, and that no new evidence has been

presented rebutting its conclusions or the expert reports upon which it relied. Finally, Rupco cites its detailed application outlining the project, its history of responsible project development and detailed comments responding to resident concerns, including listing transportation options, project infrastructure and services designed to integrate residents. Thus, Rupco contends that because the project meets legislative zoning requirements, the Board must be directed to approve the applications, subject only to any reasonable conditions and restrictions, pursuant to the City's zoning laws and Gen. City Law §§ 27-a and 27-b, as remittal for further consideration would not overcome the Board's improper reliance on general community opposition.

The Board contends that this proceeding should be treated as an appeal from the second vote, that the record supports its factual determination that pre-existing and undisputed infrastructure and traffic conditions in the project's vicinity would likely be exacerbated by the addition of sixty-six units of housing, that Rupco failed to adequately address those concerns and that the Board appropriately considered factors referred to in Code §§ 405.30 and 405.32, regarding SPs and SUPs, respectively, and credited local residents' knowledge of the neighborhood and their unaddressed concerns over Rupco's deficient presentation.

Specifically, it cites the concerns about integration of the facility's residents into the community where there are no sidewalks, stores or transportation proximate to the site, and as to pedestrian safety given the proximity of Flatbush Avenue, a major thoroughfare lacking sidewalks. In addition, it refers to the concern about adding to the three existing housing complexes in the area and the resulting impact on City services. In support, it cites

comments by neighborhood residents with personal knowledge it insists, on the record here, are sufficient to support its rationale, to wit:

1. a retired City sewer department employee who rejects the City Engineer's report asserting that Clifton Avenue residents will get sewage back-up when the pump house doesn't work which happens four to five times a year, requiring a clean out;
2. concern that there is no sidewalk within two to three miles of the project thereby increasing pedestrian traffic at the Eastchester-Flatbush intersection and along Flatbush Avenue proximate to the project, rendering it dangerous for existing residents and the project beneficiaries due to additional pedestrian and vehicular traffic;
3. concerns of additional stress on public services including fire, police and building and safety departments;
4. a resident's assertion that the stormwater report establishes insufficient filtration practices due to bedrock depth at the site, and asserting said plans are incomplete;

In conclusion, the Board avers that Rupco does not deny the need for sewer repairs, stating only that it would work with the City to mitigate acknowledged issues, that the lack of sidewalks is evidenced in the site plan, as is the existence of the other area housing projects, all of which are proper considerations regarding the public health, safety and welfare and comfort and convenience of the public properly considered in assessing a site plan. Thus, the Board contends that its determination is rationally based upon substantial evidence.

Discussion

Judicial Review

The arbitrary and capricious standard "relates to whether a particular action should have been taken or is justified...and whether the administrative action is without foundation in fact." *Pell v Bd. of Ed. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974] (internal citations omitted).

Review of administrative action upon the arbitrary and capricious standard, after a hearing that does not include the formal taking of testimony, requires a court to “consider substantial evidence only to determine whether the record contains sufficient evidence to support the rationality of the board’s determination.” *Fildon, LLC v Planning Bd. of Inc. Vil. of Hempstead*, 164 AD3d at 503 (internal citations and quotations omitted) (planning board has considerable discretion); *Sasso v Osgood*, 86 NY2d 374, 385 [1995]. However, the administrative authority must state the basis of its findings with sufficient clarity to permit judicial review. *Rochdale Mall Wines & Liquors, Inc. v State Liq. Auth.*, 29 AD2d 647, 648 [2d Dept 1968], *affd*, 27 NY2d 995 [1970].

Further, although a SEQRA determination may not serve to adjudicate compliance with municipal zoning requirements, *WEOK Broadcasting Corp. v Planning Bd. of Town of Lloyd*, 79 NY2d 373, 382 [1992]; *Frigault v Town of Richfield Planning Bd.*, 128 AD3d 1232, 1233 [3d Dept 2015] (board failed to comply with the zoning ordinance when it failed to consider the eight conditions for special use permit review, despite an adequate negative declaration) a body’s determination that fails to adhere to its own precedent or to state any reason for “a different result on essentially the same facts is arbitrary and capricious,” *Corona Realty Holdings, LLC v Town of N. Hempstead*, 32 AD3d 393, 395 [2d Dept 2006] even where “there may be substantial evidence in the record to otherwise support the determination.” *Id.*

Special Use Permit and Site Plan Review

“A special use allowed under a zoning law by permit ‘is tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood.” *Blanchfield v Town of Hoosick*, 149 AD3d 1380, 1383 [3d Dept 2017].

Thus, an applicant for a special use permit “need only show that it has complied with every legislatively imposed condition on the permitted use,” *Nathan v Bd. of Appeals of Town of Hempstead*, 125 AD3d 866, 866 [2d Dept 2015] (internal citations and quotations omitted); *Frigault v Town of Richfield Planning Bd.*, 128 AD3d at 1234; see also, General City Law §§ 27-a, 27-b (board shall have the authority to impose such reasonable conditions and restrictions as are directly related and incidental to the proposed SP or SUP) and a denial may not be based upon generalized community objections contrary to expert opinion. *Blanchfield v Town of Hoosick*, 149 AD3d 1380, 1383 [3d Dept 2017]; *Retail Prop. Tr. v Bd. of Zoning Appeals of Town of Hempstead*, 98 NY2d 190, 196 [2002] (expert opinion regarding traffic patterns, when presented, may not be disregarded in favor of generalized community opposition); cf., *Ifrac v Utschig*, 98 NY2d 304, 308 [2002] (determination on variance application was supported by more than generalized objections where it was based upon objective and largely undisputed factual evidence in the form of oral and written testimony by neighbors with actual knowledge of the conditions and corroborated by documentary evidence supplied to the board). Indeed, objections to a permitted use require “specific, reasonable grounds (supported by evidence) for concluding that the use, though permitted, is not desirable at the particular location,” based upon its zoning ordinance. *Fischlin v Bd. of Appeals of Town of Philipstown*, 176 AD2d 50, 53 [3d Dept 1992], citing *Mkt. Sq. Properties, Ltd. v Town of Guilderland Zoning Bd. of Appeals*, 109 AD2d 164, 166 [3d Dept 1985], *affd*, 66 NY2d 893 [1985].

City Zoning Requirements

When considering a SUP, the Board must consider public health, safety and welfare, in light of the following objectives:

1. Ready accessibility to structures for fire and police protection;
2. That the proposed use as to location, size and character is, in general, in harmony with the appropriate and orderly development of the district; and,
3. As to sites located in a residential district,
 - a. That its location, size, nature and intensity of the use and its layout will not be hazardous to pedestrian and vehicular traffic to and from same or the use and assembly of persons in connection therewith, or conflict with the normal traffic of the neighborhood; and,
 - b. that the nature and height of buildings, walls and fences and the nature and extent of landscaping and screening will not hinder appropriate development and use of adjacent land or diminish the value thereof. Code § 405-32

Statutory site plan considerations are also assessed as to public health safety and welfare, including comfort and convenience to the public and the development's residents, based upon factors such as whether there are adequate internal sewer and water systems; connections to municipal systems in accordance with City standards; whether the project is in conformance with relevant portions of the City Plan; the structural design is compatible with the design of surrounding structures as to scale, mass, height and location; whether traffic access is adequate regarding, *inter alia*, visibility and alignment and other similar safety considerations; whether there is adequate parking; and, whether all parking or other service areas are adequately screened. Code § 405.30.

Here, the Board's determination is arbitrary and capricious because it contradicts its prior determinations without explanation, albeit as SEQRA lead agency, that the project is in conformity with the City Plan, demonstrates design compatibility with surrounding structures, does not compromise pedestrian or traffic safety or increase vehicular traffic over prior uses, has adequate water and sewer systems and proposed sewer hook-up, and that the DEC-approved SWPP establishes a reduced stormwater flow. The Board fails to

explain its departure from these conclusions based upon the same information and concerns expressed prior to rendering its negative declaration, or to establish that the proposed population density, which is not listed as a consideration in the City's zoning ordinance, would be more onerous under the project than any other residential development of this site. *Corona Realty Holdings, LLC v Town of N. Hempstead*, 32 AD3d at 395; *SCI Funeral Services of New York, Inc. v Planning Bd. of Town of Babylon*, 277 AD2d 319 [2d Dept 2000] (planning board acted arbitrarily and capriciously when it ignored its own SEQRA finding that the business would have no significant traffic impact and then denied the application due to traffic considerations); *Claim of Martin*, 70 NY2d 679, 681 [1987] (absent explanation, an administrative agency decision which, on essentially the same facts underlying a prior determination, reaches a contrary conclusion, is arbitrary and capricious); *Serota v Town Bd. of Town of Oyster Bay*, 191 AD2d 700, 701 [2d Dept 1993] (denial of a special use permit based on traffic congestion may be arbitrary and capricious unless the evidence establishes that the proposed use would have a greater impact on traffic than would other unconditionally permitted uses and no such consideration was demonstrated, rendering the determination arbitrary and capricious); see also, *Kinderhook Dev., LLC v City of Gloversville Planning Bd.*, 88 AD3d 1207, 1209 [3d Dept 2011] (where respondent relied upon generalized community objections rather than unchallenged empirical evidence, its determination was not supported by substantial evidence).

Indeed, one member substantiated his vote by directly repudiating the negative declaration, stating that he believes "there is still significant environmental impacts that this project will have on the neighborhood," thereby indicating a position at odds with the Board's prior determination without citing new support. *Ramapo Pinnacle Properties, LLC v*

Vil. of Airmont Planning Bd., 145 AD3d 729, 731 [2d Dept 2016] (the only record evidence concerning traffic and safety issues cited by the Board to deny the special use permit was the conclusory opposition of neighboring residents, which was not supported by any of the expert consultants and was contradicted by the Board's, negative SEQRA declaration, rendering the permit denial arbitrary and capricious); see also, 6 NYCRR § 617.7(f) (rescission of a negative declaration must be based upon newly discovered information or changes in circumstances not previously considered, leading the agency to determine that a significant adverse environmental impact may result and such action requires notice to the applicant and an opportunity to respond); *Veysey v Zoning Bd. of Appeals of City of Glens Falls*, 154 AD2d 819, 820 [3d Dept 1989] (no substantial evidence to support SUP denial where report of petitioner's traffic expert as to inconsequential effect of project is totally uncontradicted); *Van Euclid Co. v Sargent*, 97 AD2d 913, 915 [3d Dept 1983] (board acted arbitrarily and capriciously in relying on evidence of traffic volume counts by residents unsupported by expert proof). Moreover, the Board failed to consider whether the proposed use establishes a greater impact on pedestrian traffic than other permitted uses on this site. *Serota v Town Bd. of Town of Oyster Bay*, 191 AD2d at 701.

Thus, unlike cases cited by the Board, which involve expert studies corroborating residents' traffic complaints, *Stackhouse v Planning Bd. of Town of Cortlandt*, 7 Misc 3d 1011(A) [Sup Ct 2005] or are otherwise inapposite, *Caspian Realty, Inc. v Zoning Bd. of Appeals of Town of Greenburgh*, 68 AD3d 62, 77 [2d Dept 2009] (concerning the balancing of factors for the grant of a *variance* and deceptive conduct by applicant)³ here the Board's

³ The Board also cites *Riverhead PGC, LLC v Town of Riverhead*, 21 Misc 3d 1112(A) [Sup Ct 2008], where the court, *inter alia*, overturned a zoning authority's grant of six variances and a site plan approval based upon community objections. However, said determination is no authority as it pertained to variances which have a

determinations, which lack a clearly stated rationale, are arbitrary and capricious. *Claim of Martin*, 70 NY2d 679. See, e.g., *Hudson Canyon Const., Inc. v Town of Cortlandt*, 262 AD2d 484, 485 [2d Dept 1999] (local opposition improper ground to deny site plan to operate an otherwise conforming use); *C & B Realty Co. v Town Bd. of Town of Oyster Bay*, 139 AD2d 510, 511 [2d Dept 1988] (record did not support general objections, albeit based upon personal knowledge of the objectors, that property values would decline or that the health, welfare and comfort of the area residents would be threatened and a determination on such a basis would undermine the previously approved environmental impact ruling that the project was compatible with its surroundings, rendering the determination arbitrary and capricious). However, this lack of clarity does not necessarily preclude a basis in substantial evidence. *Corona Realty Holdings, LLC v Town of N. Hempstead*, 32 AD3d 393, 395 [2d Dept 2006].

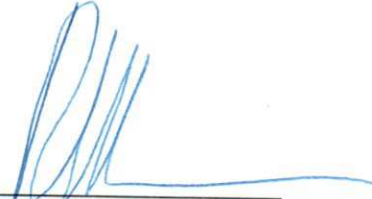
Accordingly, the petition is granted to the extent of annulling the Board's August 20, 2018 and September 17, 2018 determinations rejecting/denying Rupco's SP and SUP applications, respectively, and the matter is remitted to the Board for further proceedings consistent herewith, including further inquiry and/or the imposition of any reasonable conditions and restrictions, pursuant to the City's zoning laws and Gen. City Law §§ 27-a and 27-b.

This constitutes the Decision and Order of this Court. The Court is forwarding the original Decision and Order directly to the Petitioner, who is required to comply with the provisions of CPLR §2220 with regard to filing and entry thereof. A photocopy of the

higher standard and was, in any event, reversed for petitioner's lack of standing. *Riverhead PGC, LLC v Town of Riverhead*, 73 AD3d 931 [2d Dept 2010].

Decision and Order is being forwarded to all other parties who appeared in the action. All original motion papers are being delivered by the Court to the Supreme Court Clerk for transmission to the County Clerk.

Dated: Hudson, New York
March 15, 2019



RICHARD MOTT, J.S.C.

Papers Considered:

1. Notice of Petition and Memorandum of Law of John J. Henry, Esq., and Michael Moriello, Esq., and Verified Petition of John J. Henry, Esq., dated September 17, 2019 with Exhibits A-O;
2. Verified Answer and Memorandum of Law of Kevin Bryant, Esq., and Daniel Gartenstein, Esq., Assistant Corporation Counsel, dated November 8, 2018 and Certified Record of the City of Kingston Planning Board with List of Submissions;⁴
3. Reply Memorandum of Law of and Michael Moriello, Esq., Reply Affirmation of John J. Henry, Esq., with Exhibits A-F and Affidavit of Dennis M. Larios, P.E. dated November 19, 2018, with Exhibits A-C.

⁴ The certified record, which consists of thousands of pages and is not indexed, and the accompanying List of Submissions are not bate-stamped and lack page numbers.