

STATE OF NEW YORK
SUPREME COURT

ULSTER COUNTY

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**SOUTHERN REALTY
AND DEVELOPMENT, LLC. et al**

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Petitioner(s),

**DECISION & ORDER
ON MOTION**

-against-

Index No.: EF2022-253

**TOWN OF HURLEY and PLANNING BOARD OF
THE TOWN OF HURLEY,**

Respondent(s),

Supreme Court, Ulster County
Present: Hon. Kevin R. Bryant, J.S.C.

Appearances:

Petitioner(s):

John Joseph Henry / Anna V. Pinchuk
WHITEMAN OSTERMAN & HANNA LLP
One Commerce Plaza, 19th Floor
Albany, NY 12260

Respondent(s):

Daniel Cade Stafford
MCCABE & MACK, LLP
63 Washington St.
Poughkeepsie, NY 12601

Bryant, K.:

On or about February 9, 2022, a petition was filed by Southern Realty and Development, LLC and Brown Cow Rental, LLC (hereinafter referred to as "Plaintiffs") pursuant to Article 78 of the CLPR alleging, *inter-alia*, that the Planning Board of the Town of Hurley's denial of site plan approval for proposed development at the corner of Routes 28 and 375 in the Town of Hurley, County of Ulster, was arbitrary, capricious and contrary to law and requesting that this Court direct said Board to grant site plan approval; and

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A verified answer and memorandum of law having been submitted to the Court by the Town of Hurley and the Planning Board of the Town of Hurley (hereinafter referred to as “Defendants”); and

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An administrative record having been submitted to the Court¹.

NOW, it is hereby ORDERED, that the petition is hereby granted to the extent that the determination is hereby vacated, and the matter is remanded for further proceedings consistent herewith².

Findings of Fact

On or about August 17, 2020, an application was filed to obtain site plan approval from the Hurley Planning Board for a proposed drive-thru Dunkin Donuts at the intersection of NYS Route 28 and NYS Route 375 in the Town of Hurley³. Over the next seventeen months, numerous memoranda and updates were sent to the Planning Board by Nelson Pope Voorhis (hereinafter referred to as “NP”) regarding traffic and other concerns. Traffic Impact Studies, Engineering Reports and comments from the Architectural Review Board (hereinafter ARB”) were also prepared as were recommendations and comments from the New York State Department of Transportation (hereinafter referred to as “NYSDOT”). In response to the concerns that were raised, the applicant repeatedly revised relevant aspects of the project. Many of these communications and negotiations between the applicant and these various entities are not contained within the record on appeal and there is no indication that any formal record of many of these communications exist.

¹ The administrative record that has been submitted does not comply with applicable rules for electronic filings in that it is not bookmarked or text searchable nor does it include actual transcripts of any of the meetings of the Planning Board.

² In determining this motion, this Court has considered documents filed on NYSCEF as cited herein as well as all other filings in this matter that have been electronically filed with the Court.

³ NYSCEF doc. 2

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The matter appeared on the Hurley Planning Board agenda on July 12, 2021; August 2, 2021 and August 30, 2021 whereupon the Planning Board continued to raise conclusory concerns regarding traffic and other issues and engaged in discussions with the Planning Consultant, the applicant and other reporting individuals. Thereafter, on August 30, 2021, the Planning Board conducted a public hearing. The matter appeared before the Board on October 4, 2021 and December 6, 2021 for further discussions and further updates were provided by NYSDOT, the involved engineers, traffic consultants and other individuals and further memorandum and other written reports and communications continued between the applicant, the Board and the Board's planning consultant.

Pursuant to General Municipal Law §239, the matter was referred to the Ulster County Planning Board (hereinafter referred to as "UCPB"). The Planning Board submitted its recommendations and required modifications by letter dated August 4, 2021. Therein, the UCPB indicated that "[f]ast food restaurants with a drive-thru are of significant concern to the Board . . . problems that arise relate to inadequate queue lengths, poor turning movements, and an overall lack of space to accommodate site improvements. There are many lessons to be learned from the missteps in other communities and the concerns expressed by the Board and its recommendations should be viewed as cautionary to the changing popularity associated with drive-thrus and the demands they place on site design"⁴. The UCPB outlined seven required modifications to the plan.

Thereafter, on December 15, 2021, "a virtual meeting was held with the UCPB, the Applicant, the Applicant's consultants, N+P, select Planning Board members and NYSDOT" (emphasis supplied)⁵ (hereinafter referred to as "gateway meeting"). Further submissions clarify

⁴ NYSCEF doc. 21, page 1

⁵ NYSCEF doc. 1, para. 77

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that Dennis Doyle, the Director of the Ulster County Planning Department was present at this meeting as was John Reilly, the “NYSDOT Residency 8-7 Ulster County Permit Engineer” and Planning Board Chair Mitchell Cohen⁶. According to John Joseph Goonan, the meeting was “called” by Dennis Doyle, the Ulster County Planning Director. The meeting was attended by the applicant’s traffic engineer and civil engineer, the Planning Chair, “a few Planning Board members and the Planning Board’s planning consultant”⁷. In their verified answer, Defendants’ “deny knowledge or information sufficient to form a belief as to the truth of the allegations” regarding the “gateway meeting”⁸.

While both parties submit affidavits that include brief statements regarding this meeting, and the meeting is referenced in the pleadings and answer, the record is not clear the authority pursuant to which this meeting was arranged. There is no record of invitations or communications between the two Boards or communications between the Boards and the representatives of the applicant, the experts who participated or the representative of NYSDOT. There is no record of a formal agenda or of the scope and purpose of this meeting. There is no record of public notice of the occurrence of this meeting, no indication whether the meeting was made open to the public either in person or electronically and no transcript of the meeting has been provided to the Court. Moreover, it is unclear from the various references made in the submitted affidavits which Board members participated nor is it clear whether a quorum of either Planning Board was present. Regardless of whether a quorum of either Planning Board was present, it is abundantly clear that the participants specifically discussed the issues that have been

⁶ Para. 84

⁷ NYSCEF doc. 45, para. 26

⁸ NYSCEF doc. 54, para. 3

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brought before this Court and this Court finds based upon the limited record that the discussions were part of the deliberative process that led to the ultimate decision on review.

On January 5, 2022, Robert Leibowitz, the Principal Planner for the Planning Department wrote to Mr. Cohen and indicated that

[a] gateway meeting was . . . conducted by the Ulster County Planning Department staff in coordination with the applicant, the Town Planning Board, a representative of NYSDOT on December 15th, 2021 in which . . . the concerns of the UCPB staff and the Town consultants, as well as NYSDOT's position on the project was discussed. Given the additional analysis and amendments to the project that have been completed post-referral, the Town Planning Board, at its discretion, can re-refer the project to the UCPB for a response that addresses the most recent materials submitted for review⁹.

Despite the letter from Mr. Leibowitz, on January 10, 2022, the Planning Board moved forward and addressed the application on the record. Again, rather than submitting transcripts of this meeting, Defendant has submitted meeting minutes that were prepared by the clerk of the Board. According to the minutes, the "discussion" started with the applicant making a statement. Thereafter, Jonathan Lockman, the "Town Planner" spoke to the Board at length about "a few unresolved issues". Notably, these issues were not articulated, discussed, or deliberated upon by the Planning Board members prior to Mr. Lockman identifying them as "unresolved".

Immediately after the Planner's statement, the Chair asked if anyone on the board wanted to comment. Board member Raymond Palmer then stated "I'm concerned about the traffic, having lived here for all these years and things and concerns from our planner and traffic consultant. I don't see how these concerns can be fixed. At this point, I'm proposing a resolution not to approve this project at this point"¹⁰.

⁹ NYSCEF doc. 47

¹⁰ NYSCEF doc. 39, page 3.

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After the “resolution” was seconded, counsel for the applicant and the applicant attempted to question Mr. Palmer regarding the ongoing concerns from the traffic consultant. The Board Chair then interrupted and stated “[w]e were in the middle of conducting a vote and we had a motion of Ray Palmer and Planning Board Member Tony Bonavist, second. I would just like to go through the Planning Board members”. The Board then voted unanimously to deny the application.

After each individual member cast their vote, Mr. Lockman interjected once again and stated that “I wanted to ask procedurally . . . you’ve polled the Board members and it looks like a ‘no’ vote is coming and you didn’t actually vote yet but would you like to discuss the items that Mr. Stafford would include in the resolution or would you want him, at a future meeting, bring a resolution to vote on, or how do you want to do that procedurally?”. Counsel for the applicant then interjected and stated “[i]f there was a resolution on the table that was voted on by a majority of the Board, to now go back and retroactively provide your reasoning would be inappropriate”. Mr. Lockman replied “[t]here is nothing that prevents you from going back and discussing why you voted the way you did”. Thereafter, counsel for the Planning Board replied “if you want to tell me why you voted the way you did, that’s fine and I can provide a written resolution based on the notes I have taken at this meeting and if it’s consistent with the way you voted, that’s what will be adopted”¹¹.

The Board members then proceeded to restate their votes and, once again, Mr. Lockman interjected and “summarized” what should be set forth in the resolution that counsel for the Board would prepare. Counsel for the applicant interjected and pointed out that “Mr. Lockman is a planning board consultant and not a voting Member of the Board so, to the extent his

¹¹ NYSCEF doc. 59, page 119

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comments shouldn't be replaced for those of the Board". While the discussions continued, there was no final decision with regard to the drafting of a formal resolution or plans to table the matter for a vote after such a resolution was drafted.

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On January 11, 2022, Mr. Leibowitz wrote to the applicant and, referencing the January 5, 2022 letter, he indicated that "[w]e sent them a letter this week that said we would be willing to receive a re-referral . . . given the progress that had been made and subsequently issue an updated letter, but the Town was inclined to simply reject it outright"¹². Thereafter, on January 21, 2022, Board Member Bonavist wrote to Board Chair Cohen regarding the continuing "confusion about whether the [Planning Board] should use the minutes or adopt a resolution, denying the Dunkin project". Mr. Bonavist indicated that "it was recommended" by individuals from the Town of Marbletown that the Planning Board call a special meeting, make a motion to nullify the previous vote on Dunkin, and then vote on a newly drafted formal resolution¹³.

Despite the discussions during the meeting and the communication from Mr. Bonavist, there is no indication in the record that a formal resolution denying the application was drafted and/or adopted by the Planning Board.

As noted above, the instant Article 78 was filed on February 9, 2022.

Discussion

It is well accepted that "administrative findings of fact must be made in such a manner that the parties may be assured that the decision is based on the evidence in the record, uninfluenced by extralegal considerations, so as to permit intelligent challenge by an aggrieved party and adequate judicial review" (Matter of Morgan v. Warren County, 191 A.D.3d 112 (3rd Dept., 2021)). See also, Matter of Alverson v. Albany County, 173 A.D.3d 1415

¹² NYSCEF document 71

¹³ NYSCEF, doc. 70

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(3rd Dept., 2019); Ethington v. County of Schoharie, 144 A.D.3d 1473 (3rd Dept., 2016);
Arthur v. Soares, 95 A.D.3d 1619 (3rd Dept., 2012).

It is also well accepted that “[i]t is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials . . . Given this explicit declaration, it is clear that the provisions of the Open Meetings Law are to be liberally construed in accordance with the statute’s purpose” (Gordon v. Village of Monticello, 87 N.Y.2d 124 (1995)). See also, Smith v. City Univ. of New York, 92 N.Y.2d 707 (1999)).

It is the finding of this Court that Defendant failed to consider this project in a manner that is consistent with applicable law. The Board’s failures led to a fundamentally flawed record that precludes a review by this Court and necessitates a vacatur of the findings of the Board and a remand. While this failure is best illustrated by the absence of an actual resolution denying site plan approval, the Board’s failures to follow appropriate meeting protocol was consistent from the outset of the seventeen-month review, a review that continued for over a year beyond the time limits for a decision set forth in the Town of Hurley Code. This Court has reviewed the record and has found no indication that the applicant consented to the Board’s review continuing beyond the timeframes set forth in the Code.

As noted above, the record does not contain transcripts of actual deliberations leading to a decision nor any discussion of the factual basis for the decision of the Planning Board members. To the contrary, and as specifically preserved by counsel for the applicant during the January 10, 2022 meeting, the Town’s consultant Planner stated his own concerns on the record, and then the Planning Board members merely cast votes in accordance with the assertions made by the consultant.

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Generally, “[i]n the case of an insufficient record, the procedure often used by the Article 78 court is to remit the matter to the body or officer for further consideration. Remand is appropriate where the record is incomplete, precluding a proper review of the particular determination” (Harris v. New York City Tr. Auth., 22 Misc. 3d 1118(A), Supreme Court, New York County, 2009)). Here, the limited record establishes that the Board’s decision was based on extensive information, deliberations and decisions that occurred outside the record and a remand for the purpose of preparing a revised record cannot cure this issue.

This is particularly true with regard to the “gateway meeting”. The discussions at this meeting and the information exchanged should not have been considered by the Board in rendering its determinations and the information that was considered is not and cannot be made part of the record in this proceeding. It is the finding of this Court that the deliberations and determinations of the Planning Board were irreparably compromised and cannot be cured at this juncture.

This Court also finds that the process followed by the Planning Board clearly circumvented the intent of the Open Meeting Law. In this regard, “the Legislature, by enacting the Open Meetings Law, intended to affect the entire decision making process and **not** merely formal vote taking as it is the deliberative process which is at the core of the Open Meetings Law . . . Public bodies may not escape public view by claiming that they did not formally convene when, in fact, a meeting took place at which business of public interest was discussed” (Goodson Todman Enters. v. Kingston Common Council, 153 A.D.3d 103 (3rd Dept., 1990)). See also, Orange County Publs. v. Council of City of Newburgh, 60 A.D.2d 409, affd 45 N.Y.2d 947.

While it is not clear from the record whether a quorum of either Planning Board was present at the gateway meeting, this Court is particularly troubled by the descriptions set forth in

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the pleadings. Any post-recommendation discussions of the UCPB's August 4, 2021 letter and any communications with NYSDOT or other consultants, absent an exception to the Open Meetings Law, should have been conducted at a public meeting in order to ensure that the public business is performed in an open and public manner. Similarly, any discussions with NYSDOT or with the traffic consultants regarding traffic issues should have been conducted at a public meeting or taken place in writing and made part of the formal record.

As such, for the reasons set forth above, the decision on review was arbitrary, capricious, and contrary to law.

Conclusion

For the foregoing reasons, the petition is granted, the determination of the Planning Board on January 10, 2022, as articulated on the record, is hereby vacated and the matter is remanded to the Hurley Planning Board for further proceedings consistent with this decision.

This shall constitute the Decision and Order of the Court.

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 that rule regarding notice of entry.

Dated: June 24, 2022
Kingston, New York

ENTER,


HON. KEVIN R. BRYANT, J.S.C.