

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

**TRIAL/IAS, PART 7
NASSAU COUNTY**

**PASQUALE CERVASIO, ROSA CERVASIO,
GUISEPPE GRAZIOSI AND CARPINA GRAZIOSI,**

Plaintiff,

**for a judgment pursuant to Article 78 of the
Civil Practice Law and Rules,**

**INITIAL MOTION DATE:
4/8/08**

**Subsequent Re-Assignment
and Submission Oct 1, 2008
MOTION SEQ. NO.: 001**

-against-

**LEONARD BARON, City of Glen Cove Building
Department Administrator, THOMAS SCOTT,
Chairman, JOSEPH RENAGHAN, CYNTHIA ROGERS,
HERBERT KAUFMAN, ROBERT JAKOBSZE,
RAFFAELLA BERTUCCI and STEPHEN GRONDA,
constituting the members of the City of Glen Cove
Planning Board,**

INDEX NO.: 017334/07

Defendants.

The following papers having been read on the motion (numbered 1-5):

Notice of Petition.....	1
Verified Answer.....	2
Statements in Opposition.....	3
Memorandum of Law.....	4
Supplemental Affirmation in Opposition.....	5

Proceeding by the petitioners Pasquale Cervasio, Rosa Cervasio, Giuseppe Graziosi and Carpina Graziosi pursuant to CPLR Article 78 for judgment, *inter alia*: (1) declaring that their site plan application for the construction of a proposed, two-story office building was “approved by default” in light of the alleged failure of the respondents to timely act upon the plan in accord with applicable law (City of Glen Cove Code § 280-15[D],[E]); and (2) compelling the respondents to issue a building permit for the petitioner’s proposed office building.

By verified petitioner dated September 2007, the petitioners Pasquale Cervasio, Rosa Cervasio, Giuseppe Graziosi and Caprina Graziosi commenced the within proceeding as against the City of Glen Cove Planning Board pursuant to CPLR article 78 for, *inter alia*, judgment in the nature of mandamus and stated declaratory relief.

The petitioners primarily contend that their building permit and site plan application for the construction of a proposed, two-story office building in the City of Glenn Cove were approved by default in light of the municipal respondents' alleged failure to timely conduct a public site plan hearing in accord with applicable provisions of the Glen Cove Code (*see*, City of Glen Cove Code § 280-15[D],[E] *cf.*, General City Law § 27-a[8] *see also*, *United Water New Rochelle, Inc. v. Planning Bd. of Town of Eastchester*, 2 AD3d 627, 628; *Figgie Intern., Inc. v. Town of Huntington*, 203 AD2d 416, 418-419).

In substance, the City Code requires that the Planning Board conduct a public a hearing on a site plan application within 62 days of a properly prepared submission, and mandates the insurance of a decision thereon within 62 days of the public hearing, or the application will be deemed approved by default (*see generally*, *King v. Chmielewski*, 76 NY2d 182, 187-188 [1990]; *Matter of Sun Beach Real Estate Dev. Corp. v. Anderson*, 98 AD2d 367, 375-376, *affd*, 62 NY2d 965 [1984]; *Benison Corp. v. Davis*, 51 AD3d 1197, 1198; *United Water New Rochelle, Inc. v. Planning Bd. of Town of Eastchester*, *supra*; *Figgie Intern., Inc. v. Town of Huntington*, *supra*).

More particularly, the petitioners contend, *inter alia*, that the Planning Board repeatedly made unnecessary information requests and conducted unauthorized, preliminary hearings as a delaying tactic; that the Board's true objective was to prolong the site plan process until the so-called "Hillside Protection Ordinance" – relating to certain landscape grade slopes – could be amended in May of 2007; that the foregoing Ordinance was, in fact, amended to require variances where none had been previously required (Glen Cove City Code, Article X11, §§ 280-52A, 53); and that by virtue of the Board's bad faith, the petitioners acquired vested rights pursuant to the "special facts" doctrine, thereby mandating application of the pre-amendment version of the "Hillside Ordinance" (Pet., ¶ 149, 155-156; Pets' Brief at 4-5; 10-11)(*see e.g.*, *Pokoik v. Silsdorf*, 40 NY2d 769 [1976]; *Mamaroneck Beach & Yacht Club, Inc. v. Zoning Bd. of Appeals of*

Village of Mamaroneck, 53 AD3d 494, 497).

Significantly, some ten months after the petitioners filed their site plan in October of 2007 – and after a series of preliminary, informational meetings – the Building Department Administrator denied the petitioners' underlying application for a building permit, finding, *inter alia*, that: (1) the application required variances from the amended, Hillside Protection Ordinance; and (2) that certain portions of a proposed retaining wall system was in violation of Code § 280-53[B], inasmuch as various walls would be located within zero to 2 ½ feet of an adjacent property line, whereas the Code provides for a minimum distance of ten feet (Return Exh., "24").

The municipal respondents have since answered, denied the material allegations of the petition and interposed various objections in point of law pursuant to CPLR 7804[f].

The matter is now before the Court for review and resolution of the claims interposed.

Upon the record presented, the petition should be denied and the proceeding dismissed on the merits.

Preliminarily, while the petitioners assert, *inter alia*, that their application was complete upon submission in early October of 2006, and thereby triggered the 62-day period within which a public hearing must be conducted (Glen Cove Code § 280-15[D]), the Code defines “submission” as the “date of the first Planning Board meeting following the submission of a *properly prepared plan* to the Secretary to the Planning Board * * *” [emphasis added].

Accordingly, the mere submission of a site plan which, as a threshold matter, complies with the basic requirements “of the Glen Cove Zoning Code,” – as determined by the Building Department Administrator – does not alone establish that a site plan is “complete,” since applicable Code provisions identify a variety of additional items which must be included in a proper application for site plan review (*see*, City Code 280-16 *see also*, Section 5, 6 Planning Board Rules) (*cf.*, *Cifone v. Aiello*, 179 AD2d 876). Indeed,

“[s]ite plan review permits Municipalities to regulate the development and improvement of individual parcels in a manner not covered under the usual provisions of building and zoning codes * * *” (*Moriarty v. Planning Bd. of Village of Sloatsburg*, 119 AD2d 188, 191; General City Law § 27-a[2][a]).

The Court disagrees with the further contention that the preliminary or pre-hearing meetings conducted by the Board evidence the existence of bad faith or constitute *ultra vires* acts for which no supportive Code authority exists.

A review of the Code reveals that there is nothing therein which precludes the Board from conducting post-filing, informational meetings relative to a specific and pending application – conduct which is consistent with the Code’s emphasis upon ensuring that an applicant obtains a “clear understanding” of the Board’s site plan requirements (*see generally*, Code § 280-15[A]).

The respondents have also asserted that, as a matter of custom and practice – and as a courtesy to applicants – the Planning Board generally schedules these informal, “preliminary review hearings” to apprise an applicant of any additional information which the Board might require as part of the site plan review process (Scott Aff., ¶ 9 [D], [E]). Indeed, despite their current assertions, the Court notes that the petitioners never contemporaneously objected as unauthorized or improper.

In any event, the Court notes that the respondents have not argued that the scheduling of preliminary meetings or consultations would, by themselves, toll the approval by default provisions set forth in the Code (*cf.*, *King v. Chmielewski*, *supra*).

Further, and contrary to the petitioners’ contentions, neither the Building Administrator’s September 26, 2007 letter, which focused primarily upon the absence of variance issues – nor the January 25, 2007 memorandum issued by the City Planner, constitute statements – much less definitive findings – that the petitioners’ plans were complete from a site plan perspective upon their initial submission. Indeed, as the petitioners themselves have complained, the various memoranda issued by the City

Planner consistently took the position that additional information was required and that, therefore, the plans were far from complete (*e.g.*, Pets' Brief at 10).

Turning to those plans, the record supports the respondents' contention that the subject application was never properly prepared and complete within the meaning of the foregoing Code provision. Here, the Planning Board – in the exercise of its broad discretion and statutory powers of review (*Incorporated Village of Atlantic Beach v. Gavalas*, 81 NY2d 322, 326-327 [1993]) – discerned and identified a series of omissions, questions and complications with the filed plans, in connection with which additional information, feed-back and further modifications were legitimately and reasonably requested (*see*, Scott Aff., ¶¶ 35-36).

The Court notes that apart from the specifically enumerated elements of a proper site plan, the Code also confers upon the Board an exceedingly wide degree of latitude with respect to requests for data, since it authorizes requests for, “[a]ny other information deemed to be necessary to determine the conformity of the site plan with the spirit and intent of this chapter”(Code § 280-16[D][14]).

Indeed, a Board's land use and/or environmental review powers are extensive and can encompass, among other things, analysis of “the proposed location of the buildings, parking areas, and other installations on the plot, and their relation to existing conditions, such as roads, neighboring land uses, natural features, public facilities, ingress and egress roads, interior roads, and similar features” (*Incorporated Village of Atlantic Beach v. Gavalas, supra*, at 327, *quoting from*, 5 Ziegler, Rathkopf's The Law of Zoning and Planning, Site Plan Review, § 62.01 [1][4th ed]).

Alternatively, the Court is persuaded by the respondents' further assertion that the project remained incomplete for purposes of triggering the approval by default period since outstanding proceedings relative to the Board's SEQRA review obligations were still pending and on-going (*see, Pheasant Meadow Farms, Inc. v. Town of Brookhaven*, 31 AD3d 770, 771 *see also, Chase Partners, LLC v. Incorporated Village of Rockville*

Centre, 43 AD3d 1049, 1052; *Tinker Street Cinema v. Town of Woodstock Planning Bd.*, 256 AD2d 970, 972-973).

The Second Department has recently reaffirmed that in general, where there is a conflict between the timing provisions of local, "approval by default" ordinances and SEQRA's "elaborate procedural framework" (*New York City Coalition to End Lead Poisoning, Inc. v. Vallone*, 100 NY2d 337, 347 [2003]), "SEQRA must prevail," since SEQRA "'far overshadows the rights of developers to obtain prompt action on their proposals'" (*Chase Partners, LLC v. Incorporated Village of Rockville Centre*, 43 AD3d 1049, 1052, quoting from, *Matter of Sun Beach Real Estate Dev. Corp. v. Anderson*, *supra*, 98 AD2d 367, 375-376; *Tinker Street Cinema v. Town of Woodstock Planning Bd.*, 256 AD2d 970, 972-973; *Figgie Intern., Inc. v. Town of Huntington*, 203 AD2d at 418-419).

Specifically, the Court in *Chase Partners, supra*, observed that, "a lead agency's SEQRA review obligations are not considered complete until it issues a SEQRA findings statement" (*Chase Partners, LLC v. Incorporated Village of Rockville Centre, supra*, at 1053 *see, Benison Corp. v. Davis, supra*, 51 AD3d 1197; *Matter of Jones v Amicone*, 27 AD3d 465, 467).

Here, the record supports the respondents' assertions that prior to the commencement of the within proceeding, the Planning Board designated itself as "lead agency" on July 31, 2007, immediately after the petitioners re-submitted a previously unsigned Part I of the long Environmental Assessment Form (Sahn Aff., ¶¶ 9-10). Moreover, at that time and thereafter, the record similarly indicates that the Board was still engaged in the process of gleaning and collecting relevant and necessary project information, and for that reason, had not yet issued a determination of significance and/or concluded that a draft environmental impact statement would be required for the proposal (Scott Aff., ¶¶ 9[G]-[L], 93; Sahn Aff., ¶¶ 9-10; Resps' Brief at 20)(*Pheasant Meadow Farms, Inc. v. Town of Brookhaven, supra*, 31 AD3d at 770-771 *see, Benison Corp. v.*

Davis, supra, 51 AD3d 1197 *cf.*, *Figgie Intern., Inc. v. Town of Huntington, supra*, at 418). Significantly, “[r]easonable delays will be countenanced where it appears that they were caused by the agency's acquisition or review of information necessary to an initial determination of environmental significance” (*Tinker Street Cinema v. Town of Woodstock Planning Bd., supra*, at 972).

Lastly, the Court disagrees with the assertion that the Planning Board acted in bad faith and unduly delayed the proceedings until after the “Hillside Protection Ordinance” could be amended, thereby establishing – under the “special facts” doctrine – an exception to the prevailing rule that “[a] court will apply the zoning ordinance currently in existence at the time a decision is rendered” (*Greene v. Zoning Bd. of Appeals of Town of Islip*, 25 AD3d 612, 613 *see also*, *Pokoik v. Silsdorf, supra*; *Jul-Bet Enterprises, LLC v. Town Bd. of Town of Riverhead*, 48 AD3d 567; *Denton v. Town of Brookhaven*, 32 AD3d 395, 396).

Although certain delays ensued during the site plan process (*Matter of Cleary v Bibbo*, 241 AD2d 887, 888), a qualitative review of the respondents’ conduct belies the assertion the delays which occurred were attributable to “an abuse of administrative procedures” (*Pokoik v. Silsdorf, supra*, at 773; *Aversano v. Two Family Use Bd. of Town of Babylon*, 117 AD2d 665, 667 *see generally*, *Ronsvalle v. Totman*, 303 AD2d 897, 899; *Home Depot U.S.A., Inc. v. Village of Rockville Centre*, 295 AD2d 426, 428-429; *Cleary v Bibbo, supra*, at 888; *Property Developer, Inc. v. Swiatek*, 190 AD2d 1078, 1079).

The Court notes that the respondents’ have advised that the challenged Code amendments to the so-called “Hillside Ordinance” were the culmination of a one-year planning study which the City had commenced in March of 2006 – before the petitioners filed their permit application (Scott Aff., ¶¶ 61-62; Pet., ¶ 76) (*see, e.g., Home Depot U.S.A., Inc. v. Village of Rockville Centre, supra*, 295 AD2d at 428-429).

It is settled that local Planning Boards enjoy “a large measure of discretion with respect to the decision as to whether to approve petitioner's site-plan application” (*Twin*

Town Little League Inc. v. Town of Poestenkill, 249 AD2d 811, 813 *see also*, *E.F.S. Ventures Corp. v. Foster*, 71 NY2d 359, 370 [1988]).

In sum, the record supports the conclusion that “[a]ny delays in processing the application were * * * attributable to legitimate circumstances, rather than to ‘malice, oppression, manipulation or corruption’” (*Home Depot U.S.A., Inc. v. Village of Rockville Centre*, *supra*, at 429, *quoting from*, *Matter of Aversano v Two Family Use Bd. of Town of Babylon*, *supra*, 117 AD2d at 667 *see also*, *Ronsvalle v. Totman*, *supra*; *Cleary v Bibbo*, *supra*, at 888; *Property Developer, Inc. v. Swiatek*, *supra*, at 1079).

The Court has considered the petitioners’ remaining contentions and concludes that they are lacking in merit.

Accordingly, it is,

ORDERED that the petition is **denied** and it is declared that the subjection application was not approved by default pursuant to City of Glen Cove Code § 280-15, and it is further,

ORDERED that the proceeding is **dismissed** on the merits.

This constitutes the Order of the Court.

Dated:

December 9, 2008

ENTER:

J.S.C.