

SUPREME COURT - STATE OF NEW YORK
PART 6- SUFFOLK COUNTY

PRESENT:

Hon. Sanford Neil Berland, A.J.S.C.

GREGORY REDDOCK and CARISSA
REDDOCK,

Plaintiff(s),

-against-

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION and
BASIL SEGGOS, COMMISSIONER OF THE
NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION,

Defendant(s).

ORIG. RETURN DATE: October 31, 2017
FINAL RETURN DATE: March 13, 2018
MOT. SEQ. #: 001 TAD

PETITIONERS' ATTORNEY:

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RESPONDENTS' ATTORNEYS:

NYS DEPARTMENT OF
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Upon the reading and filing of the following papers in this matter: (1) Verified Petition, dated September 25, 2017, and supporting papers; (2) Verified Answer, dated December 12, 2017, and supporting papers; (3) Reply Affirmation, dated March 2, 2018; it is,

ORDERED that Petitioners' Article 78 petition is hereby transferred to the Appellate Division, Second Department, pursuant to CPLR §§ 7803[4] and 7804[g]; and it is further

ORDERED that the Clerk of the Court is hereby directed to forthwith transmit all papers and records in this proceeding to the Clerk of the Appellate Division, Second Judicial Department.

This is a special proceeding commenced on September 25, 2018 by petitioners against the New York State Department of Environmental Conservation and its Commissioner, Basil Seggos, seeking an order vacating the denial of petitioners' area variance and permit application and directing the respondents to grant the application pursuant to Article 78 of the CPLR.

Petitioners are the owners of real property located at 287 River Road, Saint James, New York in the Town of Smithtown. The property measures 2.07 acres, is approximately 500 feet

from the Nissequogue river, and is improved by both a single family dwelling and an “accessory cottage” used as a residence for a member of petitioners’ family.¹ The property was purchased by petitioners on or about 2005 and is located in the Town of Smithtown’s R-43 Zoning District, which requires a minimum lot size of one acre. The property is also located within the Nissequogue Recreational River Corridor (the “Corridor”), which requires a minimum lot size of “at least two acres.” On or about May 9, 2014 the petitioners filed an application with the New York State Department of Environmental Conservation (“NYSDEC”) for an area variance and permit to allow them to subdivide the property into two parcels, the first one acre in area and including the existing single family dwelling, the second 1.07 acres in area and to include a new dwelling to be constructed upon removal of the “accessory cottage.” On or about May 19, 2016, the application was denied in its entirety. Thereafter, petitioners appealed the denial of their permit, and on October 4, 2016, an evidentiary hearing was held before Administrative Law Judge Richard Sherman at which witnesses were called, evidence was submitted, a site visit was conducted and findings of fact were made. In a thirteen-page Hearing Report dated January 5, 2017, Judge Sherman recommended that the permit be denied, and in an eight-page Decision dated July 26, 2017, the Commissioner of the NYSDEC denied the application.

Petitioners allege that respondents’ decision to deny their application did not have a basis in substantial evidence, or was otherwise arbitrary and capricious, because respondents “failed to properly weigh the five factors required to be considered for an area variance” under the New York Environmental Conservation Law and disregarded prior precedent of the NYSDEC granting approval of permit applications for “numerous one acre lots within the Corridor.”

Respondents oppose the petition, arguing that petitioners’ application fails to satisfy the standards required for an area variance and permit because, *inter alia*, the proposed subdivision would increase area density and pollution into the river, and because the regulations affecting the parcel were already in place at the time petitioners purchased the property. Respondents also submit that because the special proceeding raises an issue of substantial evidence, it must be transferred to the Appellate Division for resolution pursuant to CPLR § 7804[g].

CPLR § 7804[g] requires “[t]he transfer of a CPLR article 78 proceeding. . . when the substantial evidence issue specified in question four of section 7803 is raised and must be decided in order to dispose of the proceeding” (*Halperin v City of New Rochelle*, 24 AD3d 768, 769 [2d Dept 2005] [internal quotations omitted]; *see* CPLR § 7803[4]). Such circumstances arise where a “determination was made after a hearing directed by law at which evidence was taken. . . and the petition raises a question of substantial evidence” (*Garvey v Sullivan*, 129 AD3d 1078, 1081 [2d Dept 2015] [internal citations omitted])

¹ Respondents allege that the so-called “accessory cottage” is not permitted to be used as a residence and was originally erected as a garage.

Here, the challenged administrative determination was made following an adjudicatory hearing directed by law, at which witnesses were called and evidence was submitted (*see* ECL § 15-2709; 6 NYCRR § 624.8). Further, petitioners explicitly dispute whether the respondents' denial of their application is supported by substantial evidence. Accordingly, this Article 78 proceeding raises a question as to whether the determination is, on the entire record, supported by substantial evidence.

When the issue of substantial evidence is raised, the Supreme Court can only address objections in point of law as could terminate the proceeding before transferring the proceeding to the Appellate Division in accordance with CPLR § 7804[g] (*see Huth v Barr*, 56 AD3d 556 [2d Dept 2008]; *Bush v Mulligan*, 57 AD3d 772 [2d Dept 2008]).

Here, there are no objections raised that could terminate the entire proceeding within the meaning of CPLR § 7804[g]. Accordingly, this matter is ordered transferred to the appellate division.

The foregoing constitutes the decision and order of the court.

Dated: 7/16/2018

Riverhead, New York


HON. SANFORD NEIL BERLAND, A.J.S.C.

FINAL DISPOSITION

NON-FINAL DISPOSITION