SUPREME COURT CHAMBERS
Ulster County Courthouse
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CHRISTOPHER E. CAHILL
Supreme Court Justice

SHARI S. GOLD, ESQ.
Principal Law Clerk

March 16, 2018

Marty I. Rosenbaum, Esq.
1971 Western Avenue #105
Albany, New York 12203

DiStasi Moriello & Murphy Law PLLC
PO Box 915
Highland, New York 12528
Attn: Joseph M. Moriello, Esq.

Re: Beer v. New Paltz
Index No. 16-0806

Dear Counselors:

Enclosed please find a copy of a Decision and Order in the above-entitled matter. Kindly direct your attention to the last paragraph of the Decision and Order regarding filing, entry and notice of entry. For purposes of notice of entry, counsel can contact the Ulster County Clerk directly at (845) 340-3288 to obtain the date of filing.

Very truly yours,

Therese M. Landi

Therese M. Landi, Secretary to
CHRISTOPHER E. CAHILL, JSC

/tml
Enclosure

STATE OF NEW YORK
SUPREME COURT **ULSTER COUNTY**

INGRID BEER,

Petitioner,

-against-

Decision, Order and Judgment
Index No.: 16-0806

TOWN OF NEW PALTZ, NEIL BETTEZ, AS SUPERVISOR, JEFFREY LOGAN, AS DEPUTY SUPERVISOR AND COUNCIL MEMBER; and DANIEL TORRES, MARTY IRWIN and JULIE SEYFERT-LILLIS TOWN COUNCIL MEMBERS, EACH IN HIS OR HER OFFICIAL CAPACITY WITH THE TOWN OF NEW PALTZ,

Respondents.

Supreme Court, Ulster County
Motion Return Date: November 28, 2017
RJI No. 55-16-00508

Present: Christopher E. Cahill, JSC

Appearances: MARTY I. ROSENBAUM, ESQ.
Attorney for Petitioner
1971 Western Avenue #105
Albany, New York 12203

DiSTASI, MORIELLO & MURPHY LAW PLLC
Attorneys for Respondents
PO Box 915
Highland, New York 12528
By: Joseph M. Moriello, Esq.

Cahill, J.:

The relevant facts underlying this CPLR article 78 proceeding in the nature of certiorari brought pursuant to Town Law § 195 have been fully reviewed by this court in

considering the respondents' motion to dismiss this proceeding pursuant to CPLR § 7804 (f) which resulted in this court's decision/order in this case dated September 14, 2016. Such determination denied in part and granted in part the respondents' motion to dismiss and left intact only petitioner's third, fourth, sixth, eighth and ninth causes of action, thereby limiting the challenges to petitioner's efforts to annul the February 25, 2016 order of the respondent Town of New Paltz establishing Water District No. 5 of the Town of New Paltz.

Petitioner's third cause of action alleges that the Town's petition to create the District is defective, and, therefore, the Town's order creating the district should be vacated because, in violation of Article 12 of the Town Law, the petition sets forth an "estimated" maximum amount proposed to be expended for the construction of the proposed district when Town Law § 191 requires a more definite cost analysis. Petitioner further challenges the Town's "Order Calling Public Hearing" and "Order Establishing District" as statutorily deficient since they also failed to specify "the maximum amount proposed to be expended for the improvement...and the cost of the district or extension to, the typical property and, if different, the typical one or two family home..." (Town Law § 193 [1] [a]) when the only permitted estimate is for the cost of hook-up fees (id.). With the underpinnings of such allegation stemming from the statement that the "estimated cost to the average user is estimated to be approximately $18.00 per month ($216.00 per year) based upon a three (3) bedroom home with average usage of 200 gallons per day based

upon industry standard costs for the type of groundwater source and supply public water system to be constructed," petitioners maintain that this "estimate" significantly understates the average gallons-per-day usage of the typical homeowner as well as the likely cost per gallon. Buttressing these claims are references to estimates from the United States Environmental Protection Agency and a recent survey of water prices in 30 major cities in the United States between 2010 and 2015.

In opposition, respondents note that Town Law § 191 simply requires the "maximum amount proposed" and not the exact amount of the expenditure. Moreover, they contend that Town Law § 193 (1) was fully complied with when the order and notice in this case, as here relevant, contained a recitation, in general terms, of the contents of the petition, an estimated cost of hook-up fees, the cost of the district to the typical property in the proposed district and the time and place when the board would meet to consider the petition. Having satisfied the requirements of the statute as written, and with Town Law § 193 (2) (c) recognizing that the "cost of the district or extension to the typical property" shall mean the amount that is estimated that the owner of such a typical property or home within the district or extension will be required to pay for debt service, operation and maintenance and other charges..." (id.), respondents maintain that there can be no viable challenge alleging that a specific recitation of costs is required.

Relying upon the clear and unambiguous statutory language, and with respondents countering the challenge to the estimates of the usage and cost of water as detailed in the

petition, the notice of hearing and the order approving same by their reliance upon the calculations performed by the town's qualified municipal engineer, David Clouser, having knowledge of the customary usage of the typical homeowner in the communities in and around the Town of New Paltz, they urge this court to dismiss the challenge.

In reply, petitioner maintains her challenge as to the estimate of the requisite maximum amount proposed to be expended in constructing the proposed water system and notes that not only was there a failure to comply with the specific requirement in Town Law § 191 (1) (a) that there be prepared and filed for public inspection, prior to the publication of a copy of the order, a "detailed explanation of how the estimated cost of hook-up fees, if any, to, and the cost of the district or extension to, the typical property and if different, the typical one or two family home was computed" (id.), but also that respondents' reliance upon Mr. Clouser's estimates was in error in light of his estimates, on a different project, in September 2016, whereby he estimated that a typical three bedroom home in the Cherry Hill neighborhood of New Paltz would consume 390 gallons per day...almost 100% greater than the 200 gallons-per-day estimate that was used here to calculate costs in the petition, notice and approving order for the district. Petitioner further notes that in this very proceeding, in response to residents' questions (R., p 584), such Town engineer has estimated a water rate for this district of $3.00 per 1,000 gallons of water used that is more than 600% higher, yet the petition, notice and order relied upon a low estimated cost of 29.863 cents per 1,000 gallons of water used.

With this court recognizing the deficiencies and inconsistencies noted, it must still find that the relevant statute at issue required an "estimate" of the costs and that the Board relied upon the data as presented by its municipal engineer at the relevant time (see Capitol Real Estate, Inc. v Town Bd. Of Town of Charlton, __Misc3d__, 2003 NY Slip Op. 51282 (U) [Sup Ct, Saratoga County 2003]). Moreover, since the purpose of the statute is to ensure that notice would be given to the community of the general terms outlined in the petition so that there would be a duly convened hearing whereby all interested persons could be heard (see Town Law 5 § 193 [1] [a]), to the extent that there was error in failing to file the detailed explanation of the costs prior to the publication of the notice or that the board improperly relied upon the opinion of its municipal engineer, this court notes that since the public hearing is intended to allow the residents to further question these calculations, which they did, and to the extent that the board here relied on the advice and information from one of its consultants who had no interest in the determination before the board when making its determination, (id), none of these deficiencies are sufficient to vacate the determination.

Next addressing the fourth cause of action alleging that the map and plan that accompanied the petition did not meet the requirements of Article 12 of the Town Law (see Town Law § 194 [1] [a]) in that such documents do not disclose the "mode of constructing the proposed water works" (Town Law § 192), the location of "water mains and distributing pipes" (id.), or the "hydrants" (id), this court's further review of the map

and plan compel the conclusion that the map and plan do, in fact, indicate that the water distribution mains are to be located within the right-of-way of the public roadway and that an additional water transmission main would be installed northerly along the right-of-ways of Plains Road and the Wallkill Valley Rail Trail for connection to the existing Village water system on Main Street. The plan and the map further describe the lands and water rights to be acquired, the proposed water connection main, the proposed booster pump, and the proposed Plains Road distribution main as well as the mode of construction in terms of proposed water treatment facilities. While it is undisputed that the graphical map did not include the location of the hydrants, only referencing that they would be located "throughout the proposed water district," and that such omission was in violation of the statutory dictate (see Town Law § 192), the omission does not, in this court's view, "seem to be of such importance as to rise to jurisdictional status, particularly since it is a matter which could have been presented at the public hearing conducted by the town board.... Since there is no claim here that this was in fact brought to the board's attention at a time when the plan could have been amended to be more specific ...[and since this court rejects petitioner's speculative claims of prejudice by its omission,] the objection ... [will] be rejected as inconsequential" (Matter of Wright v Town Bd. of Town of Carlton, 70 Misc2d 1, 7 [Sup Ct, Erie County 1972], modified on other grounds 41 AD2d 290 [4th Dept 1973]).

The sixth cause of action alleges a violation of Town Law § 194 (1) (a) in that the

signatures on the challenged petition, or lack thereof, of certain owners of real property within the district do not represent owners of more than 50 percent of the assessed value of all of the taxable real properties in the proposed district. Conceding all issues regarding tenants by the entirety, petitioner instead focuses on properties held as joint tenancies with rights of survivorship or properties held by trust where no signature of the trustee was acquired. As to the properties held by joint tenancy, this court concludes, after reviewing the pertinent statutory language, that no error of law has occurred by the respondents obtaining only one joint tenant's signature for these purposes as "all the tenants have together, in the theory of the law, but one estate in the land and this estate each joint tenant owns conjointly with the other co-tenants" (In re Lorch's Estate, 33 NYS 2d 157 [Sur Ct, Queens County 1941]; see 1989 Ops Atty Gen No. 89-17 [and cases cited therein]; 1987 Op Atty Gen No 87-85). Moreover, "'[i]t is the fundamental principle of a joint tenancy, that while the parties constitute but one person, so to speak, as far as the rest of the world is concerned, with regard to themselves, each is entitled to an equal share of the rents, income, and profits as long as he lives...'" (id. at 166, quoting Schouler, Pers. Prop., 5th ed., § 156).

Nor does this court find error in the inclusion of 13 Woodland Drive, through the signatures of Marygrace Renella and Kristen Zigouras who purchased the property on June 30, 2015, since it is only necessary that the property appear on the last assessment roll, which it did, and that the owners-in-fact sign the petition, which they did (see

Petrocci v Wright, 51 Misc2d 227 [Sup Ct, New York County 1966]). As to the properties held in trust, this court agrees with petitioners that the assessed value of these properties should not have been included. Even with the exclusion of these signatures, however, the Town has reached the 50 percent or greater threshold. Moreover, the court rejects any contention that the signatures on the petition could be rightly challenged by claiming that they are illegible when such signatures were accompanied by an attestation of a subscribing witness as verification and proof of the source of each such signature. Finally, this court rejects any challenge to respondents' inclusion of the Cryer property since the Cryers' efforts to withdraw approval were untimely pursuant to the standards articulated in Gray v Town Board of North Hempstead, 303 NY 575 [1952] and 1965 Ops St Compt 65-397. For all of these reasons, these challenges are rejected.

Finally, as to the eighth and ninth causes of action, petitioner alleges in the eighth cause of action that respondents failed to comply with Town Law § 194 (1) (c) because not all of the properties that will benefit from the proposed water district are included within the boundaries of the district and because not all of the properties included in the proposed district would benefit. As to those who would benefit, petitioners note that the residents of the Village of New Paltz and a small group of Town residents outside the proposed district would receive the benefit of an uninterrupted water supply from the Plains Road aquifer during the planned shutdowns, along with a potential backup supply if needed. Claiming that the funds made available from the New York City Department

of Environmental Protection are limited and that thereafter it would be the responsibility of the district residents to maintain the waterworks, pipes and infrastructure, petitioner contends that the respondents violated Town Law § 194 (1) (c) failing to include in the District the Village and Town residents outside of the proposed district who will benefit. The court disagrees. Petitioner's burden in challenging this determination is a "'heavy one'". . . (Matter of Palmer v. Town of Kirkwood, 288 AD2d 540, 541 [3rd Dept 2001]), quoting Matter of Calm Lake Dev. V Town Bd, 213 AD2d 979 [4th Dept 1995]). As the respondents argue, the test used to determine when a property receives a "benefit" from the creation of a water district is whether the district infrastructure touches on the property, and whether the properties would be enhanced or affected in quality or value by the improvement (Id.) The Town Board properly found that the property of the neighboring Town and Village customers outside of the district would not be touched by the proposed infrastructure and that these properties would not be affected in quality or value by the improvements, and they, therefore, do not "benefit" in the sense intended by the statute. Furthermore, while existing Village and Town customers outside the proposed district, pursuant to the "Inter-Municipal Agreement Between the Town and Village of New Paltz" (IMA), periodically would receive water from the District on an "as needed" basis, it is also not a "benefit" for the same reason.

To the extent petitioner argues that it is unfair for the residents of the proposed district to pay for operation and maintenance costs which will benefit the non-district

customers, this is remedied by the provisions of the IMA which requires these customers to pay a premium rate for the water which is calculated to recover additional wear and tear on the district during the limited periods when they draw water from the district. Also, the Town and Village entered into a Long Term Maintenance Agreement in November 2015 in which the Village has agreed to pay for non-routine costs of maintenance during the term of the IMA. The court has considered the remaining assertions petitioner has made in support of the eighth cause of action and conclude that they are without merit.

As to petitioner's ninth cause of action, while petitioner maintains that the public interest considerations of providing a back up water supply to the Village and Town during the periods of shutdown should not be sufficient to support the conclusion that the creation of the district would be in the public interest when those within the district could lose the use of their wells or suffer devastating business losses due to higher costs and environmental harms, this court must conclude that "[t]he finding by the Town Board that all lands in the ...[district] would be benefitted by the improvements is generally held to be the product of legislative power which will not be interfered with unless it is shown to be so arbitrary or palpably unjust as to amount to a confiscation of property" (Matter of Wright v Town Bd. of Town of Carlton, 70 Misc2d 1, 5 [Sup Ct, Erie County 1972], modified on other grounds 41 AD2d 290 [4th Dept 1973]). "The test is not whether as now used by its present owner any advantage is received, but whether its general value

has been enhanced" (Wright v Town Bd. of Town of Carlton, 41 AD2d 290, 295 [4th Dept 1973]). Hence, the existence of private wells within the proposed district is not controlling on the issue of "benefit" and since it can not be said, "as a matter of law", that the improvements will not increase the value of the properties permanently serviced, or that such parcels would not benefit under any circumstance, the determination rendered must be sustained (id). In reaching this conclusion, the court rejects petitioner's contention that her present well source for drinking water is cost-free. This contention ignores the initial costs of drilling a well, installing pumps, the electricity required to operate the pumps, and the purchase of and subsequent necessary replacement or repair of the pump and other hardware required for the operation of the well. In addition, the well water may be used for all non-potable purposes.

Having reviewed and rejected any remaining contentions not specifically addressed herein, and in finding that no rule of law affecting the rights of the parties herein have been violated, or that the implementation of the proposed District will result in the confiscation of petitioner's property, this court must conclude that the underlying petition challenging the establishment of Water District #5 in the Village of New Paltz must be dismissed.

This shall constitute the Decision, Order and Judgment of the court. The original Decision, Order and Judgment and all other papers are being delivered to the Supreme Court Clerk for transmission to the Ulster County Clerk for filing. 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.

SO ORDERED.

Dated: Kingston, New York
March 16, 2018

ENTER,

CHRISTOPHER E. CAHILL, JSC

Papers considered: Notice of petition and verified petition dated March 28, 2016 with exhibits; verified answer dated November 21, 2016 with exhibits; Rosenbaum reply affirmation dated December 12, 2016 with exhibits; record on appeal volumes 1-5..