

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

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In the Matter of the Application of

CAMILLO M. SANTOMERO and  
DENISE C.R. SANTOMERO,

Plaintiffs/Petitioners,

Index No. 62222/2017  
(Seqs. #1 & #2)

For Judgment Pursuant to Article 78 and Sections 3001  
of the CPLR,

-against-

THE TOWN OF BEDFORD and THE TOWN BOARD  
OF THE TOWN OF BEDFORD,

Defendants/Respondents.  
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Minihan, J.

On August 14, 2017, the plaintiffs/petitioners, Camillo and Denise Santomero, filed this combined declaratory judgment action and Article 78 proceeding seeking a judgment (1) declaring the Town of Bedford Local Law 1 of 2017 (hereinafter the 2017 Law) to be unconstitutional as vague and overbroad and in violation of the due process clauses of the U.S. and N.Y. Constitutions, (2) setting aside the Town Board’s adoption of the Survey of Historic Buildings (hereinafter the Survey) as arbitrary and capricious and contrary to law, (3) setting aside the Town Board’s inclusion of petitioners’ property on the Survey as arbitrary and capricious and contrary to law, (4) setting aside the 2017 Law as arbitrary and capricious and contrary to law because it was enacted without the Town Board conducting a complete review under the State Environmental Quality Review Act (SEQRA), and (5) awarding attorney’s fees, costs and disbursements. The defendants/respondents are the Town of Bedford (hereinafter the Town) and the Town Board.

*Factual & Procedural Background*

The Town has two designated historic districts - Bedford Village and Katonah - each of which is assigned a Commission to review proposed alterations to historic buildings within that district. Chapter 71 of the Town’s Code regulates historic districts, with Article I covering Bedford Village and Article II covering Katonah. To protect the historic buildings outside of Bedford Village and Katonah, the Town Board, in 2002, enacted Article III, by adopting Local Law 3 of 2002. Article III, entitled “Historic Building Preservation,” in pertinent part, sets forth

standards to determine whether a demolition permit should be issued for an historic dwelling. The statute defined “historic dwelling” as “[a] dwelling classified as one which (1) was built prior to the year 1900, or (2) is listed on the National Register of Historic Places” (Local Law 3 of 2002, Section 71-21). The 2002 Law, by its express terms, was to expire April 1, 2003 (Local Law 3 of 2002, Section 71-29).

In March, 2003, the Town Board adopted Local Law 1 of 2003, repealing and replacing the 2002 Law. The 2003 Law, in pertinent part, defined “historic building” as:

A dwelling, commercial building, or accessory building which is at least two hundred (200) square feet, and which meets one (1) or more of the following criteria: (1) was built before the year 1900; or (2) is registered on the National Register of Historic Places, or (3) which was constructed after the year 1900 and **is listed on the Survey of Historic Buildings (the “Survey”) prepared by the Town** (Town of Bedford, Local Law 1 of 2003, Section 71-22) (emphasis added).

The 2003 Law directed the Town Board to appoint an “Historic Building Preservation Commission” (hereinafter the Commission), a non-compensated five-member panel, to handle permit applications. The Commission was required, in pertinent part, “[t]o create, maintain and update the Survey prepared by the Town in connection with the adoption of this Article” (Local Law 1-2003, Section 71-24[A][5]). Echoing in large part the statute’s definition of “historic building”, the statute defined Survey, in pertinent part, as “[a] written inventory of all dwellings, commercial buildings, and accessory buildings... which were constructed after the year 1900 and which have been designated by the Town as ‘historical buildings.’”

Ten years later, in 2013, the Town Board retained professional consultants to work with the Commission to prepare a revised Survey. The consultants generated a 67-page report dated December 2015, detailing their property evaluation process, and a draft Survey dated February 15, 2016, listing properties with the following proposed classifications: “Individually Significant”, “Contributing”, or “Other Historic Resource (Unregulated).”

At the start of 2016, the Commission sent written notice to the owners of the listed properties, inviting them to provide input at informational sessions about (1) the draft Survey and (2) a proposed classification system for historic properties with new procedures to apply for demolition or significant alterations. Petitioners’ property (393 Guard Hill Road) is listed on the draft Survey as “Individually Significant.” Three informational sessions were held from February through March, 2016.

From May, 2016 to March, 2017, the Town Board held several work sessions with the Commission on the issue of revising both the Survey and the 2003 Law. According to an Executive Summary from the January 17, 2017, work session, the Commission recommended “an overhaul of the [2003 Law], significantly reducing the [Commission’s] authority and the number of properties subject to its review”. The Commission pointed out that the 2003 Law required all permit applications affecting any historic building to be referred to the Commission

for permit approval. The Commission proposed a Tier System, distinguishing between Tier 1 “Individually Significant” Properties, which require a Commission permit for substantial alteration or demolition, and Tier 2 “Contributing” Properties, which require a permit from the Town Planner for demolition, but do not require any Commission permit, and Unclassified Properties which are not subject to regulation by the Commission. The Commission pointed out that under the 2003 Law 807 properties required a Commission permit and none were eligible for fee/tax incentives, while under the proposed Law 258 properties (Tier 1) required a Commission permit for demolition or substantial alteration and 349 properties (Tier 2) required an administrative permit for demolition and all 607 of them were eligible for fee/tax incentives. The proposed law also defined “as of right” projects/actions which required no application for a permit.

At a Town Board work session on March 20, 2017, petitioners, by counsel, raised their concerns about the existing 2003 Law, the proposed changes and the Survey. By letter filed with the Town Clerk that day, petitioners’ counsel objected to the 2003 Law as giving too much discretion to the Commission in designating a house as historically significant, and unfair to the taxpayers who find themselves unreasonably restricted from constructing additions or otherwise demolishing portions of their “historic” homes. Counsel noted that petitioners did not know about the Survey when they purchased their property in 2006, nor were they informed of their inclusion thereon when they applied for permits to make interior renovations to the property. Counsel described petitioners’ property as approximately 26-acres with a main house built in 1926 and several accessory buildings, including a stable and a pool house. Should petitioners decide to make exterior changes, counsel noted, they would require a permit from the Commission under the existing 2003 Law or the proposed amended version. Counsel urged the Town Board to revise the Law to reflect the goal of historic preservation as a voluntary step not a regulatory burden.

By letter dated March 29, 2017, the Commission recommended that the Town Board adopt (1) the proposed revisions to the 2003 Law, (2) the Survey, “as an appendix to the law”, and (3) the reduction in building permit fees. By memorandum dated March 30, 2017, counsel for the Town presented a final version of the proposed Law and the Survey for adoption by the Town Board.

The Town Board scheduled a Public Hearing for April 18, 2017, to consider the adoption of Local Law #1-2017 (hereinafter the 2017 Law). By notice dated April 6, 2017, the Town Board informed the owners of the properties listed as Tier 1 or Tier 2 on the proposed Survey of the upcoming hearing, provided a summary of the proposed changes, and cited to a link on the Town website for the proposed amendments and proposed list of historic properties. On April 7, 2017, Public Notice was published in the Bedford Pound Ridge Record Review that the Town Board would hold the hearing “to consider revisions to Chapter 71, Article III, concerning Historic Building Preservation.”

According to memorandums to the Town Board from the Commission and the Town's counsel, both dated April 13, 2017, 14 properties were eliminated from the Appendix to the Law (the Survey) upon discovery that they had been included by virtue of "minor clerical errors." Specifically, four of the properties were mis-classified at a greater Tier. The Commission noted that those four mistakes appeared only in the Appendix posted online under "proposed overall amendments" but appeared correctly on the website under "individual properties with proposed classifications." Six of the other mistakes entailed Tier 1 or Tier 2 properties listed with incorrect SBL numbers, which resulted in the property owners not receiving the mailed notice of the public hearing. The remaining four mistakes involved properties in the "unregulated" category being listed with incorrect SBL numbers.

By letter filed with the Town Clerk on April 12, 2017, petitioners' counsel argued, in pertinent part, that to ensure due process, the Town Board must, upon due notice, hold a public hearing as to each property listed on the Survey, to review whether that inclusion was proper. Counsel noted that while the 2003 Law allowed property owners to take an appeal to the Town Board from a decision of the Commission, that provision improperly shifted the burden on the property owner to show lack of historical value. Lastly, counsel questioned whether there was a sufficient analysis of the proposed revisions under SEQRA, in particular the socio-economic impacts.

On April 18, 2017, the Town Board held the public hearing. According to the minutes, the Chairman of the Commission presented an overview of the reasons for the proposed law and the process used to determine the Tier designations. The Town Attorney reviewed the proposed amendments to the law. Various residents, and representatives from some Town boards and commissions, voiced approval of the proposed legislation. Some residents and attorneys for property owners affected by the Tier designations voiced their opposition, arguing that the law would negatively affect property values and that the process used to determine which properties to include on the Survey was unfair and improper. They also argued that the Town Board should be required to review each property impacted by the proposed law. The Town Attorney responded to the legal issues raised at the meeting and in the letters sent to the Town Board. The Town Board voted 3 to 1 to adopt the 2017 Law. In regard to SEQRA, the Director of Planning recommended that, in accordance with parts two and three of the Full Environmental Assessment Form (EAF) completed by his office, the Town Board, as Lead Agency, should issue a negative declaration. The Town Board adopted parts 2 and 3 of the EAF and issued a negative declaration under SEQRA, finding that the proposed legislation would not have a significant adverse impact on the environment, and would not prohibit development or redevelopment of the subject buildings but, rather, would ensure that any work on those buildings would preserve their historical nature and that of the immediate area and protect significant historic resources in the Town.

The 2017 Law expressly adopts the Survey, which is attached thereto, and made a part of the statute. The 2017 Law defines the Survey, in pertinent part, as a "written inventory of all dwellings, commercial buildings, and accessory buildings located within the Town of Bedford

proposed by the Commission and designated by the Town Board.” Under the 2017 Law, as with the 2003 Law, one of the Commission’s duties is to “create, maintain and update the Survey.”

The 2017 Law expands the definition of historic building to includes Tier 1, Tier 2 and Unregulated Historic Buildings (*see* Local Law 1 of 2017, Section 71-22). A Tier 1 building is defined, in pertinent part, as one which:

- (d) is identified with persons or events significant in local, state or national history; or
- (e) embodies the distinguishing characteristics of a type, period or method of construction or design style or is representative of the work of a known designer, architect or builder.

For permit applications on Tier 1 properties, where the work is not limited to “as-of-right actions,” the Building Inspector must refer the applications to the Commission to determine whether the proposed work constitutes Substantial Alteration or Demolition, and if so, to determine, upon public hearing or conference with the applicant, whether a permit should be issued (Sections 71-26[A-B], [D]).

The 2017 Law permits the Commission to recommend additional properties for inclusion on the Survey, if that recommendation is accompanied by a report of an independent consultant as to the historic, architectural, archeological or cultural importance of the property, and requires the Town Board, upon due notice and public hearing, to approve or disapprove the proposed addition (Section 71-25[A-C]). Any property owner wishing to appeal the inclusion or assigned category of a property on the Survey may appeal by submitting an Historic Resource Review Request (HRRR) to the Commission, which is required to act on that request at a meeting (Section 71-25[D]). If the Commission proposes an amendment to remove a property from the Survey, or to lower that property’s Tier, the Town Board must review that proposal and, upon due notice and public hearing, may approve it (Section 71-25[E-F]).

By letter to the Town Board dated May 3, 2017, petitioners tried to appeal their Tier 1 classification, citing to Section 71-27 of the 2017 Law, and noting that a prior HRRR to the Commission would have been futile since the property designation was “only recently reviewed by the Commission.” By response letter dated May 25, 2007, the Town Board stated that pursuant to Section 71-25(D) petitioners were required to submit their appeal to the Commission by completing an HRRR. The Town Board noted that petitioners could ultimately appeal an adverse determination by the Commission pursuant to Section 71-27(A)(1).

#### *Present Proceeding*

Petitioners commenced this proceeding to challenge the constitutionality of the 2017 Law, the Town Board’s adoption of the Survey within that Law, and the inclusion of petitioners’ property on the Survey. The verified petition raises four causes of action, along with a claim for attorney’s fees and costs and disbursements. In the first cause of action, petitioners seek a judgment declaring that the 2017 Law is unconstitutional as vague and overbroad and in

violation the due process requirement. While recognizing that historic preservation is a legitimate governmental purpose, petitioners argue that the law regulates, with vague criteria, vastly more properties than necessary to advance that purpose. Petitioners argue that given the lack of a time frame in the statute's definition of Tier 1 buildings many non-historic buildings would fall into that definition. Petitioners argue that the statute is void as vague because it does not give adequate notice of the conduct that is prohibited, nor does it provide clear enforcement standards. Specifically, the Survey does not differentiate between the various buildings on each property, nor does it provide a reason for the particular designation of each property. Petitioners point out that while the statute provides for notice and a public hearing to add new properties to the Survey, it operates based on a current Survey which was adopted by the Town Board entirely on the recommendation of the Commission. With respect to the current Survey, petitioners argue that the lack of any notice and an opportunity to be heard regarding those designations was unconstitutional.

Similarly, in the second cause of action, petitioners argue that the court should set aside the Town's Board's adoption of the Survey, given the Town Board's failure to provide notice and a public hearing as to each affected property. By the third cause of action, petitioners seek to set aside as arbitrary and capricious and contrary to law the Town Board's inclusion of petitioners' property on the Survey. The fourth cause of action seeks to set aside the 2017 Law for the Town Board's failure to take the required hard look under SEQRA, before issuing a negative declaration.

The Town and the Town Board, collectively, joined issue with a verified answer, which raised 12 affirmative defenses, and a certified record.

On or about March 27, 2018, the Town and the Town Board, collectively, moved for an order dismissing the first cause of action, either pursuant to CPLR 3211(a)(7) or, alternatively, pursuant to CPLR 3212. The motion is supported by, inter alia, affidavits of John Stockbridge, the Chairperson of the Commission, and Chris Burdick, the Town Supervisor. By way of background of the 2017 Law, the Chairperson stated that after 10 years of operating under the 2003 version, the Town Board and the Commission determined that it was necessary and appropriate to review the statute and re-examine the buildings designated as historic. Hence, in 2013, the town retained professional consultants to study and report on the Town's historic structures. In about December, 2015, the consultants provided a draft revised Survey. Between 2014 and 2017, the Commission researched the buildings proposed for inclusion on the Survey, and reviewed the consultants' work, including at dozens of public work sessions.

The Town Supervisor stated that he, along with the other members of the Town Board, advised the Commission that the process of developing the revised Survey had to be "open to the public" and that every owner of every building recommended for inclusion on the Survey "should be given an opportunity to be heard, initially by the [Commission], and thereafter, by the Town Board." The Town Board "would make the final determination as to which buildings would be included on the revised Survey and in which category." The Town Supervisor argued that the

affected property owners received adequate notice and opportunity to be heard as to their inclusion on the Survey. At each information session, according to the Town Supervisor, the public was advised which buildings were to be included in the Survey and how a property owner could object to that inclusion. Based on the work sessions, public information meetings, and the information submitted by the property owners, significant changes were made to the number of properties proposed for regulation, to the level of regulation proposed, and to the language of the statute. The Chairperson noted that much of the 2017 Law was based on the Model Landmarks Preservation Local Law for New York State Municipalities (hereinafter Model Law), prepared in 2014 by the Preservation League and the N.Y.S. Historic Preservation Office.

The Chairperson pointed out that the 2017 Law allowed for property owners to appeal their inclusion on the Survey, or their Tier, "at any time" and noted that, to date, 18 property owners had filed HRRRs with the Commission. Of those 18, the Commission recommended that seven have their Tier reduced, nine keep their Tier, and at least one be removed from the Survey. The Chairperson cited to those HRRRs as proof that the various processes in the statute for reviewing the classifications were working. Finally, the Chairperson noted that the statute outlined a property owner's right to seek judicial review of any determination by the Town Board, by commencing an Article 78 proceeding.

By affirmation in opposition, petitioners' counsel argued that the court should deny the Town's motion to dismiss because the first cause of action asserted a valid claim to invalidate the 2017 Law as unconstitutional. Counsel reasoned that while the statute provided a proper notice procedure to *add* properties to the Survey in the future, it operated based on a Survey for which the property owners had not received proper notice and instead shifted the burden to those owners to request to be removed from the Survey. In response to the Town's position that it relied on the Model Law in drafting the 2017 Law, counsel pointed out that the Model Law provided for a public hearing for an individual property, with evidence and testimony. Counsel argued that the information session on April 18, 2017, did not qualify as such a hearing because it did not entail an analysis of each property on the Survey, nor did it provide an opportunity for the affected property owners to give and receive evidence as to their inclusion on the Survey. The Town Board's failure to hold individual public hearings for each property that was added to the Survey, counsel argued, rendered its adoption of the 2017 Law unconstitutional. Moreover, counsel argued that the statute was unconstitutional as broad and vague. As for the Town's alternative request for summary judgment dismissing the first cause of action, counsel argued that the Town was not entitled to summary judgment because it failed to demonstrate how it reviewed and evaluated each property on the Survey, and that information was not in the certified record or the Town's affidavits. Counsel asked that, at a minimum, the court remand the matter to the Town Board for full hearings on the inclusion of each property on the Survey.

In reply, the Town argued that the affected property owners, including petitioners, were provided multiple opportunities to participate in the process used to determine the historic building classification criteria, to establish which properties to include on the Survey, and to protest the inclusion of a particular property on the Survey. The Town acknowledged that a public hearing was required to add a new property to the Survey, but argued that it was within the

Town's authority to create an historic district without holding separate public hearings for each of the properties therein and that, here, the approval of the Survey was analogous to the adoption of a large historic district containing hundreds of properties.

#### *Analysis*

The court denies the Town's motion pursuant to CPLR 3211(a)(7) to dismiss the first cause of action. In determining a motion to dismiss for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable theory (*Brookhaven Baymen's Assn. v Town of Southampton*, 85 NY2d 1074, 1076 [2d Dept 2011]). Here, the first cause of action sets forth a cognizable claim for a judgment declaring the 2017 Law unconstitutional and, thus, should not be dismissed under CPLR 3211(a)(7).

The court also denies the Town's alternative request for dismissal of the first cause of action pursuant to CPLR 3212. For summary judgment dismissing the first cause of action, the Town was required to make a prima facie showing of entitlement to judgment as a matter of law dismissing that claim, with evidence showing the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Here, the Town's motion papers failed to show as a matter of law that the 2017 Law, in particular its express adoption of the Survey, can withstand a constitutional challenge.

The court finds that this matter should be remanded to the Town Board for individual public hearings, on due notice, as to each property listed on the Survey, unless such a hearing is waived by that property owner. "A hearing is required where expressly provided by statute or where an agency adversely affects property rights" (*Honey Dippers Septic Tank Servs. v Landi*, 198 AD2d 402 [2d Dept 1993]). Here, pursuant to Section 71-25(A-C) of the 2017 Law, the Commission may recommend to the Town Board new properties to include in the Survey and the Town Board, after due notice and a public hearing, "shall by resolution approve or disapprove" the recommendation. Such notice and an opportunity to be heard is warranted because the 2017 Law restricts property rights by, among other things, creating a permit review process for owners seeking to make significant alterations to their historic homes. However, it is undisputed that the owners of the properties already listed on the Survey were not afforded such an individual hearing as to the merits of their inclusion on the Survey. The court finds unconvincing the Town's contention that it was not required to hold separate hearings as to the properties listed on the Survey because the Survey was tantamount to the Town creating a large historic district. The record shows that the Survey was created piecemeal, from years of review and analysis of the historic relevance of the properties listed thereon. However, the affected property owners are entitled to due process, just as the 2017 Law protects the due process rights of the owners of properties recommended by the Commission to be added to the Survey.



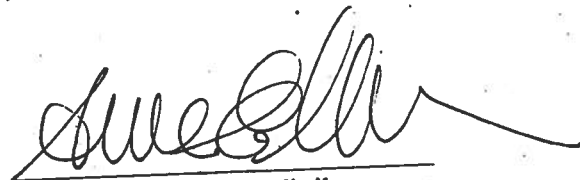
Under the circumstances, it is ORDERED that the motion to dismiss the first cause of action is denied, in its entirety, and it is further

ORDERED and ADJUDGED that the petition is granted to the limited extent that the matter is remanded to the Town Board of the Town of Bedford for a hearing, upon due notice, as to each property listed on the Survey, and it is further

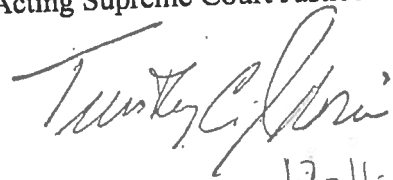
ORDERED that the remaining causes of action of the petition are denied, and the proceeding is dismissed.

The foregoing constitutes the opinion, decision and judgment of this court.

Dated: White Plains, New York  
December 11, 2018



Honorable Anne E. Minihan  
Acting Supreme Court Justice



12-11-2018