

**COPY**

SUPREME COURT-STATE OF NEW YORK  
IAS PART-ORANGE COUNTY

Present: HON. ELAINE SLOBOD, J.S.C.

SUPREME COURT : ORANGE COUNTY

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WORKS III ASSOCIATES, LIMITED  
PARTNERSHIP, STUART J. SACHS and  
HILARY NEWMAN,

Petitioners,

-against-

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

CITY OF NEWBURGH, NEW YORK, CITY COUNCIL OF THE CITY OF NEWBURGH, NEW YORK and MILL STREET PARTNERS, LLC,

Respondents.

Index No. 9921-2013  
Motion Date: April 15, 2014

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The following papers numbered 1 to 19 were read on this proceeding pursuant to CPLR Article 78 to review a determination of the respondent City Council of the City of Newburgh (hereinafter "the City Council"), dated November 12, 2013 and for related relief and this motion by respondents City of Newburgh, New York and City Council of the City of Newburgh, New York (hereinafter "the Newburgh respondents") for an order dismissing the petition [CPLR 7804(f)]:

Notice of Petition-Petition-Affidavit-Exhibits A-O.....	1-4
Notice of Motion-Affirmation-Exhibits 1-8.....	5-7
Affidavit (Sachs)-Exhibit A.....	8-9
Affidavit (Vitek)-Exhibits 1-4.....	10-11
Affidavit (Ortiz)-Exhibits 1-2.....	12-13
Memoranda of Law.....	15-19

Upon the foregoing papers it is ORDERED and ADJUDGED that the motion by the Newburgh respondents is denied and the petition is granted; the determination is annulled and the matter is remitted to the Newburgh respondents for further proceedings, without costs or disbursements.

Petitioners own property in a city block in the City of Newburgh which is bounded by Lander Street, Johnston Street, 1<sup>st</sup> Street and Broadway. Respondent City of Newburgh (hereinafter "the City") owns property in the same block. This proceeding concerns a plan to develop the City's property, creating a supermarket (or other retail space) and residential units ("the Mid-Broadway Project"). The City's property is in a TC-1 Zone (Tourist Commercial). A supermarket was not a permitted use in a TC-1 zone. Only "tourist-related retail" uses were permitted in the TC-1 Zone (Schedule of Use and Bulk Regulations, City of Newburgh Zoning Ordinance, Chapter 300 of the Code of the City of Newburgh).

On October 23, 2012, the City entered into a Development Agreement with respondent Mill Street Partners, LLC (hereinafter "Mill Street"). The City designated respondent Mill Street as the developer for the Mid-Broadway Project and stated:

The Development shall consist of a mixed-use project consisting of housing and commercial components along Broadway, Johnston Street, and Lander Street in the City of Newburgh, New York. The Development may be constructed in one phase (consisting of approximately 103 residential rental apartment units, together with a ground floor supermarket and/or other retail space and sufficient parking spaces) or may be constructed as a two-phase project [with the Phase I Project consisting of approximately sixty-seven (67) residential rental apartment units, together with a ground floor supermarket and/or other retail space and sufficient parking spaces and the Phase 2 Project consisting of the new construction of approximately thirteen (13) two-family attached residential townhomes, together with sufficient parking spaces]. In either case, total residential development shall not exceed 105 residential units and the Development shall provide, at a minimum, at least one parking space per residential unit.

(Development Agreement, Article I, section 1.02)

The City agreed to adopt "modifications to the City's Zoning Ordinance to permit the proposed Development" [Id., Article V, section 5.03(B)(I)].

On May 28, 2013, the City Council enacted Ordinance 6 of 2013, entitled "An Ordinance to Amend Article VII, Entitled 'Special Use Permits' of Chapter 300 of the Code of Ordinances of the City of Newburgh entitled 'Zoning' by Adding Section 300-38 Entitled 'Large-Scale Mixed-Use Development Special Permit'" (Exhibit G to the Petition). It incorporated the provisions of section 300-35 of the Zoning Ordinance. Section 300-35, which governs special uses provides that a condition to be fulfilled is that "[t]he use requested is listed among the special uses in the zone for which application is made".

On November 12, 2013 the City Council granted Mill Street's application for a special use permit to conduct a mixed-use building consisting of 13,000 square feet of retail space on the ground floor and 91 residential units on the upper floors. The only condition imposed upon the special use permit was that it had a duration of one year.

Petitioners bring this Article 78 proceeding seeking review of the City Council's determination to grant the special use permit. Petitioners allege, inter alia, that the uses which comprise the "mixed-use" are not permitted uses in the TC-1 zone. They also claim that proper notice of the public hearing was not given to the persons entitled thereto and that the permit allows parking arrangements

which violate the City of Newburgh Zoning Ordinance.

The Newburgh respondents now move to dismiss the petition purporting to state objections in point of law [CPLR 7804(f)].

A motion pursuant to CPLR 7804(f) is analogous to a pre-answer motion pursuant to CPLR 3211 in an action. For the most part the "objections" contemplated are those which do not go to the merits and might possibly allow the court to dispose of the proceeding without reaching the merits at all (see generally Siegel, New York Practice [5<sup>th</sup> Ed] § 567).

The only such objection raised is to petitioners' standing and, perhaps, a failure to join necessary parties. As above stated, petitioners own property in the same city block as the property for which the permit was issued and the petition alleges that the parking approved is within 20 feet of their property in violation of the Zoning Ordinance. Petitioners clearly have standing; their property is in close proximity to the subject property and they have also alleged an injury in fact which is within the zone of interests protected by the Zoning Ordinance (see Matter of Gernatt Asphalt Prods. v Town of Sardinia, 87 NY2d 668; Matter of Sun-Brite Car Wash v Board of Zoning & Appeals of Town of N. Hempstead, 69 NY2d 406). The court does not find that other neighboring landowners are indispensable parties [CPLR 1001].

The parties have argued the merits at length. The court does not see a need to allow the service of an answer and allow the Newburgh respondents two bites at the apple (see Siegel, supra;

Rockland County Patrolmen's Benevolent Association, Inc. v Collins, 225 AD2d 534; Breidis v Village of Tuxedo Park, 156 AD2d 744).

An applicant for a special use permit must establish that the proposed use complies in all other respects with the zoning ordinance (see Matter of Tandem Holding Corp. v Board of Zoning Appeals of Town of Hempstead, 43 NY2d 801; Matter of Vergata v Town Board of the Town of Oyster Bay, 209 AD2d 527; Matter of CBS Realty v Noto, 139 AD2d 645). Here, the respondent City Council granted the special use permit to allow two uses not permitted in the TC-1 zone, namely a retail space which is not "tourist-related" and residential uses on upper floors of buildings which exceed three stories in height. The court rejects the Newburgh respondents' argument that in allowing a mixed-use it may allow any conceivable uses to comprise the "mixed-use" without regard to the other provisions of the Zoning Ordinance.

Accordingly, the determination is annulled and the matter is remitted to the Newburgh respondents for further proceedings.

The foregoing constitutes the decision, order and judgment of the court.

Dated: June 24, 2014  
Goshen, New York

E N T E R

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