SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

COALITION FOR THE RESPONSIBLE GROWTH OF DOVER, by its President, Carolyn B. Handler; and Barbara Clay,

Petitioners,

For an Article 78 proceeding,

- against -

TOWN BOARD OF THE TOWN OF DOVER,

Respondent.

Index No. ________
RJI No. __________

MEMORANDUM OF LAW IN SUPPORT OF PETITION

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PRELIMINARY STATEMENT

Petitioners Coalition for the Responsible Growth of Dover ("Coalition") and Barbara Clay bring this proceeding to challenge the adoption by the Dover Town Board of Local Law No. 1 of 2008 (the "Local Law") as a blatant and gross violation of the Municipal Home Rule Law ("MHRL") §20, General Municipal Law ("GML") § 239-m and the Section 145-69 of the Town Zoning Law. The Town Board began the process of amending the zoning law governing the Mixed-Use Institutional Conversion Overlay District (hereinafter referred to as the "MC Overlay District") in January 2008 stating that its sole purpose was to change the procedures involved in approving projects in the MC Overlay District. The only stated purpose was to remove site plan approval authority from the Planning Board and grant complete authority to the Town Board.

Literally at the last minute, without providing any advance notice to the public and even some members of the Town Board, a new substantive section was included in the draft local law that materially changed the scope of the MC Overlay District. Where the MC Overlay District has always, by its very terms been limited to the site of the former Harlem Valley Psychiatric Hospital ("HVPC"), the last minute amendment allowed for the inclusion of "substantially contiguous" lands to be included in any comprehensive development plan for HVPC. This change was submitted on the day of the public hearing and adopted the same day.

This case is not about the wisdom or merits of the proposed amendment, but whether the Town Board complied with the law and respected the due process rights of the citizens to have notice and the opportunity to comment on the provisions of a local law. The public and interested agencies were under the impression that the only topic of the local law was whether the Planning Board would maintain site plan approval for the MC Overlay District. The ability

to effectively extend the district and include vaguely described "substantially contiguous" land was never raised. The requirements of the Municipal Home Rule for adequate public notice of proposed laws and the requirement that final versions be on the desk of Town Board members a minimum of seven days before action are designed specifically to prevent such shenanigans and attempts to sneak in substantive changes without proper consideration. The Local Law, clearly, must be annulled.

STATEMENT OF FACTS

Set forth herein is a brief summary of the relevant facts. Further detail is available in the accompanying Verified Petition, the Affirmation of Jeffrey S. Baker and Affidavits of Carolyn B. Handler and Barbara Clay.

The Harlem Valley Psychiatric Center ceased operations in 1994. In 1999 the Town amended the zoning law to adopt the MC Overlay District (§145-16) recognizing the unique characteristics of the HVPC site and seeking to promote the redevelopment of the site as a mixed-use community. The procedures of § 145-16 provided, *inter alia*, for greater densities of development within the property and approval of uses via site plan approval instead of special use permit and the consideration of uses that might not otherwise be permitted in the underlying zone. § 145-16 also allowed for the Town Board to re-zone some or all of the property to facilitate redevelopment as part of a comprehensive development plan. The procedures vested initial approval authority for the conceptual site plan and the comprehensive development plan with the Town Board. Thereafter, site plan approval would be granted by the Planning Board.
The MC Overlay District was specifically limited to the HVPC property. (Zoning Law § 145-16(A)).

Since in or around 2003 a development company has been pursuing the redevelopment of HVPC using the MC Overlay District procedures for a project known as the Knolls of Dover. In August 2007, due to the developer's perceived disagreement with the Town Board it unilaterally withdrew its application.

In January 2008, after the election of a new Town Supervisor and some Town Board members, the Town Board initiated a proposal to amend the MC Overlay District provisions. The stated purpose was to change the procedures for the approval of projects and streamline and facilitate approvals. The stated intent was only to remove site plan approval from the Planning Board and place the entire approval process in the hands of the Town Board.

On January 23, 2008 the Town Board accepted a draft local law entitled "A Local Law Amending the Procedures for Applications in the Mixed-Use Institutional Overlay District". That draft of the law only concerned the removing site plan approval from the Planning Board. (Baker Affirmation ¶2.)

The Town Board circulated notice of the proposed local law and that a public hearing would be held on February 27, 2008. The notices stated that the purpose of the hearing was "to consider an amendment to the Article IX, Chapter 145-16 of the Zoning Code for the Town Board to assume Site Development Plan Approval from the Planning Board for projects located in the MC Overlay District (the "Zoning Text Amendment") and to consider information relevant to any potential environmental impact of the proposed action. A copy of the zoning Text Amendment may be seen at Town Hall in the office of the Town Clerk." (Baker Affirmation ¶¶ 3-4.)

The Dutchess County Planning Board, believing that the subject of the amendment only concerned the jurisdiction of the approving agencies deemed the action one of local concern and did not otherwise comment on its referral pursuant to General Municipal Law §239-m.

The Dover Planning Board objected and provided comments regarding its loss of jurisdiction and the inadequate provisions in the draft law for it to review and comment on any proposal. (Baker Affirmation ¶5.)

At the February 27, 2008 public hearing, for the first time a new version of the local law surfaced. Where the original draft contained six sections, the new version contained nine. The most significant and material change, and the subject of this litigation, was the insertion of a new Section 4 to the local law that dramatically expanded the scope of the MC Overlay District to include lands outside of the HVPC. (Baker Affirmation ¶¶ 7-11.)

The Town Supervisor and the Town Attorney glossed over the change as insubstantial and the Town Attorney explained that although there was not a pending application for the Knolls of Dover at the time, the Town Board knew an application was forthcoming and that it would include a comprehensive development plan for lands beyond HVPC. For inexplicable reasons, the Town Attorney stated that since a future applicant would want to include greater lands in a major redevelopment, it made sense to expand the provisions of the MC Overlay District at this time. (Baker Affirmation ¶¶ 7-11.)

Copies of the revised local law were not available to the public at the hearing. Members of the Town Board only received the revised draft the day of the hearing. Many members of the public objected to having to comment on a local law that they had not seen and were particularly concerned about the amendment to the scope of the MC Overlay District. Two members of the Town Board also objected to having received the revised law that day and had no knowledge of

the change of the scope of the MC Overlay District. (Baker Affirmation ¶¶ 14-16; Handler Affidavit ¶¶ 6-8; Clay Affidavit ¶¶ 5-7.)

Nevertheless the Town Board proceeded to adopt Local Law No. 1 of 2008 by a vote of 3-2, the two dissenting votes being the members who objected to only receiving the revised law that day.

ARGUMENT

POINT I

THE CHANGE TO THE MC OVERLAY DISTRICT WAS A MATERIAL AND SUBSTANTIVE CHANGE TO ZONING LAW

The fundamental question before the Court is whether the last minute revisions to the Local Law were material and substantial so as to preclude adoption on February 27th without running afoul of the Municipal Home Rule Law, the General Municipal Law and the Town Zoning Law. Since the original draft of the law only concerned jurisdiction for site plan review and the new law included a manifest change in the scope of the MC Overlay District, it is obvious that the change was substantial and precluded the Town Board from approving the law that night.

As stated in § 145-16(A) of the Zoning Law, the purpose of the MC Overlay District is to facilitate the redevelopment of the former HVPC. The Overlay District was only limited to the HVPC property and was never intended to encompass a larger area. Prior to the adoption of the Local Law, the first sentence of §145-16(C)(2) read:

> The Town Board may, by zoning amendment in its sole discretion, rezone all or a portion of the MC District pursuant to a comprehensive development plan for a portion of the property that includes at least 40 acres.

As provided in the Local Law, the revised sentence now reads:

> The Town Board may, by zoning amendment in its sole discretion, rezone all or a portion of the MC District and rezone lands substantially contiguous to the MC District pursuant to a comprehensive development plan for a portion of the property that includes at least 40 acres. [Amendment underlined]

This provision of the MC Overlay District regulations allows the Town Board to rezone all or a portion of the property, the HVPC property, to facilitate the comprehensive development plan. The revised language dramatically changes the scope of the MC District by now allowing the simultaneous rezoning of lands substantially contiguous to the MC District. Where all of §145-16 was previously limited to the HVPC property, suddenly the scope has been increased to potentially include hundreds of acres and affect numerous property owners who may never have believed that their, or adjacent lands could be dramatically rezoned.

Once again, the Court is not being asked to rule on the wisdom of the amendment. It is simply a question of recognizing the obvious fact that the new Section 4 of the Local Law dramatically expanded and changed the nature of what had previously been circulated and that by doing so, the Town Board was precluded from adopting the law the same day it appeared on their desks. As demonstrated below, the Town Board violated the MHRL, the GML and the Town Zoning Law.

POINT II

THE TOWN'S FAILURE TO COMPLY WITH THE PROCEDURAL REQUIREMENTS OF THE MUNICIPAL HOME RULE LAW CONSTITUTES A JURISDICTIONAL DEFECT AND REQUIRES ANNULLMENT OF THE LOCAL LAW

Where a municipality elects to adopt and/or amend zoning regulations through the enactment of a local law, the notice, hearing, voting, filing, and publication requirements of the Municipal Home Rule Law must be observed. The procedure for the adoption of local laws is set forth in the Municipal Home Rule § 20. (N.Y Mun. Home Rule Law § 20). Pursuant to subdivision 4, no local law "shall be passed until it shall have been in its final form and either (a)

upon the desks or table of the members at least seven calendar days, exclusive of Sunday, prior to its final passage, or (b) mailed to each of them…at least ten calendar days, exclusive of Sunday, prior to its final passage." (N.Y. Mun. Home Rule Law § 20[4]). Subdivision 5 mandates notice and a public hearing on the adoption of local laws by the legislative body. (N.Y. Mun. Home Rule Law § 20[5]). As set out in more detail below, the Town's failure to satisfy the procedural requirements of Municipal Home Rule Law § 20 constitutes a jurisdictional defect requiring annulment of the local law.

a. Substantial changes to proposed amendment after notice was published required new notice and hearing

Subdivision 5 requires notice and a public hearing prior to the adoption of a local law. (N.Y. Municipal Home Rule Law § 20[5]). The purpose of a published notice is to notify the public of the nature of the legislation and to give interested persons an opportunity to be heard on the matter. (*See* Village of Chestnut Ridge v. Town of Ramapo, 45 A.D.3d 74, 87 [2 Dept. 2007]["[t]he purpose of these requirements is to ensure that when a town exercises the police power that is has been granted to it, it does so in a manner that provides a reasonable opportunity for the presentation to and consideration by the [town's board] or council of complete data and arguments for and against the proposed local law"]; Op. N.Y. State Compt. No. 81-124, p. 1-2 [1981]). Indeed, a notice provision is meant to give the average reader reasonable warning that land in which he has an interest may be affected. (Salkin, 1 N.Y. Zoning Law & Practice § 3:19 [2007]; *See also* Gernatt Asphalt Products, Inc. v. Town of Sardinia, 87 N.Y.2d 668, 170 [1996]["The sufficiency of the notice is tested by whether it fairly appraises the public of the fundamental character of the proposed zoning change. It should not mislead interested parties into foregoing attendance at the public meeting"]). A notice that does not describe the proposed change with reasonable precision will not satisfy this purpose of the notice requirement. (*See*

Gernatt Asphalt Products, 87 N.Y.2d at 170). And where there is doubt as to the sufficiency of the notice, such doubt will be resolved against the notice. (Salkin, 1 N.Y. Zoning Law & Practice § 3:19 [2007])

When events subsequent to the publication of notice lead to an amendment that is substantially different from that which was noticed, and which is not embraced within the notice, new notice and opportunity to be heard is required. (Id.; *see generally,* Reizel, Inc. v. Exxon Corp., 42 A.D.2d 500, 504 [2 Dept. 1973][“a new notice and a new hearing would be needed only when it could be fairly said that the deviation was such that interested persons would not have been alerted to the possibility by original notice”]; *See also* Albini v. Stanco, 61 Misc.2d 813, 825 [Nassau Co. 1968][new hearing was not required where changes made resulted from public hearing and “did not constitute a change in purpose or area…”]; Village of Sands Point v. Sands Point County Day School, 2 Misc.2d 885, 889 [Nassau Co. 1955][under Village Law section requiring publication of notice on hearing for adopting zoning regulations, notice must be reasonable to apprise public of essence of regulations to be adopted and where notice referred only to amending ordinance in relation to "applications and permits and permit fees" the adoption of an ordinance containing provisions relative to use of existing buildings was not validly enacted], *affd* 2 A.D.2d 769 [2 Dept. 1959]).

A review of the facts shows that the published notice did not satisfy the requirement of subdivision 5 in that it did not adequately apprise interested parties that their property would be affected by the adopted amendment. (*See* N.Y. Mun. Home Rule Law § 20[5]). The public had no notice that there was any intention to expand the scope of the MC Overlay District beyond the boundaries of the HVPC and thus it clearly deemed the notice invalid.

b. Town Board members were not afforded the opportunity to review the local law in its final form prior to its adoption.

As stated previously, Municipal Home Rule Law § 20[4] provides that no local law "shall be passed until it shall have been in its final form and either (a) upon the desks or table of the members at least seven calendar days, exclusive of Sunday, prior to its final passage, or (b) mailed to each of them…at least ten calendar days, exclusive of Sunday, prior to its final passage." (N.Y. Mun. Home Rule Law § 20[4]). As such, it is clear that subdivisions 4 contemplate the prior existence of the actual document which is proposed for adoption, and that a local law cannot come into being until what will constitute the text thereof is reduced to writing. (Op. N.Y. State Compt. No. 81-124, p. 1 [1981][asserting "[i]t is that writing which must be presented to the members of the legislative body pursuant to subdivision 4 and which must be before the assembly at the public hearing"]). Indeed, it is impossible to comply with the mandates of subdivisions 4 if there is no document which can be submitted to legislators. (Id. at 1).

In the instant matter, it is clear that the Town could not comply with the requirements of subdivisions 4 because the amendment at issue was only provide to the Town Board the day of the hearing and the day it was passed. It was not on the desks or table of members of the Board in its final form at least seven calendar days prior to its final passage or mailed to each of them at least ten calendar days prior to its final passage, thus violating the explicit requirements of subdivision 4. (*See* Tylec v. Niagara County Legislature, 572 A.D.2d 676 [4 Dept. 1991][redistricting plan enacted by county legislature was invalid under seven-day requirement of municipal home rule law]).

Moreover, the Town's failure to provide copies of the local law prior to its adoption violated the purpose behind of General Municipal Law § 20[5], inasmuch as a person attending the public hearing had no access to the legislation intended to be considered for adoption. (Op. N.Y. State Compt. No. 81-124, p. 1 [1981][the purpose behind the statutory requirement of notice is thwarted where the amendment is not reduced to writing, and thus, not obtainable (at town hall or any other place) by one who might have wished to study it, nor available at the time of the public hearing]).

Based on the foregoing, it is clear that the Town has failed to comply with the procedural requirements of the Municipal Home Rule Law. As such, the Town's adoption of the local law is jurisdictionally defective and must be annulled.

POINT III

THE PLANNING BOARD'S FAILURE TO COMPLY WITH GENERAL MUNICIPAL LAW §239-m CONSTITUTES A JURISDICTIONAL DEFECT AND REQUIRES ANNULLMENT OF THE LOCAL LAW

It is undisputed that the instant local law, amending the zoning code of the Town of Dover, required referral to the Dutchess County Planning Board pursuant to New York General Municipal Law §239-m. The statute expressly provides what information the County Planning Board was required to review prior to making recommendations on this local law:

> The term "full statement of such proposed action" shall mean all materials required by and submitted to the referring body as an application on the proposed action . . . <u>When the proposed action referred is the adoption or amendment of a zoning ordinance or local law</u>, "full statement of such proposed action" <u>shall also include the complete text of the proposed ordinance or local law</u> as well as all existing provisions to be affected thereby, if any, if not already in the possession of the county planning agency or regional planning council
> (General Municipal Law §239-m(1)(c) (emphasis added)).

When the full statement of proposed action submitted to a county or regional planning agency pursuant to General Municipal Law §239-m is substantially revised from the original submission, the county or regional board should have the opportunity to review and make recommendations based upon the revised plans, and a failure to re-submit the statement requires annulment of the municipal approval (*see Matter of Ferrari v Town of Penfield Planning Bd*, 181 AD2d 149, 152 [4th Dept 1992] (subdivision plat and site plan approvals annulled where the form and content of the plans accepted by the town were not the same as that in the statement provided to the county planning board). The express language of General Municipal Law §239-m(1)(c) requires that the statement of proposed action submitted to the county or regional planning agency include "the final version and complete text of the proposed new zoning law . . ." (*see Matter of LCS Realty Co., Inc. v Inc. Vil. of Roslyn*, 273 AD2d 474, 475 [2d Dept 2000], *lv to appeal denied* 96 NY2d 705 [2001]).

Obviously the County Planning Board was not provided with the complete text of the proposed amendment and had no knowledge of the expanded scope of the MC Overlay District. Thus the Town's referral to the County was jurisdictionally defective and the Local Law must be annulled.

POINT IV

THE TOWN BOARD FAILED TO REFER THE COMPLETE ZONING AMENDMENT TO THE TOWN PLANNING BOARD

Much like the provisions for referral under GML § 239-m, §145-69 of the Town Zoning Law requires that proposed amendments to the zoning law be referred to the Town Planning Board for recommendation. The Town Board only provided the Planning Board with the January 23rd draft of the amendment. It did not provide the Planning Board with the final version and it never informed the Planning Board of its intent to change the parameters of what could be

developed as part of the MC Overlay District. By providing the Planning Board a *per se* incomplete referral of the scope of the proposed amendment, the Town Board violated the requirements of its own zoning law and thus its subsequent approval of the local law must be annulled.

CONCLUSION

For the foregoing reasons, Local Law No. 1 of 2008 must be annulled.

Respectfully submitted,

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Jeffrey S. Baker, Esq.