

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.

Disp _____ Dec x Seq. Nos. 4-5 Type Art. 78

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

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In the Matter of the Application of

HAMPSHIRE RECREATION, LLC, and
HAMPSHIRE CLUB, INC.,

Plaintiffs/Petitioners,

Index No. 2371/14

For Order and Judgment Pursuant to
Section 107 of the Public Officers Law,
Article 78 of the CPLR, and Declaratory
Judgment,

-against-

DECISION AND ORDER

THE VILLAGE OF MAMARONECK, THE VILLAGE OF
MAMARONECK BOARD OF TRUSTEES, and THE
VILLAGE OF MAMARONECK ZONING BOARD OF
APPEALS,

Defendants/Respondents.

-----X

The following papers numbered 1 to 5 were read on these
motions:

<u>Paper</u>	<u>Number</u>
Notice of Motion, Affirmation and Exhibits	1
Memorandum of Law	2
Notice of Cross-Motion, Affirmation and Exhibits	3
Memorandum of Law	4
Reply Memorandum of Law	5

There are two motions before the Court. The first is filed
by Hampshire Recreation, LLC and Hampshire Club Inc.

(collectively, "Hampshire"). Hampshire's motion seeks to compel
defendants/respondents to produce certain witnesses for

deposition, namely, former Mayor Norman Rosenblum, former Trustees Louis Santoro, Andres Bermudez Hallstrom and Leon Potok (collectively, the "former officials"), and former planning consultant Frank Fish. Hampshire also seeks costs and attorneys' fees for the motion. In response, defendants/respondents' (collectively, the "Village") motion seeks a protective order preventing Hampshire from deposing the former officials and Mr. Fish.

Hampshire argues that it is entitled to take these depositions "concerning the circumstances surrounding their refusal to entertain Hampshire's Zoning Petition," including "conversations with the neighborhood opposition group, consideration of alternatives for development of the Hampshire property; the reasons for [Mr. Fish's] opinion that the Village Board should ask Hampshire to submit a lower-density version of the condominium plan and that the Village Board should commence the review process; the Village Board's consideration of new zoning for the property that would prevent any development; and input the Village received from other community members. . . ." Hampshire concedes that it is not interested in deposing the witnesses as to "the motive of the individual Trustees," or "conversations the Village Board member [sic] had with each other leading up to their vote not to entertain the Zoning Petition."

In response, the Village asserts that all of these inquiries are barred by the legislative privilege and the deliberative process privilege, because "the purpose of the depositions is to ask the legislators why they refused to consider Hampshire's petition for a zoning change," which is "an inquiry about the legislator's motives for not acting." The Village contends that Hampshire wants to inquire into the purpose of the legislators' refusals "to consider proposed legislation," which "is the same as inquiring into the legislator's motives for doing so." The Village also argues that because the Village refused to consider the proposed legislation, there is "no permissible inquiry into the legislator's reasons for not acting."

The seminal case that both parties cite in support of their contrary positions is *Burack v. Town of Poughkeepsie*, 32 A.D.2d 806, 806, 302 N.Y.S.2d 314, 315-16 (2d Dept. 1969). In that case, the Second Department noted, as both parties admit, that "An examination before trial as to motives inducing legislative action is improper." The Court went on to state that "while there may not be an examination into the motives which move a legislative body in the exercise of its legislative discretion, there may be an inquiry into the purpose of the legislation." (Emphasis added). The Court stated that where the inquiry is "material and necessary on the issue of whether the purpose of the challenged amendment was to benefit the individual property

owner rather than to promote the general welfare of the community pursuant to a well-considered, comprehensive plan," the depositions would be allowed. (Emphasis added). Hampshire argues that this case supports its position, because it is seeking "only to demonstrate that the purpose of the legislative action taken by the Village Board as a whole was to assist a small group of neighbors seeking to stop any development in their backyard." In contrast, the Village interprets this case to support its position, because "there was no legislation. The Board of Trustees refused to consider Hampshire's petition," which they "had the unfettered discretion" to do. As a result, the Village argues, Hampshire cannot inquire into "the purpose of legislators' actions" because "the only legislative act in issue is the rejection of the petitioners' rezoning applications. A refusal to act cannot give rise to any question about the legislative body's authority to act, so there can be no inquiry about the 'purpose' of that act." The Village cites no cases in support of this assertion.

In fact, research has revealed that a party may inquire into a refusal to act, just as when the legislators do act. In *Redco v. Town of Oyster Bay*, 87 A.D.2d 647, 647, 449 N.Y.S.2d 5, 5-6 (2d Dept. 1982), the Second Department noted that "Although a party may seek, by pretrial discovery, information relating to the purpose of challenged legislation, it is impermissible to

inquire into motive." It went on to state that inquiry into the failure to act is just as permissible as whether passed legislation was, in the Village's words, "within the competence of the Board of Trustees to adopt." Specifically, the Second Department stated that the requested discovery "properly seek[s] the factual basis for the town's denial of a change in the zoning classification, and those factors which distinguish the subject property from parcels of land similarly situated which were granted a change in their classifications." (Emphasis added).

Given that the inquiry applies equally to legislation passed or rejected, the Court finds that the Village's motion for a protective order must be denied in its entirety. Hampshire may take the depositions it seeks "as to the circumstances surrounding" the failure to act. *During v. City of New Rochelle*, 55 A.D.3d 533, 534, 865 N.Y.S.2d 279, 281 (2d Dept. 2008). The motives for the legislative inaction are of course unbroachable, but Hampshire may inquire into the "purpose of the legislation. The examination, as herein limited, is permissible within that rule, and is material and necessary on the issue of whether the purpose of the challenged amendment was to benefit the individual property owner rather than to promote the general welfare of the community pursuant to a well-considered, comprehensive plan." *Reformed Church of Mile Square v. City of Yonkers*, 8 A.D.2d 639, 640, 185 N.Y.S.2d 983, 984-85 (2d Dept. 1959) (Emphasis added).

The Village also argues that the "deliberative process privilege" applies to bar "legislators and those who assist them" from "testifying regarding documents and communications related to the pre-decisional deliberative process. . . ." The Court disagrees. First, as the Village grudgingly acknowledges, this is not a settled privilege outside of the context of Freedom of Information Law requests.

The Fourth Department recently held, in the case of *Mosey v. Cty. of Erie*, 148 A.D.3d 1572, 1575, 50 N.Y.S.3d 641, 645 (4th Dept. 2017), that "the Court of Appeals has never created nor recognized a generalized 'deliberative process privilege.'" The Fourth Department stated that although there are some cases "which all too casually mention the 'deliberate process privilege' and purport to apply it outside the context of a FOIL proceeding," "it is also important to recognize that privileges simply do not exist in the absence of either constitutional or statutory authority, or, when created as a matter of jurisprudence." It rejected the County's argument, stating that "Although the County seeks to assert the so-called deliberative process privilege in the context of a civil litigation, neither the Court of Appeals' case law nor that of the Fourth Department can be construed as having created a distinct 'deliberate process privilege' outside the context of a FOIL proceeding." *Id.*

Putting this case aside, and assuming that there is such a privilege, Hampshire correctly points out that even those cases that mention the "so-called deliberative process privilege" construe it "narrowly to serve the goals of an open and transparent government." Hampshire also asserts that it would never apply to "communications between Village Board Members and non-governmental parties, such as the members of the neighborhood opposition group." This is supported by the law. See *Tuck-It-Away Assocs., L.P. v. Empire State Dev. Corp.*, 54 A.D.3d 154, 163, 861 N.Y.S.2d 51, 58 (1st Dept. 2008), *aff'd sub nom. W. Harlem Bus. Grp. v. Empire State Dev. Corp.*, 13 N.Y.3d 882 (2009) (in FOIL context, deliberative process privilege did not protect communications with consultant who was also working with non-legislative entities). Even if the deliberative process privilege were to apply outside the FOIL context - a finding which the Court does not make - it certainly would not apply to discussions between members of the public and legislators or their consultants. The Village cannot thus bar discovery concerning the interactions with the neighbors.

As for Hampshire's request to depose Mr. Fish, the Village asserts that it must be barred on the basis that he was offering his advice and opinion "to assist Village officials to perform their legislative acts." To the extent that that was all he was doing, the Court agrees. As the Second Department explained in

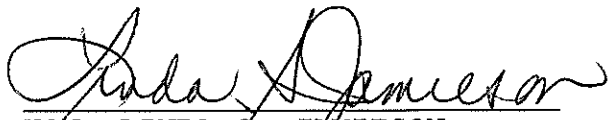
Sea Crest Const. Corp. v. Stubing, 82 A.D.2d 546, 549, 442 N.Y.S.2d 130, 132 (2d Dept. 1981), "an agency often needs to rely on the opinions and recommendations of temporary consultants as well as its own employees, and that such consultations are an integral part of its deliberative process, [so] that to conduct this process in public view would inhibit frank discussion of policy matters and likely impair the quality of decisions."

To the extent that Mr. Fish's opinions and recommendations have been made public in any way, however, including through the production of documents in this litigation, any possible privilege has been waived. Anything that has not been made public shall not be raised during his deposition.

All other requests for relief are denied. There is no basis for sanctions, as there is no evidence that the Village acted in bad faith.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
September 11, 2018


HON. LINDA S. JAMIESON
Justice of the Supreme Court

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