SUREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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In the Matter of the Application of

HILLCREST FIRE COMPANY #1, KEARSING & EDWARDS AMERICAN LEGION POST 1600, JUSTIN SCHWARTZ, ALBERTO CAPIRO, DANIEL JOHNSON, HOHN LEWIS JR., ROBERT STEELE, MAXINE GRUNER, SPENCER STANDFORD and GLORIA COPELAND,

Petitioners- Plaintiffs,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules and a Declaratory Judgment Pursuant to §3001 of the civil Practice Law and Rules,

- against -

THE VILLAGE OF NEW HEMPSTEAD; THE BOARD OF TRUSTEES OF THE VILLAGE OF NEW HEMPSTEAD, ABE SICKER in his capacity as the Mayor and Trustee of the Village of New Hempstead, MOSHE SCHULGASSER in his capacity as a Trustee of the Village of New Hempstead, SHALOM MINTZ in his capacity as a Trustee of the Village of New Hempstead; ALLISON WEINRAUB in her capacity as Village Clerk of the Village of New Hempstead; and BRUCE MINSKY in his capacity as Village Attorney of the Village of New Hempstead,

Respondents - Defendants.

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Index No. 030l28/2022
DECISION & ORDER
Mot. Seq. #1

Sherri L. Eisenpress, J.S.C.

The following papers, electronically filed as NYSCEF documents numbered 1-15; 22, 24-34; 39-46; 60-62; 70-102, were considered in connection with the Petition/Complaint.

Petitioners/Plaintiffs commenced this hybrid proceeding, *inter alia*, pursuant to Article 78 to review resolutions adopting the 2021 Comprehensive Plan for the Village of New Hempstead and adoption of Local Law No. 3 of 2021 of the Village of New Hempstead and action, among other things, for a judgment declaring that the Comprehensive Plan and Zoning Amendment are void and unenforceable. As relevant here, the petition/complaint alleges that the Comprehensive Plan and the Zoning Amendment are void and unenforceable on the ground that the Village of New Hempstead Board of Trustees (hereinafter the BOT) failed to strictly comply with the

procedural and substantive mandates of the State Environmental Quality Review Act (ECL art. 8; hereinafter SEQRA), and on the ground that the BOT failed to comply with the General Municipal Law §239-m.

The Petition asserts six causes of action. As an initial matter, the parties have stipulated to the dismissal of the fifth cause of action without prejudice and petitioners have requested that Robert Steele be removed from the caption as he passed away in November 2022.

The Village filed an Answer on September 20, 2022, asserting general denials and five objections in point of law: the first and fourth relate to standing and failure to exhaust administrative remedies; the second and third relate to the dismissal of the fifth cause of action which is now moot and the fifth is a nonspecific claim of mootness. The Village did not assert any affirmative defenses.

Standing

Generally, standing to challenge an administrative action turns on a showing that the action will have a harmful effect on the challenger and that the interest to be asserted is within the zone of interest to be protected by the statute (see, *Matter of Association for a Better Long Is., Inc. v New York State Dept. of Envtl. Conservation*, 23 NY3d 1, [2014]). A nearby property owner may have standing to challenge a proposed zoning change because aggrievement may be inferred from proximity (*Matter of Sun–Brite Car Wash v. Board of Zoning & Appeals*, 69 N.Y.2d 406, 413–414 [1987]). The proximity alone permits an inference that the challenger possesses an interest different from other members of the community. Standing to raise a SEQRA claim involves this variation: a SEQRA challenger must "demonstrate that it will suffer an injury that is environmental and not solely economic in nature" (*Matter of Mobil Oil Corp. v. Syracuse Indus. Dev. Agency*, 76 N.Y.2d 428, 433 [1990]).

Since the petitioners, American Legion Post, Justin Schwartz, Alberto Caprio, Daniel Johnson, John Lewis, Jr. and Maxine Gruner are located and live in close proximity to the portion of the site that is the subject to the challenged determinations, they do not need to show actual injury or special damage to establish standing) (*Youngewirth v Town of Ramapo Town Bd.*, 98 AD3d 678 [2d Dept 2012]; *see also Matter of Gernatt Asphalt Prods. v. Town of Sardinia*, 87 N.Y.2d 668, 687 [1996]; *Matter of Sun–Brite Car Wash v. Board of Zoning & Appeals*, 69 N.Y.2d 406, 413–414 [1987]). Further, the injuries alleged by the petitioners - increased noise, traffic, detrimental impact of water/sewer infrastructure and community services, and degradation in the character of the neighborhood - fall within the zone of interest to be protected by SEQRA and the Village's zoning laws and are potential noneconomic environmental concerns within the zone of interest of SEQRA (*see Matter of Gernatt Asphalt Prods. v. Town of Sardinia*, 87 N.Y.2d 668, 687 [1996]; *Matter of Long Is. Contractors' Assn. v. Town of Riverhead*, 17 A.D.3d 590, 594 [2d Dept 2005]; *Matter of McGrath v. Town Bd. of Town of N. Greenbush*, 254 A.D.2d 614, 616 [3d Dept 1998]. Given such determination, the Court need not address the respondents' challenge of standing as to the other plaintiffs (*Saratoga County Chamber of Commerce, Inc. v Pataki*, 100 NY2d 801 [2003]; *see also Congregation Rabbinical College of Tartikov, Inc. v Village of Pomona, NY* 945 F/3d 83 [2d Cir. 2019]).

Exhaustion of Administrative Remedies

Contrary to the respondents' contention, the petitioners are not precluded from maintaining this proceeding on the ground that they did not actively participate in the underlying administrative proceeding. The Village generally contends in its supplemental affirmation that many of the grounds asserted in the petition were raised for the first time but fails to identify a single claim that can be dismissed. Further, the petitioners allege and the record establishes, that the issues relating to the need for the Village to comply with SEQRA, notice and GML §239-m requirements were specifically advanced by others at a public hearing or in written comments timely submitted to the Village (*see Youngewirth v Town of Ramapo Town Bd.*, 98 AD3d at 680).

SEQRA

Petitioners challenge the BOT's lack of procedural compliance with SEQRA prior to passing the 2021 Comprehensive Plan, subsequent rezoning resolutions and Local Law 3-2021. "SEQRA mandates literal compliance with its procedural requirements and substantial compliance is insufficient to discharge the responsibility of the agency under the act" (*Matter of East End Prop. Co. # 1, LLC v. Kessel*, 46 A.D.3d 817, 820 [2d Dept 2007]).

"The purpose of an environmental impact statement is to provide detailed information about the effect which a proposed action is likely to have on the environment, to list ways in which any adverse effects of such an action might be minimized, and to suggest alternatives to such an action so as to form the basis for a decision whether or not to undertake or approve such action" (ECL 8–0109[2]). In a findings statement, the lead agency "considers the relevant environmental impacts presented in an EIS, weighs and balances them with social, economic and other essential considerations, provides a rationale for the agency's decision and certifies that the SEQRA requirements have been met" (6 NYCRR 617.2[p]; *see Matter of WEOK Broadcasting Corp. v. Planning Bd. of Town of Lloyd*, 79 N.Y.2d 373, 380 [1992]). Agencies have considerable latitude in evaluating environmental effects and choosing between alternatives (*see Akpan v. Koch*, 75 N.Y.2d 561, 570 [1990]).

While an agency's ultimate conclusion is within the discretion of the agency, it must be based upon factual evidence in the record and not generalized, speculative community objections (*see Matter of WEOK Broadcasting Corp. v. Planning Bd. of Town Lloyd*, 79 N.Y.2d at 384–385). "While an EIS does not require a public agency to act in any particular manner, it constitutes evidence which must be considered by the public agency along with other evidence which may be presented to such agency" (*Matter of Town of Henrietta v. Department of Envtl. Conservation of State of N.Y.*, 76 A.D.2d 215, 222 [4th Dept 1980]).

Here, upon review of the record, the SEQR process for the Comprehensive Plan is comprised of unsigned, undated Full Environmental Assessment Forms ("FEAF") forms that do not cite to supporting documentations and which were never adopted by the BOT. There are no FEAF forms in the record for any subsequent rezoning actions. The Village Affirmations in response to the petition appear to rely upon the SEQR process for the Comprehensive Plan as the

basis for the three subsequent rezoning map and rezoning code actions. Two versions of the Comprehensive Plan included in the record include a Part 1 form as well as a second set of forms which were all unsigned and undated with no mention of any SEQR determination. Both Part 3 forms direct the reader to supplements but none are found in the record. Annexed as Exhibit B to the Village Affirmation is a document identified as "expanded Part 3" and contends it depicts the rational basis for a negative declaration (see NYSCEF Doc No 24 ¶33). A review of the document belies such contention. The Town Planner states there exists the potential for significant environmental impacts and recommends that a Generic Environmental Impact Statement (GEIS) be prepared. The Village Affirmations sole response to a failure to comply with SEQRA is conclusory and without record citations.

"Judicial review of an agency determination under SEQRA is limited to whether the agency procedures were lawful and whether the agency identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination" (*Matter of Falcon Group Ltd. Liab. Co. v. Town/Village of Harrison Planning Bd.*, 131 A.D.3d 1237, 1239 [2d Dept 2015] [internal quotation marks omitted]; *see Matter of Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 417 [1986]). "In a statutory scheme whose purpose is that the agency decision-makers focus attention on environmental concerns, it is not the role of the courts to weigh the desirability of any action or choose among alternatives, but to assure that the agency itself has satisfied SEQRA, procedurally and substantively" (*Matter of Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d at 416). "The agency decision should be annulled only if it is arbitrary, capricious, or unsupported by the evidence" (*Matter of Falcon Group Ltd. Liab. Co. v. Town/Village of Harrison Planning Bd.*, 131 A.D.3d at 1239; *see Matter of Riverkeeper, Inc. v. Planning Bd. of Town of Southeast*, 9 N.Y.3d 219, 231–232 [2007]).

6 NYCRR 617.6(a)(4) permits an agency to waive the requirement for an environmental assessment form (hereinafter EAF) if a draft environmental impact statement is prepared or submitted. In this case, there was no negative declaration issued, nor was any draft environmental impact statement produces for any of the challenged BOT actions, all of which were Type I actions (6 NYCRR 617.4(b)(1) and (2). Thus, the failure to prepare an EAF amounts to a failure to literally comply with SEQRA's procedural requirements.

GML §239-m

It is undisputed that the Village had a duty to comply with the procedural requirements of General Municipal Law § 239–m in order to properly enact its Comprehensive Plan. Among other provisions, General Municipal Law § 239–m mandates that the Village refer its proposed planning and zoning actions to County Planning for review and recommendation (see, General Municipal Law § 239–m [2], [3]). Furthermore, the Village was required to submit to County Planning the "full statement of such proposed action", including "all materials required by and submitted to the referring body as an application on a proposed action, including a completed environmental assessment form" (General Municipal Law § 239–m[1][c]). In addition, the General Municipal Law requires that County Planning "shall have" at least 30 days, after receipt, to consider the materials before making its recommendations, if any (see, General Municipal Law § 239–m[4][b]).

After referral by the Village of a draft Comprehensive Plan, County Planning deemed the Village's FEAF Part 1 incomplete and were never provided with a final Comprehensive Plan to review. County Planning's letter dated August 17, 2020, included 59 comments of corrections and recommendations including four pages of "typographical, punctuation, format and update errors". Resolution 2020-103 acknowledges receipt of the County Planning comments and claims that some unspecified "concerns" were incorporated into a Final Comprehensive Plan dated October 27, 2020 yet no final Comprehensive Plan of said date exists in the record. County Planning should have been in possession of all of the materials which the Village needed in order to pass the Comprehensive Plan and new zoning resolutions, including the final version and the final GEIS. However, it is clear that County Planning did not have these materials for the requisite 30–day period before the Village acted and adopted the subject Comprehensive Plan and subsequent Zoning Amendment. Under such circumstances, the Village did not comply with General Municipal Law § 239–m and, as a consequence, the Comprehensive Plan and Zoning Amendments were improperly adopted and are void (*see, LCS Realty Co., Inc. v Incorporated Village of Roslyn*, 273 AD2d 474 [2d Dept 2000]).

Contrary to the Village's contention, the public hearing held for the Comprehensive Plan was for a draft plan, thus a new public hearing was warranted for the approval of the corrected Final Comprehensive Plan which did not occur. Where changes are made to a proposed zoning amendment following the conclusion of a properly-noticed public hearing, new notice and another public hearing are not required if the "amendment as adopted is embraced within the public notice" (*Matter of Gernatt Asphalt Prods v Town of Sardinia*, 87 NY2d 668, 678-679 [1996]) or if the amendment as adopted is not substantially different from the amendment as noticed (*see Caruso v. Town of Oyster Bay*, 250 A.D.2d 639 [2d Dept 1998]; *Marcus v. Incorporated Vil. of Spring Valley*, 24 A.D.2d 1021 [2d Dept 1965]). Here, although the October 27, 2020 Minutes state the BOT incorporated certain concerns into a Final Comprehensive Plan dated October 27, 2020 no such document exists in the record. The two drafts in the record are identical yet Resolution 2020-103 states it is different without any specifics making it impossible to determine whether the amendment as adopted is or is not substantially different from the amendment as noticed.

Respondents have failed to adequately discharge their responsibilities under SEQRA in failing to identify the relevant areas of environmental concern and in failing to take a "hard look" at them when passing the Comprehensive Plan.

Second, Third and Fourth Causes of Action

Petitioners contend that if the Comprehensive Plan is invalidated then the subsequent Zoning Amendments are also invalid. Respondents argue that even if the Comprehensive Plan is invalidated, the adoption of the subsequent Zoning Amendments is valid as they were based on rational planning and consistent with the Village's Comprehensive Plan. Respondents' argument is specious. If the Comprehensive Plan is invalidated for failure to comply with the procedures mandated by SEQRA, any zoning amendments that rely solely upon such defective Comprehensive Plan must be invalidated.

The second cause of action challenges Resolution BOT 2021-18 which states that it amends the zoning map to reflect changes to the various zoning districts previously approved by the Village

Board in the Comprehensive Plan. Such language makes it unclear whether this particular resolution is a rezoning resolution as the Comprehensive Plan cannot approve zoning changes and as of the date of this Resolution no local law was adopted to change the zoning maps. The Resolution amended the zoning map to include zoning designations which did not exist, were undefined and were not codified in the Village Code including a Planned Unit Development Zone, four (4) Optimized Single Family Cluster overlay zones; Optimized Multi-Family Cluster Zone and Fairway Park Village Center Zone. Respondents' argument supports petitioners' claim as it relies upon the adoption of Local Law 3-2021 which took place six months after the resolution to change the zoning map.

The third cause of action challenges Zoning Map Resolution 2021-72 and Local Law 3-2021 which was also enacted to reflect the zoning amendments contained in the Comprehensive Plan. The fourth cause of action challenges Resolution BOT 2021-90 which purports to update and clarify the zoning map to reflect the changes to the various zoning districts previously approved by the Village Board in the Comprehensive Plan without identifying what map was being updated or what new map was being approved. Further, the Village Affirmations fail to refute or even address the claims made in the fourth cause of action.

The petitioners have demonstrated, based on the record, that the Village's actions were arbitrary and capricious in the change of zone process. In fact, prior to filing their Answer, the Village attorney represented to this Court its intention to pass a new local law to moot out this litigation and opened a public hearing where the Mayor represented the Village would do a Draft Generic Environmental Impact Statement ("DGEIS"). Just recently, the Village agenda for their regular meeting dated September 12, 2023, includes a Resolution that addresses the Village's lack of compliance with SEQRA when passing the Comprehensive Plan specifically mentioning this litigation. In essence, the Village acknowledges its errors in failing to comply procedurally with SEQRA prior to passing the 2021 Comprehensive Plan, subsequent rezoning resolutions and Local Law 3-2021. The solution is not to make corrections but to start the process all over again in compliance with the procedural requirements of SEQRA and GML §239-m.

Sixth Cause of Action

Without admitting any conflict of interest, the Village Supplemental Affirmation asserts that this cause of action is moot because Attorney Terry Rice is representing the Village in this litigation as well as the adoption of a successor comprehensive plan and zoning law.

Accordingly, it is hereby

ORDERED that the Petition is GRANTED to the extent that the actions of the respondents in passing Resolution No. BOT 2020-103, Resolution No. BOT 2021-18, Resolution No. BOT 2021-72 and Resolution No. 2021-90 are annulled and vacated as is fully set forth above; and it is further

ORDERED that attorney Bruce Minsky is enjoined from participating in any rezoning matters relating to 301 Pomona Road; and it is further

ORDERED that the caption be amended to remove Robert Steele as a petition; and it is further

ORDERED that the remaining contentions set forth in the petition are denied as without merit.

This decision constitutes the order of the Court.

E N T E R

Dated: January 10, 2023
New City, New York

HON. SHERRI L. EISENPRESS, J.S.C.

TO: Counsel of Record via NYSCEF