SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
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In the Matter of the Application of

CITIZENS UNITED TO PROTECT OUR NEIGHBORHOOD-HILLCREST and SHARON DOUCETTE,

Petitioners-Plaintiffs,

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

-against-

THE TOWN OF RAMAPO, THE TOWN OF RAMAPO ZONING BOARD OF APPEALS, THE TOWN OF RAMAPO PLANNING BOARD, BLUEFIELD EXTENSION LLC, and SUNSHINE GARDENS REALTY LLC.

Respondents-Defendants.
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DECISION AND ORDER

Index No.: 031155/2022
(Action #1)

In the Matter of the Application of

CITIZENS UNITED TO PROTECT OUR NEIGHBORHOOD-HILLCREST and SHARON DOUCETTE,

Petitioners-Plaintiffs,

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

-against-

THE TOWN OF RAMAPO, THE TOWN OF RAMAPO PLANNING BOARD, BLUEFIELD EXTENSION LLC, and SUNSHINE GARDENS REALTY LLC.

Respondents-Defendants.
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Index No.: 032462/2022
(Action #2)

Sherri L. Eisenpress, J.

The following papers, numbered NYSCEF documents 1-55, were considered in connection with an Article 78 Petition filed by Petitioners on March 21, 2022 (Index No. 031155/2022, "Action 1"), seeking to annul, vacate and set aside the use variance and each of the area variances approved by the Zoning Board of Appeals on or about February 10, 2022.

The following papers, numbered NYSCEF documents 1-35, were considered in connection with an Article 78 Petition filed by Petitioners on June 12, 2022 (Index No. 032462/2022, "Action 2"), seeking to annul, vacate and set aside the July 13, 2021, Negative Declaration ("Neg. Dec.) determination and the grant of subdivision approval by the Planning Board, dated May 13, 2022.

Upon the foregoing papers, the Court now rules as follows:

INTRODUCTION

On or about March 21, 2022, Petitioners-Plaintiffs, Citizens United To Protect Our Neighborhood-Hillcrest ("CUPON") and Sharon Doucette ("Petitioners") commenced an Article 78 proceeding against Respondents-Defendants, The Town of Ramapo, The Town of Ramapo Zoning Board of Appeals ("ZBA"), The Town of Ramapo Planning Board ("PB"), Bluefield Extension, LLC ("Bluefield"), and Sunshine Gardens Realty LLC ("Sunshine") (together "Respondents" or "Applicants").(Index No. 031155/2022 "Action 1")

On or about June 12, 2022, a new petition was filed by the very same Petitioners against the very same Respondents, excluding the ZBA. (Index No. 032462/2022)("Action 2"). Answers were filed on July 29, 2022 (Action 1) and January 12, 2023 (Action 2). Opposition to the relief requested in the Petitions were filed on December 9, 2022, and January 12, 2023, with reply papers submitted by Petitioners on or about March 3, 2023.

These two actions are the latest in a string of actions revolving around the ZBA's approval of various "use variances" and "area variances" and the PB issuance of a Negative SEQRA Declaration ("Neg. Dec."), all related to a project commonly referred to as the "Bluefield Extension" Project (the "Project").

The current Petitions seek to annul, vacate and set aside the use variance and each of the area variances approved by the ZBA on or about February 10, 2022 (the "2022 variance decisions") and to annul, vacate and set aside the July 13, 2021, Neg. Dec. determination and the grant of subdivision approval by the PB, dated May 13, 2022.

Given the complete identity of parties, and the intrinsically, intertwined underlying facts and legal issues, the Court decides both petitions together, as further set forth herein.

BACKGROUND

In 2012, Bluefield's predecessor filed applications for subdivision approval and variances for ten dwelling units and ten accessory units.

On January 16, 2013, the PB adopted a Neg. Decl. for this Project. This Negative Declaration was never annulled, vacated or invalidated, and remains in effect. E. Deane Leonard v. Planning Bd. of Town of Union Vale, 136 A.D.3d 868, 870, 26 N.Y.S.3d 293, 297 (2d Dept. 2016).

The ZBA granted the first requested use variance on January 30, 2014, and the PB subsequently granted subdivision approval.

On February 9, 2016, Mr. Grunwald acquired the site through his wholly owned entities, Bluefield and Sunshine. The prior subdivision approval had, by the time of the Grunwald purchase, expired by operation of law. When the Applicants sought to obtain reapproval of the subdivision, he was required to and did reduce the total number of dwelling units to 15 (10 dwelling units and five accessory apartments) as a means of addressing concerns raised by opponents of the Project. The Applicants at that time also sought area variances, which the ZBA approved on or about February 1, 2017.

Subsequently, although Applicants contended that the prior approvals and variances remained valid, Applicants agreed to apply again for the same variances and approvals anew, at what Applicants contend was a considerable cost, including extensive engineering and professional fees. Applicants appeared before the PB prior to seeking the variances on or about May 7, 2019, at which time the PB issued its Neg. Dec.

What followed were several years of litigation, including two prior Article 78 proceedings, over the various "reissued" approvals, that resulted in this Court's Decisions and Orders dated January 6, 2020 (Index No. 000506/2018) and May 3, 2020 (Index No.

32128/2020) which granted the Petitions on procedural grounds (the "Prior Decisions and Orders.")

The properties that are the subject of Action 1 and Action 2 presently before the Court (122, 126, 128 and 130 Union Road (the "Site")) is the same Site that was the subject of the two prior Article 78 proceedings, resulting in the Prior Decisions and Orders. The Court hereby incorporates the facts set forth in those Decisions and Orders as if fully set forth herein.

Post March 3, 2021 Developments and
Current Procedural Posture

Following this Court's 2020 and 2021 Decisions, proceedings before the ZBA and the PB were recommenced with the March 22, 2021, submission of an application by Respondents for subdivision and sketch plat approval. This application was submitted along with a Full Environment Assessment Form ("FEAF") Part I, dated March 19, 2021, prepared by the Project's sponsor, Civil Tec Engineering & Surveying PC ("Civ Tec") which concluded that the Project had no potential environmental impacts.

On March 26, 2021, the Applicants submitted a subdivision plan to the PB, including ten maps upon which were notations as to the use variance and area variances that would be required. The Applicants also submitted to the PB a fire truck turning template, a fire flow availability calculations' chart, a stormwater pollution prevention plan and a water report, all prepared by Civ Tec. The proposed use of the "X.3" use group for the Project's bulk requirements was approved by Ian Smith ("Smith"), the Town's Building Inspector.

In mid-April 2021, the Town's Fire Inspector, Department of Public Works ("DPW") and Smith submitted their respective comments. Specifically, the Fire Inspector had no comments; the DPW noted that its comments had previously been addressed; and the Building Inspector submitted comments and identified the variances which would be required for the Project.

On April 21, 2021, the Community Design Review Committee ("CDRC"), essentially the architectural review board, met to review the application, having received the application

materials and the local agency comment letters in advance. The CDRC deemed the Project a "Type 1" action under SEQRA which designation required the Project to undergo a coordinated review by a lead agency to determine whether the Project would have a significant environmental impact.

On June 7, 2021, the PB disseminated its Notice of Intent to be Lead Agency ("NOI Packet") to other involved local agencies. The NOI Packet included: (1) the sketch plat application, (2) the FEAF Part I, (3) a narrative from attorney Terry Rice, counsel for the Applicants, (4) a narrative from Civ Tec, (5) the fire flow availability calculations chart, (6) the water report, (7) the stormwater pollution prevention plan, (8) the "Lange Report" (discussed in more detail below), (9) the subdivision plan, and (10) the proposed drainage and existing drainage area maps prepared by Civ Tec.

The opening pages of the NOI Packet make clear that the Project requires use and area variances and that the requested relief is "identical" to the Applicant's prior applications, all of which likewise required such variances. The proposed Project consists of a four-lot subdivision with 10 dwelling units with a combination of two and three family semi-attached residences with five accessory apartments. Two and three family semi-attached units are not permitted in the R-15 zone. Since the zone in which the properties are located is an R-15 zoning district, a use variance is required for the Project to proceed. Multiple area variances are similarly required.

The virtually identical application was previously approved by the PB, including the issuance of a Neg. Dec., on May 7, 2019, and subdivision approval on November 20, 2020. By Decision and Order dated March 3, 2021, this Court again annulled the Town's approvals on procedural grounds.

<u>The John Lange Report</u>

The submitted and circulated NOI Packet included a report from former Town Planner John Lange of Lange Planning and Consulting (the "Lange Report"). The PB had reviewed this report when it previously issued the first Negative Declaration pursuant to SEQRA. The Lange

Report notes the undisputed facts that the Property consists of 1.05 acres and is located in the Town's R-15 zone. The Lange report goes on to describe details about the transitioning area surrounding the Project site:

> Directly south [of the Project is] the Park Towers development, [sic] a three story, older apartment complex. To the west, a large recent development provides three family semi-attached homes with multiple accessory apartments along Bluefield Drive. This development was created by the sale of the former public school to a developer who subdivided and sold the school to a religious institution and subdivided the surrounding area into 10,000 square foot lots. The density for this development is approximately 24 ± units per acre. The approval of this development was approximately fifteen years ago, and is indicative of the Town's intentions for this area at that time. To the southwest, three family homes with multiple accessory apartments have been constructed. To the north are aged (original) homes, vacant and deteriorating single-family homes, in significant decay.

Lange's report also contains maps depicting what he describes as the abundance of multi-family housing in the immediate vicinity of the Project. Lange asserts (with respect to one map in particular) that it establishes "the predominance of multifamily units in close proximity [to the subject property]."

Lange opines that given the pattern; the Site is nearly completely surrounded by multifamily uses. The density for these developments varies from 3 units to 77 units. The highest density units surround the site in three directions – from the north, east and south. The lower density 3-6-unit homes on 10,000 square foot lots are to the west. Thus, Lange concludes that based upon units per acre, even the lower density 3-6 family development equates to 12-24 units per acre, and that this density characterizes the predominant current development.

In his report, Lange identified the permitted uses in the R-15 zoning district—utilities, residences/community residences, agriculture; two-family detached residences, one-family semi attached residences, local houses of worship, and community houses of worship—and explains why none of these permitted uses are viable alternatives for the Project. First, Lange contends that the Applicant cannot realize a reasonable return on their investment. In

addition, Lange concludes that the alleged hardship relating to the Property is unique and does not apply to a substantial portion of the district or neighborhood.

From these findings, Lange then concludes that none of the aforementioned permitted uses in an R-15 zone are practicable for the Applicants. He also concludes that "the granting of the use variance will place this parcel in conformance with the majority of the surrounding neighborhood, rather than at odds with the current neighborhood."

Petitioners dispute Lange's conclusions and contend instead that, in fact, the R-15 zone is meant to be a transitional one and is not meant to incorporate the higher density lots.

Notice of July 13, 2021 Public Hearing
and SEQRA Review

On June 29, 2021, the PB issued a notice that it would hold a public hearing on July 13, 2021. The PB placed the Project on the agenda on that date for a determination of potential environmental impacts pursuant to SEQRA. The PB notice clarified that this public hearing was not a "SEQRA Hearing" within the meaning of 6 NYCRR Part 617 but that the PB would still accept public comment at the hearing.

The Town issued this notice 14-days before the hearing, even though such notice is only required after a lead agency determines a positive declaration is warranted and the lead agency determines there should be a public hearing concerning the action. See 6 N.Y.C.R.R. § 617.9(a).

GML Referral & Override Letter from Terry Rice

Before the July 13, 2021 hearing, the Rockland County Sewer and Highway Departments submitted letters with comments on the Project. The Rockland County Planning Department also submitted comments pursuant to §239-n of the General Municipal Law, disapproving of the sketch plat application.

On July 13, 2021, Applicant's counsel submitted a letter to the PB requesting that it override the County Planning Department's recommendation of disapproval.

The July 13, 2021 Planning Board Hearing

On July 13, 2021, the PB held a public hearing on the application for sketch plat approval and SEQRA review. At that hearing, Applicant's counsel spoke at length about the application. He explained this Court's prior invalidation of PB approval as having been only on the basis of insufficient notice. Counsel also discussed the Lange Report, particularly Lange's conclusion that the area surrounding was "in transition because new development, immediately, adjacent in its surrounding area consists of extensive new and existing multifamily dwelling."

Rachel Barese, a Civ Tec Engineer, also spoke at the hearing about the sketch plat application. She explained that the Project would require a use variance and that the Project utilized the "x.3" use group for the Project's bulk requirements because multi-family residences are not permitted in an R-15 Zone as-of-right. Board Member Yisroel Eisenbach questioned whether the requirements under "x.3" are similar to those used in an R-15C zone in the Town. Barese noted the "x.3" use group is applicable in the R-15C Zone. Barese also summarized the various CDRC reports and indicated most local agencies had no comments or issues with the Project. As for the agencies that did have comments, including the County Highway and Sewer Departments, and M.J. Engineering, Barese indicated that the Project would comply with those comments.

PB Chairman Sylvain Klein, Town Engineering Consultant Joel Bianchi, and Applicant's counsel discussed the GML comments, deciding the PB need not discuss entertaining an override of any/all comments because it was not necessary for a sketch application. The PB decided not to decide at that point in the process whether or not to override the GML comments, with Chairman Klein stating: "we, usually, always wait to final [subdivision approval]" to consider overriding GML comments.

The PB subsequently opened the hearing to public comment, during which Petitioners' spoke and raised objections, which objections are likewise asserted in Actions 1 and 2 and will be addressed infra. Applicant's counsel responded to some of the comments.

Town Engineering Consultant Bianchi then spoke about the draft he had prepared for Part II of the Project's FEAF. He indicated the PB determined the Project was consistent with community character and would not have a potentially adverse environmental impact on land, geological features, surface water, groundwater, flooding, air, plants and animals, agricultural resources, aesthetic resources, historic/archaeological, open space and recreation, critical environment areas, transportation, energy, noise odor and light, and human health.

Because the PB did not find any potentially adverse environmental impact, the PB did not have to complete Part III of the FEAF, which requires consideration of whether any identified, potentially-large, adverse impacts "are actually significant." See 6 N.Y.C.R.R. § 617.1, appendix(a); 6 N.Y.C.R.R. § 617.9(a)(4).

A few additional public comments were heard and Planning Board counsel, George Litcho, opined in response to an objection to the "premature" SEQRA review, that while SEQRA review is not a "necessary requirement" when considering a sketch plat application, "[SEQRA] does require...you take action to consider the environmental impacts at the earliest opportunity." (emphasis added) He thus felt it appropriate for the PB to consider making a SEQRA determination at that time.

At the conclusion of this proceeding, the PB voted on several resolutions. Specifically, they voted unanimously to (1) assume lead agency under SEQRA, (2) approve the request to grant the Negative Declaration under SEQRA, and (3) refer the Project to the ZBA "with no recommendation."

<u>The Planning Board's Negative SEQRA Declaration</u>

On July 13, 2021, having before it a full FEAF with Parts I to III, the PB adopted the Neg. Dec. for the Project, which states, in pertinent part:

> [T]he Town of Ramapo Planning Board hereby concludes that an Environmental Impact Statement (EIS) will not be required for the project because (a) this Action will result in no adverse environmental impacts, or (b) the identified adverse environmental impacts will not be significant (see 6 NYCRR § 617.7(a)(2)) and the issuance of a negative declaration under SEQRA is warranted.

The PB set forth its rationale for concluding the Project will not have a significant adverse environmental impact and contends that it did so after considering each required area of environmental concern pursuant to the Part II of the EAF, and concluded they would not be significantly impacted.

The PB found the Project will not result in a significant impact on land. The PB based this conclusion on Civ Tec's stormwater pollution prevention plan, which addresses construction phase erosion and sediment control and permanent water quality/quantity control measures to be employed. The Neg. Dec. made clear that the Town Engineer would "continue to [review the plan] during the preliminary and final subdivision review process for compliance with state and local laws, codes and ordinances pertaining to stormwater runoff and controlling construction phase sediment and erosion controls." The PB further determined the Project would not result in any significant impact upon geological features as the Project site "does not include any unique or unusual landforms."

Further, the PB found the Project would not yield any significant impact upon any surface, or groundwater, but would still be subject to the review and approval of the Town DPW and Rockland County Sewer District. The Neg. Dec. also re-iterated that the Town Engineer would "continue to [review the plan] during the preliminary and final subdivision review process for compliance with state and local laws, codes and ordinances pertaining to stormwater runoff and controlling construction phase sediment and erosion controls" for prospective impact on surface waters.

The Neg. Dec. also concluded the Project would not have any significant impact on groundwater, flooding, air, plants and animals, agricultural resources, historical and archaeological resources, open community space and recreation, critical environmental areas, transportation, energy, or human health.

The PB further concluded the Project would have "temporary noise [generated]" from construction but concluded the noise for this type of project is "typically intermittent and associated with short-term phases of the construction" meaning the impact was "expected to

be minimal, localized, and short-term in duration." The PB found that while the Project will be visible from the public right of way "the vantage points are not from designated scenic or aesthetic resources" signifying the Project would have no impact on aesthetic resources as well. Finally, the Neg. Dec. found the Project was consistent with community plans on the growth or character of the existing community and thus not would not negatively impact it.

Zoning Board- Application & Other Submissions

On September 24, 2021, the Applicant applied to the ZBA for variances. In this application, the Applicant sought a "variance or modification from the requirement[s] of Section[s]" §367-31, §376-41 from the Town's R-15 Zone. The application requested to permit the construction, maintenance and use of:

> [A] four-lot subdivision of a 1.05 acre parcel, a two-family dwelling with two accessory apartments, semi-attached on Lot # 1; three-family dwelling with one accessory apartment, semi-attached on Lot # 2; three-family dwelling, semi-attached on Lot # 3; and a two-family dwelling with two accessory apartments, semi-attached on Lot # 4.

As part of its application materials, the Applicant also submitted copies of (i) the Building Inspector's CDRC review memo in connection with the PB sketch plat application, dated April 19, 2021, (ii) the Fire Inspector's review letter in connection with the PB sketch plat application, dated April 15, 2021, (iii) a narrative from Applicant's counsel on behalf of the Applicant, dated September 8, 2021, and (iv) the subdivision plan, previously submitted with the PB sketch plat application, dated March 26, 2021. The Applicant also submitted an updated "Lange Report," dated August 27, 2021. In his narrative Applicant's counsel delineates a list of multi-family uses near the site that includes 41 different properties, ranging from three to 77 units.

The Beckmann Appraisal Report

The Applicant also provided the ZBA with a report from Appraiser William Beckmann of Beckmann Appraisals, Inc., (the "Beckmann Report"), dated September 9, 2021. Beckmann reviewed the costs associated with the purchase of the Property lots, as well as the intended use of the site for which the Property owner sought a use variance; he reviewed the permitted

uses within the "R-15" zoning district to determine whether a reasonable return can be obtained should the subject property be operated for a use permitted in the "R-15" zone.

As indicated in the Beckman Report, the purchase price of the Site was $3,050,000. The Applicants also demonstrated that they incurred demolition, carrying and soft costs—including insurance, interest payments, and legal/engineering costs—which to date cost $425,966.00. The total accumulated purchase prices and the other expenses brings the total Site cost in excess of $4 million.

Beckmann calculated the reasonable rate of return to be expected on such a real estate investment as "not less than 10% and up to 25% return on investment depending upon the nature of the proposed development." His report "analyze[s] each of the potential uses as-of right under the R-15 zone" and specifies the "estimate of the return that it would yield...to find whether any such use would permit a reasonable return to the property investment."

The uses analyzed by Beckmann included: (1) underground surface or overhead utilities, (2) one-family detached residences, with not more than one principal residential building on a lot, (3) community residence facilities, (4) one-family detached dwellings and community residence facilities; (5) two-family detached residences, with not more than one principal residential building on a lot, (6) one-family semi-attached residences, with not more than one principal residential building on a lot-limited to vacant land only, (7) a local house of worship, and (8) a community house of worship. The Beckman Report also analyzed the suitability of vacant land or lots for residential development. Relying on another expert appraiser, he determined the "land" value of the subject property is estimated at $900,000.

With respect to the use of the property for single-family residence lots, Beckmann found "on a per lot basis... the gross value of the subject property is $945,000" which would "result in no return on the investment but would result in a large loss. With respect to the use of the property for two-family residences, the Beckman Report finds "not only [no] significant return to the property, but...on a conservative basis nearly a $2 million loss for such a residential use."

With regard to use of the property for three single-family homes, Mr. Beckman surveyed the 2021 sales prices of improved single-family residences in the area within the R-15 zone which "ranged in price from $308,000 to a high of $2,150,000 for a very large home, with a median of $595,000." And "employing a rounded price of $600,000 per home" the use would result "in a gross sell out of $1,800,000 far below the $4+ million cost basis...a huge loss." With respect to community residence facilities, Beckmann also deemed this would not be a viable use and would "provide a loss to the property owner."

Beckman also opined it would not be viable to use the Property as a house of worship. He analyzed four local properties sold for use as a house of worship which were improved with "substantially depreciated improvements of little or no value." He opined this use, like all others, would result in a return value far below the investment in the property. Beckmann also notes the "use variance should be granted" because "[n]one of the uses as right in the "R-15" zoning district provide any return to the property but generate large losses."

Notice of November 18, 2021 ZBA Public Hearing

On October 26, 2021, the ZBA posted legal notice that it would hold a public hearing on November 18, 2021 to discuss the Applicant's variance application. This hearing was ultimately adjourned to December 16, 2021.

On or about November 18, 2021, Joel Bianchi, Principal Director of Civil Engineering for MJ Engineering and Land Surveying, sent notice to the New York State Department of Environmental Conservation that the Project received a Negative Declaration.

On or about November 29, 2021, the Town circulated a document entitled a "Notice of Determination of Significance" for the Project to all local agencies identified in the Town's NOI packet, which indicated the Project garnered a Neg. Dec. The ZBA was among the entities that received notice.

On December 1, 2021, New York State's Department of Environmental Conservation posted notice that the Project had received a Negative SEQRA Declaration on its Environmental News Bulletin ("ENB")

Waterstone Real Estate Appraisal Letter and
Nelson, Pope, Voorhis Memorandum

On or about December 9, 2021, the ZBA received a letter from Lawrence Panico of Waterstone Real Estate Appraisals, Inc. ("Waterstone"). The letter requested that the ZBA not consider an appraisal that Waterstone had prepared for the property five years earlier. Waterstone was the entity which appraised the property prior to the Grunwald purchase in 2016, as noted in the Beckmann Report. Petitioner's argue that the Waterstone appraisal was outdated and based on a faulty premise.

On or about December 14, 2021, the ZBA received a memorandum from Jonathan Lockman of Nelson Pope Voorhis ("NPV"). NPV submitted this memorandum of behalf of Petitioners to challenge aspects of the Project, principally the Lange and Beckmann reports. Specifically, based on the NPV memorandum, Petitioners argue that the Beckmann Report was "wholly reliant" on the Waterstone appraisal, which Petitioners' contend was flawed.

Zoning Board of Appeal's December 16, 2021
Public Hearing

On December 16, 2021, the ZBA held a public hearing regarding the Applicants' variance application. During this public hearing, Applicants' attorney presented the variance application to the ZBA. He explained the application was "identical" to the last one. He then spoke at length about the Project's lengthy and litigious background. Applicants' attorney further explained that the Property was purchased in an arm's length transaction in February 2016, two years after the property had been approved for 20 dwelling units. He dismissed as speculation the allegations that the Applicants engaged in something "nefarious" when purchasing the site, arguing that such claims were false and "irrelevant" to the ZBA.

Applicants' attorney explained that while the Project's previous subdivision approval expired by operation of law when the Site was purchased in 2016, the variances remained in effect. He also opined that the prior ZBA approval was reversed by the Court on a procedural point, i.e., that Mr. Beckman's appraisal report was not submitted to the County Department

of Planning as part of their GML review, and he indicated an appeal is pending before the Appellate Division regarding this court decision.

Applicants' attorney also spoke briefly about Lange's report, and listed a few (of the many) multifamily and accessory apartments in the vicinity of the Property, which were also listed in the narrative he previously submitted to the ZBA. He then mentioned Beckmann's report and the "Waterstone Letter" submitted to the ZBA on December 9, 2021, requesting the Waterstone appraisal utilized in the Beckmann Report not be considered by the ZBA. Attorney Rice affirmed under oath that he spoke with Lawrence Panico, who wrote the letter, and that Panico told him that "he wrote this letter because Susan Shapiro told him to" and that he "didn't have a grasp of what the underlying facts were at all."

Applicants' attorney likewise addressed the NPV Memorandum. He argued that many of the claims in the memo were inaccurate: including (i) the assertion that the subdivision approval expired "two months" after it was granted (the approval does not expire for six months) and (ii) the implication that references to dwellings outside the R-15 zoning district is irrelevant for showing the true character of the neighborhood.

Barese (of Civ Tec) then spoke on behalf of the Applicant. She described the Project's layout, as well as the various submissions from the Applicant accounting for the Project's safety and accessibility. She explained the Project has a "shared entrance" with a "T turnaround," satisfying the International Fire Code, and the Project's fire turning templates demonstrate it is accessible for fire trucks and emergency services vehicles. She also noted the Project's sidewalks for pedestrian access to maintain safety, and that the Project is "designed" for zero net increase in stormwater runoff from a utilities' perspective. She mentioned slight changes to the Project were things "addressed in open comments" from local agencies.

Barese further clarified the Project's plans demonstrate use group "x.3" is the use

group that would apply if applicable to an R-15 zone. She indicated the Building Inspector opined, in his April 19, 2021, letter that this was the proper approach and that nobody ever appealed this determination to the ZBA rendering it the "law of the case at this point in time."

Board Member Shimon Singer asked Barese whether the Project would request variances for parking. She responded the Project did not require a variance for parking since there was one parking space per unit (i.e. dwelling), as permitted in the x.3 use group.

Lange also addressed the ZBA to discuss his report. Lange outlined the contents of his report, describing the predominant use in the area surrounding the Project as "multifamily"; he noted are "some" two and three family residences, but the area is largely multifamily residential or multifamily senior housing. Lange also addressed a letter submitted by Petitioners' planning consultant, R.O.S.A/ the Rockland Environmental Group, testifying that the letter is "picking at facts" in an effort to "overcome the obvious conclusion." When looking at the maps in his report, Lange felt "it's intuitively obvious... this is an area in transition...moving to multifamily..." He noted "there are multiple jurisdictions involved...but, basically, [the area is] the rehabilitation of older units [sic] moving towards multifamily units" and understood this observation as "not disputable at all." Lange indicated to the ZBA that the maps depicted in his report show the Project is consistent with the character of the neighborhood. He also mentioned that the Town Comprehensive Plan is "clearly" out-of-date, and opined that instilling a single- or two-family residence at the Property "makes absolutely no sense" when considering the surrounding area.

Next, Beckmann testified about his report. Beckman remarked that the Applicant has over $4 million dollars invested in the Property when factoring in all the costs associated with the Project after purchasing the Property. He observed that comparable single-family homes in the area were valued at around $315,000 per lot, meaning that the Applicant's estimated value of his Property would be $945,000, "which is far less than the total invested in the property" for that use. He also evaluated comparable two-family lots, that were "$450,00 each, for about a $1,350,000.00 total, still far less than the investment in the property."

Beckmann also testified he did a "development anticipated approach where...the owner would build houses [and] sell them." Under this scenario, he estimated a "gross sell-out of about $1,800,000 for three lots" which, again, represents "far less than the investment of the property." Beckmann also considered the value of using the Property as a community residence or a school and he determined neither of those alternative uses would prove feasible for the Property.

Beckmann concluded by stating that no other potential uses are "economically feasible to develop where [the Applicant] could yield a profit on the investment." He also opined the variances requested for the Project are "definitely" the minimum required to "attempt" a reasonable return on the property's investment.

The ZBA then opened the public comment portion of the hearing. Attorney for the Petitioner's, Susan Shapiro ("Shapiro") spoke first. She handed the Board several documents, before voicing her objections to the application. Shapiro commented this was the fourth time the Project has been before the ZBA. She conceded the previous Court rulings "never had an opportunity to consider" the substance of the previous applications.

Among other things, Shapiro argued that the Applicants' "overpayment" for the purchase of the lots is a self-created "undue hardship" for which there is "no reasonable justification" and accused the Applicants of failing to conduct "due diligence" in purchasing the property.

Shapiro then spoke of the NPV letter, claiming it rebutted both the Lange and Beckmann reports and argued that the Beckmann report was wholly reliant on the Waterstone Appraisal that Panico requested the ZBA not to consider. She also requested the ZBA to consider the 500-page "Alliance Appraisal" she had just provided them with during the hearing, which "goes through why the Beckmann Report cannot be...relied upon." Shapiro did not rebut Applicant attorney's earlier statement that Panico was "told" by Shapiro to write the letter without understanding its significance. Shapiro concluded by requesting the ZBA deny the use variance, claiming the request is in actuality "a very serious zone change."

Petitioner Doucette and Ramapo residents Miller and Munitz also addressed the ZBA, as they had during the PB hearing. They again voiced their concerns with the Project. Doucette felt she would be "severely" impacted by the Project, and pointed the ZBA to a letter she provided, dated July 17, 2019, outlining the homes around her and told the ZBA she "wanted [them] to understand how this project will impact [her] and [her] local Hillcrest community." Miller claimed there are "no other properties like [the Project]" in his community of Hillcrest and remarked the Project will put community members at risk for fire safety, pedestrian and auto accidents, among other things. Munitz urged the ZBA to "pay attention to the record before you" and claimed the purchase of the Property was not "an arms-length transaction," as Applicant's attorney had stated. She also felt Beckmann and Lange made "assumptions" in their reports and asked the Board to "demand" both men provide "detailed evidence."

Applicants' attorney then addressed the ZBA again to respond to the public comments opposing the Project. He argued that Shapiro and the other speakers relied on "rank speculation" and "complete errors of law" in their statements. He noted the Applicants are not requesting a zone change and repeated his previously expressed sentiment that the area has moved steadily towards being more "multifamily." He then reiterated the Property was bought for a fair price by the Applicant, based upon the knowledge of the prior ZBA and PB approval, of a larger subdivision than the one being requested on exactly the same Site, and that the area variances would not alter the essential character of the neighborhood.

Next the ZBA voted to adjourn the public hearing until February 10, 2022, to allow the Board members more time to consider the 500-plus pages worth of documents submitted that evening by Petitioner's counsel and Doucette.

<u>The Zoning Board of Appeal's February 10, 2022 Public Hearing</u>

On February 10, 2022, the ZBA held a second public hearing to discuss the Applicant's variance application. ZBA Member Singer outlined the applicable statutory factors for granting use variance and area variances and explained why he was inclined to grant the application. For the use variance, Board Member Singer felt: (1) the Applicant presented support that it

could not realize a reasonable return for each of the uses permitted in the R-15 Zoning District; (2) the alleged hardship is unique and does not apply to some substantial portion of the district or neighborhood; (3) granting the variance would not alter the essential character of the neighborhood, considering the large apartment buildings above the property as well as several multifamily developments (and also deemed the Project's density was consistent with the majority of the neighborhood); and (4) the hardship is not self-created as the record demonstrated an arm's length transaction for the purchase of the property.

For the area variances, Board Member Singer felt: (1) the benefit sought by the Applicant could be achieved by another feasible method, noting that the Applicant worked with the Town Consultants for a year to arrive at proposal with the minimum number of necessary variances; (2) an undesirable change will not produce a change in the character of the neighborhood nor present a detriment to nearby properties as the pattern of development in this area is consistent with the Project; (3) the variances are not substantial as the Applicant in fact scaled-back the requested variances and proposed less units than were, previously, requested and approved; (4) the variances will not have an adverse effect or impact on the physical or environmental condition in the neighborhood or district, and (5) the alleged hardship was not self-created as the Applicant purchased the property in good faith.

The ZBA then voted to (1) approve the variance application, and (2) override G.M.L. comments 1-10 and 15-20. (Id.) The motion passed with 4 "yes" votes, to 1 "no" vote.

The Zoning Board Decision Granting Use and Area Variances

On February 18, 2022, the ZBA issued its decision (the "ZBA Decision") granting the use and area variances requested by the Applicant, subject to several conditions. The ZBA Decision memorialized the sentiments Board Member Singer expressed at the February 10, 2022, public hearing in favor of approval.

The use variance granted is from §§ 376-31, 376-41 of the Ramapo Town Code to permit the use of accessory apartments, as well as the construction, maintenance and use of a four lot subdivision with multi-family housing on each lot, which is not permitted in the

Town's R-15 Zoning District. The ZBA Decision states the subdivision consists of a two-family dwelling with two accessory apartments, semi-attached on Lot 1, a three-family dwelling with one accessory apartment, semi-attached, on Lot 2, a three-family dwelling, semi attached, on Lot 3, and a two-family dwelling with two accessory apartments on Lot 4.

The area variances include one for all four lots as each lot has less than the required (1) lot width, (2) front setback, (3) front yard, (4) side setback, (5) total side setback, (6) rear setback, (7) rear setback to deck, (8) street frontage, (9) side yard, (10) permitted floor area ratio and (11) permitted developmental coverage. (Id.) The additional area variances include one from Town Law § 280(a) for Lot 1 because the lot does not have the required street frontage on the public road; an area variance from§ 376-7l(B) of the Ramapo Zoning Law for minimal parking stall width since 8 feet is proposed (9 feet is required), and an area variance from § 376-78(a) of the Ramapo Zoning Law, because more than four parking spaces is located closer than 75 feet from an intersection.

As set forth in the ZBA Decision, the ZBA based its approval on the presentation by the Applicant and the testimony of the witnesses. The ZBA Decision also summarized the testimonies of each individual who had appeared before the ZBA at the December 16, 2021, public hearing—including Shapiro, Petitioner Doucette, and the other two Town residents who opposed the Project.

For the use variance, the ZBA determined the four statutory considerations weighed in favor of the Applicant. The ZBA found the Applicant cannot realize a reasonable return from each of the uses permitted in the R-15 zoning district. The ZBA Decision cited the report and testimony of Beckmann and his analysis of each of the permitted uses in the R-15 Zone and his conclusion that for each use, a reasonable return could not be obtained absent a multi-family use.

The ZBA also found the alleged hardship of the Applicant is unique and does not apply to a substantial portion of the district or neighborhood. Specifically, it determined "[t]he size and shape of the property are unique in that, unlike any other identified lot, the lot exists as

a flag lot with an awkward shape and limited access. The lot is also unique in that it is one of the only, if not the only, property that is surrounded by multifamily developments in a transitioning neighborhood."

In addition, the ZBA held that the requested use variance would not alter the essential character of the neighborhood, finding "[t]he neighborhood... is characterized by numerous multi-family developments including three-family dwellings with multiple accessory apartments on small lots" and thus, "proposed development is consistent with the pattern of development and established character of the neighborhood." Last, the ZBA found the Applicants' hardship was not self-created, citing that (i) the evidence submitted demonstrated the Property was purchased at an arms-length transaction; and (ii) the appraisal done at the time of the purchase of the Site and submitted by the Applicants further supported this finding.

For the area variances, the ZBA also determined that all five of the statutory considerations weighed in favor of the Applicants. The Board deemed that the benefit sought by the Applicants cannot be achieved by some method feasible for the Applicants to pursue, other than by the granting of the area variances. The ZBA took note- and Petitioners did not dispute-that the Applicants worked with Town consultants for years to arrive at a proposal with the minimum necessary variances and a layout determined to be the best from a planning perspective.

The ZBA also determined that granting the area variances would not cause an undesirable change to the character of the neighborhood and would not create a detriment to nearby properties. Specifically, the ZBA noted that the pattern of development in the area is characterized by multi-family housing, including many three-family homes with accessory apartments and several large apartment complexes located adjacent to the site. It also determined "[t]he proposed density is less than the prevailing density of development in the neighborhood" and "accordingly, the proposal is consistent with the character of the neighborhood and will not be a detriment to the area." The Project was found to be consistent

with the pattern of development in the area as the engineering record substantiated there will be no deleterious impacts from stormwater, municipal services, traffic or impact on community character. It likewise held the area already has many multifamily developments in close proximity to the Project. Last, the ZBA also accounted for the negative SEQRA declaration adopted by the PB, for this consideration.

The area variances were found not to be substantial when considering the totality of the circumstances. Rather, the ZBA found the proposal to be consistent with the pattern of development in the neighborhood and at a density that is the same or less than that prevailing in the neighborhood. The decision also notes that in comparison to its previous approval, the Applicants scaled back the requested variances and proposed less units than were previously requested and approved. Last, the ZBA found the alleged hardship was not self-created, observing that the Applicant demonstrated that he purchased the Property in good faith in an arms-length transaction.

The ZBA Decision also explains why the ZBA decided to override several "G.M.L. comments" from the Rockland County Department of Planning's letter dated November 16, 2021, holding:

> The proposed use is consistent with the multi-family character of the area and, in fact, is at a lesser density than the vast majority of development in the area. The area is characterized by multi-family housing such that the proposal is consistent with the pattern of development in the area. Directly to the south, the Park Towers development, is a three-story, older apartment complex. To the west, a large recent development provides three family semi-attached homes with multiple accessory apartments along Bluefield Drive. The density for this development is approximately 24± units per acre. To the southwest, three family homes with multiple accessory apartments have been constructed. The use is consistent with the prevailing pattern of development and character of the neighborhood. Further, the Applicant demonstrated satisfaction of the use variance criteria, entitling him to approval of the use variance. Having purchased the property in good faith with a use variance in place, as is demonstrated by the financial analysis provided, the Applicant cannot obtain a reasonable return without a use variance.

All variances were thus approved subject to compliance with comments numbered 11-14 and 21-24 in the County's GML letter, dated November 16, 2021. The ZBA overrode the

remaining comments, specifically numbers 1-10, and 15-20 and provided detailed reasons for each override.

SUMMARY OF ARGUMENTS

Respondents argue that this Court should dismiss these Article 78 proceedings on the following grounds:

a. In granting the use variance for the Project, the ZBA correctly applied the four statutory considerations to weigh whether the applicable zoning regulations and restrictions have caused the Applicant unnecessary hardship. In doing so, the ZBA determined that based on the record before it, all four statutory factors weighed in favor of granting the use variance.

b. In granting the area variances for the Project, the ZBA engaged in the required balancing test, weighing the benefit to the Applicant against the detriment to the health, safety, and welfare of the neighborhood or community if the variances were granted, while also properly focusing on the statutory factors in considering the application for area variances. In doing so, the ZBA determined that based on the record before it, all five statutory factors weighed in favor of granting the requested area variances.

c. The PB comprehensively identified all relevant areas of environmental concern, took the requisite hard look, and made a reasoned elaboration of the basis for its determination in issuing the Project's Negative SEQRA Declaration.

d. The actions of neither the PB or the ZBE can be considered arbitrary or capricious; and

e. Both the ZBA and PB fulfilled all their respective procedural duties, regardless of Petitioners' contrary assertions.

Petitioners argue, on the other hand, that procedurally Cupon-Hillcrest has standing; that Action #2 is not duplicative of Action #1; that they exhausted all administrative remedies and that an appeal of the Building Inspector's CDRC Review letter was not required.

As to the Boards' substantive determinations, Petitioners contend that John Lange, was in reality, working as Applicant's-Respondent's consultant and <u>not</u> as town planner, a position he has not held since January 2015. Petitioners further argue that the Planning Board review was so cursory that it relied on an undated report from Applicants' counsel. Petitioners also argue that the Planning Board declined to consider a similar grant for a similar project

for a similar adjacent property and that the Project was only agreed upon because it financially benefitted a town councilman.

Petitioners then raise the issue of whether or not the prior subdivision approvals for an even larger subdivision - - ten single family homes and fifteen accessible apartments - - had expired prior to or subsequent to the acquisition of the Site. On this score, Petitioners point to the NPV report which opined - - in contrast to the Beckman report - - that by operation of law, the subdivision approval expired in July of 2014, prior to the acquisition. The Court finds this issue to be a red herring, as all parties actually agree that, in fact, the prior approval of the larger subdivision had expired prior to the February 2016 purchase by the Applicants.

There is likewise much back and forth about the original purchase which involved a town councilman and an alleged "land flip" to Bluefield. However, the bona fides of the original Site acquisition in 2015 is not before this Court, except to the extent it impacts on the question of whether or not any "undue hardship" or inability to recognize a reasonable return was self-inflicted by Applicants.

Petitioner further contends that:

1. The ZBA had no jurisdiction to approve use and area variances for accessory apartments as they had neither been applied for nor denied a building permit by the Town Building Inspector, and even if a denial had been issued, the 60 day appeal period had elapsed before the ZBA application was filed;

2. As no application for a use variance for the accessory apartments was filed, the County Planning did not have an opportunity to review such proposed use variance, which again violates the GML;

3. The Board disregarded the Comprehensive Plan, adopted in 2004;

4. Respondent-Defendant's alleged "undue hardship" and lack of a reasonable rate of return on their investment is self-created because they overpaid for the property;

5. The PB and ZBA treated adjacent projects differently;

6. Applicant fails to meet the requirements for a use variance as they failed to establish "undue hardship" and that "no permissible use will yield a reasonable return;"

7. The area variances decision was irrational, arbitrary and capricious and violative of town law;

8. The 2021 Neg. Dec. is procedurally and substantively defective.

THE LAW

Zoning Board of Appeals Determinations

Local zoning boards have broad discretion in considering applications for variances. See Monte Carlo 1, LLC v. Weiss, 142 A.D.3d 1173, 1175, 38 N.Y.S.3d 228, 230 (2d Dept. 2016) (citing Daneri v. Zoning Bd. of Appeals of Town of Southold, 98 A.D.3d 508, 509, 949 N.Y.S.2d 180 (2d Dept. 2012). "The determination of a local zoning board is entitled to great deference." Affordable Homes of Long Island, LLC v. Monteverde, 128 A.D.3d 1060, 1061, 10 N.Y.S.3d 283 (2d Dept. 2015) (quoting Matter of Birch Tree Partners, LLC v. Nature Conservancy, 122 A.D.3d 841, 842, 996 N.Y.S.2d 693, 694 (2d Dept. 2014)); see also Witkowich v. Zoning Bd. of Appeals of Town of Yorktown, 133 A.D.3d 679, 680, 19 N.Y.S.3d 327, 328 (2d Dept. 2015) ("In proceeding pursuant to a CPLR article 78 to review a determination of a zoning board of appeals, a zoning board's interpretation of its zoning ordinance is entitled to great deference and will not be overturned by the courts unless unreasonable or irrational.") (citation omitted).

Courts serve a limited role; they may set aside a zoning board determination only where "the record reveals that the board acted illegally or arbitrarily, or abused its discretion, or that it merely succumbed to generalized community pressure." Pecoraro v. Bd. of Appeals of Town of Hempstead, 2 N.Y.3d 608, 613, 814 N.E.2d 404, 407 (2004); see also Pinnetti v. Zoning Bd. of Appeals of Vill. of Mount Kisco, 101 A.D.3d 1124, 1125, 956 N.Y.S.2d 565, 567 (2d Dept. 2012) (holding "judicial review is limited to determining whether the action taken by the board was illegal, arbitrary, or an abuse of discretion") (citation omitted); Lucas v Bd. of Appeals of Vil. of Mamaroneck, 109 AD3d 925, 928 (2d Dept. 2013) ("A court reviewing a CPLR article 78 petition may not disturb the decision of a municipal body charged with determining land use questions unless that body's decision is arbitrary and capricious, lacks a rational basis, or is an abuse of discretion.") (emphasis added) (citation omitted).

Nor may a Court "weigh the evidence or reject the choice made by the zoning board where the evidence is conflicting and room for choice exists." Steinschneider v Zoning Bd. of Appeals of the Village of Westhampton Beach, 2011 WL 5478973 (Sup. Ct., Suffolk Cty. Oct. 21, 2011) (citing Calvi v. Zoning Bd. of Appeals of City of Yonkers, 238 A.D.2d 417, 656 N.Y.S.2d 313 (2d Dept. 1997)).

The question for Courts determining whether government action is arbitrary and capricious is whether "the determination under review had a rational basis." Halperin v City of New Rochelle, 24 A.D.3d 768, 770, 908 N.Y.S.2d 98, 103 (2d Dept. 2005); see also Sartoretti v Young, No. 31480/2009, 2010 WL 2717847 (Sup. Ct., Suffolk Cty. June 23, 2010) ("The arbitrary or capricious test chiefly relates to whether a particular action should have been taken or is justified and whether the administrative action is without foundation in fact.") (citing Pell v. Bd. of Ed. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester Cty., 34 N.Y.2d 222, 231, 313 N.E.2d 321, 325 (1974)). The challenging party bears a "heavy burden of proof" in showing a determination was arbitrary and capricious and without rational basis. See Cashin v Cassano, 129 A.D.3d 953, 954, 10 N.Y.S.3d 636, 637 (2d Dept. 2015).

Zoning board determinations that have a rational basis and are supported by substantial evidence must be sustained on judicial review. See Pecoraro, 2 N.Y.3d at 613 (citing Ifrah v. Utschig, 98 N.Y.2d 304, 308, 774 N.E.2d 732, 734 (2002)). The "substantial evidence" standard of review does not apply to a zoning board's determination of a variance application. On the contrary, "when reviewing the determinations of [a] Zoning Board, courts consider 'substantial evidence' only to determine whether the record contains sufficient evidence to support the rationality of the Board's determination." Matejko v. Bd. of Zoning Appeals of Town of Brookhaven, 77 A.D.3d 949, 949, 910 N.Y.S.2d 123, 125 (2d Dept. 2010); Harn Food, LLC v DeChance, 159 A.D.3d 819, 819, 72 N.Y.S.3d 538, 538 (2d Dept. 2018) (zoning determinations must be upheld when supported by a rational basis); see also Conway v Van Loan, 152 A.D.3d 768, 769, 58 N.Y.S.3d 598, 599 (2d Dept. 2017) ("Where a rational

basis for the determination exists, 'a court may not substitute its own judgment for that of the board, even if such a contrary determination is itself supported by the record.'"). A determination is rational if it has "some objective factual basis." Harn Food, LLC, 159 A.D.3d at 819 (internal citations omitted).

In Matter of Cowan v. Kern, 41 N.Y.2d 591, 599, 363 N.E.2d 305, 310 (1977) (internal citations omitted) the New York Court of Appeals explained that:

> The crux of the matter is that the responsibility for making zoning decisions has been committed primarily to quasi-legislative, quasi-administrative board composed of representatives from the local community. Local officials, generally, possess the familiarity with local conditions necessary to make the often sensitive planning decisions which affect the development of their community. Absent arbitrariness, it is for locally selected and locally responsible officials to determine where the public interest in zoning lies. Judicial review of local zoning decisions is limited; not only in our court but in all courts. Where there is a rational basis for the local decision, that decision should be sustained. It matters not whether, in close cases, a court would have, or should have, decided the matter differently. The judicial responsibility is to review zoning decisions but not, absent proof of arbitrary and unreasonable action, to make them.

Planning Board's SEQRA Determination

Similarly, judicial review of SEQRA findings "is limited to whether the determination was made in accordance with lawful procedure and whether, substantively, the determination 'was affected by an error of law or was arbitrary and capricious or an abuse of discretion.'" Friends of P.S. 163, Inc. v. Jewish Home Lifecare, 30 N.Y.3d 416, 430, 90 N.E.3d 1253, 1260 (2017) (internal citations omitted); see also CPLR 7803(3). As the New York Court of Appeals has held, "[T]his review is deferential for '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.'" Id. (internal citations omitted).

Accordingly, judicial review of a negative SEQRA declaration "'is limited to whether the lead agency identified the relevant areas of environmental concern, took the requisite hard look, and made a reasoned elaboration of the basis for its determination'" Manocherian v. Zoning Board of Appeals of Town of New Castle, 201 A.D.3d 804, 805, 162 N.Y.S.3d 79, 80 (2d Dept. 2022) (internal citations omitted); Friends of P.S. 163 Inc., 30 N.Y.3d at 430. This

standard of review applies to a lead agency's determination regarding the necessity for an Environmental Impact Statement ("EIS"). See Matter of Riverkeeper, Inc. v. Planning Board of Town of Southeast, 9 N.Y.3d 219, 232, 881 N.E.2d 172, 177 (2007). "It is not the province of the courts to second-guess thoughtful agency decision-making and, accordingly, an agency decision should be annulled only if it is arbitrary, capricious or unsupported by the evidence." Id. "The lead agency, after all, has the responsibility to comb through reports, analyses and other documents before making a determination; it is not for a reviewing court to duplicate these efforts." Id. While judicial review under Article 78 must be meaningful, courts "may not substitute their judgment for that of the agency for it is not their role to 'weigh the desirability of any action or [to] choose among alternatives.'" Id. (internal citations omitted).

DISCUSSION

I. THE COURT MUST ONLY CONSIDER FACTS AND ARGUMENTS THAT ARE PART OF THE RECORD

It is well-settled that in an Article 78 proceeding, the court's review is limited to the arguments and record adduced before the agency. See Kaufman v. Incorporated Village of Kings Point, 52 A.D.3d 604, 607, 860 N.Y.S.2d 573, 576 (2d Dept. 2008); Shuler v. New York City Hous. Auth., 88 A.D.3d 895, 896, 931 N.Y.S.2d 329, 330 (2d Dept. 2011) (Courts cannot consider evidence submitted for the first time in a CPLR article 78 proceeding because they are bound by the facts and record submitted to the agency).

Thus, following upon a review of the actual PB and ZBA Records, the Court will disregard any allegations in the Petition that were not part of the PB or ZBA record. Specifically, wherein Petitioner alleges the Town Boards took a purportedly "hard[er] look" at a project for an adjacent property, such an argument will not be considered. While this issue was raised to the PB and ZBA, the Court cannot determine the facts from the Records of the proceedings before the PB or ZBA "on this other project." This "evidence" was not submitted either before or during the PB or ZBA hearings, and thus cannot be considered here.

II. THE ZBA'S DETERMINATION APPROVING THE APPLICANT'S REQUEST FOR A USE VARIANCE HAD A RATIONAL BASIS AND WAS SUPPORTED BY EVIDENCE PRESENTED AT THE HEARINGS WHERE PETITIONERS' OBJECTIONS WERE DISCUSSED

To obtain a use variance, an applicant must show "applicable zoning regulations and restrictions have caused unnecessary hardship." N.Y. Town Law §267-b; see also Town Code §376-151(C)(2)(b); see also Dreikausen v. Zoning Bd. of Appeals of City of Long Beach, 287 A.D.2d 453, 453, 731 N.Y.S.2d 54, 55 (2d Dept. 2001) ("A use variance may be granted upon a showing of unnecessary hardship.") To prove unnecessary hardship, the applicant must demonstrate that for each and every permitted use under the zoning regulations for the particular district where the property is located: (1) the applicant cannot realize a reasonable return if used only for permitted purposes as currently zoned; (2) the hardship resulted from unique characteristics of the property; (3) the proposed use would not alter the character of the neighborhood; and (4) the alleged hardship was not been self-created. See White Plains Rural Cemetery Ass'n v. City of White Plains, 168 A.D.3d 1068, 1070, 93 N.Y.S.3d 103, 106 (2d Dept. 2019); see also N.Y. Town Law §267-b; Town Code §376-151(C)(2)(b).

As indicated in the Town of Ramapo's Town Code, "the ZBA has the authority to impose reasonable conditions that are "consistent with the spirit and intent of" the Zoning Code and "imposed for the purpose of minimizing any adverse impact such variance may have on the neighborhood or community." Replete throughout the ZBA Record is evidence that the ZBA analyzed and considered various submissions and entertained extensive comments on the very subjects of "unnecessary hardship", "lack of a reasonable return," "the character of the neighborhood," and whether the hardship had been "self-created." Arguments and evidence were submitted to the ZBA by both Petitioners and Respondents and included, *inter alia,* the updated Lange Report, the Beckman Report, the Waterstone appraisal, the evidence of the 2014 approval of a larger subdivision, the Alliance Review Appraisal Report, dated December 16, 2021, the testimony of Rachel Barese, the testimony of the town engineering consultant, Bianchi, and the NPV Report, dated December 14, 2021.

On several points the expert conclusions and the other evidence diverged. Nevertheless, the Court need not opine on how it would have decided the matter if it had this evidence before it, but rather whether the decision made by the ZBA was arbitrary and capricious without any rational basis. On the record before it, the Court cannot find that there was no rational basis upon which the ZBA could conclude that there was an undue hardship and no reasonable rate of return and that such hardship and lack of return was not self-created. Thus, after careful review of all the evidence, the Court will not invalidate the Use Variance on this ground.

III. THE ZBA DID NOT IGNORE THE COMPREHENSIVE PLAN'S CHARACTERIZATION OF THE R-15 ZONE AS "TRANSITIONAL"

Petitioners also argue that the ZBA ignored the Comprehensive Plan's (the "Plan") characterization of the R-15 zone as "transitional". In response, Applicants contend that the "obligation is the support of comprehensive planning with recognition of the dynamics of change, not slavish servitude to any particular plan." Kraetz v. Pleuge, 84 A.D.2d 422, 430, 446 N.Y.S.2d 807, 812 (4th Dept. 1982).

The Plan was adopted in 2004 and was supposed to be reviewed and revised every five years. While there have been minor revisions or amendments to the plan over these last 19 years, there has not been a comprehensive review or revision of this plan since its 2004 adoption. The testimony and evidence presented to the ZBA certainly provided that quasi-legislative body with a rational basis to acknowledge the changes in the area since 2004 and find that the Project does not in any essential or significant way change the character of the area as it currently exists. Thus, the Court cannot sustain the challenge to the ZBA's issuance of a use variance on this basis either.

IV. THE ZBA DID NOT LACK JURSIDCTION TO ENTERTAIN BLUEFILED'S VARIANCE APPLICATION

Petitioners contend that the ZBA lacks jurisdiction to entertain Applicants' variance application. They contend that the application was submitted after the 60-day time period

within which to appeal the Building Inspector's Denial Letter dated April 19, 2021 ('the "Denial Letter"), which listed the variances which would be required for the Project to move forward. Following the issuance of the Denial Letter, Applicants applied for the variances listed by the Inspector. They did not appeal the Denial. The Court in Sherbk, Inc. v. City of Syracuse Bd. of Zoning Appeals, 204 A.D.3d 1406, 1407, 167 N.Y.S.3d 674, 676 (4th Dept. 2022), "reject[ed] Petitioners' contention that the ZBA is only empowered to hear appeals in zoning matters and thus that the variance application must be an appeal."

Moreover, Petitioners' interpretation is repudiated by the necessary orderly review of applications requiring PB and ZBA approvals and by the dictates of SEQRA. As relayed in Smith's affidavit, when subdivision approval is required from the Planning Board and use and/or area variances also must be obtained from the Zoning Board of Appeals, a sketch plat must be approved and SEQRA must be satisfied before an application can be made to the ZBA. Such reviews, approval of a sketch plat, and adoption of a negative declaration cannot be accomplished unless the extent of any variances are known and verified by the Building Inspector. Accordingly, a "denial letter" with an enumeration of whatever variances are required must be obtained at the very beginning of the review process.

Given the lengthy review process, including one or more CDRC meetings before an application is scheduled for Planning Board review, a Planning Board meeting to classify a subdivision (major or minor) and to adopt an intent to be lead agency for SEQRA review, a second (at a minimum) Planning Board meeting to consider sketch plat approval and referral to the ZBA and the scheduling delays because of the volume of applications, it is literally impossible for an application to be made within 60 days of the Building Inspector's "denial letter."

A similar scenario applies to site plan applications. "An intent patently absurd is not to be attributed to the Legislature, and it will be presumed that the Legislature did not intend an absurd result to ensue from the legislation enacted." Statutes § 145 (McKinney). As a result, "if a construction sought to be placed on a statute produces an absurdity it is, as a general

rule, to be discarded." Id. Here, the construction suggested by Petitioners would result in an absurd situation impossible to accomplish in most situations. Accordingly, Petitioners' contention is refuted by the law and actual circumstances which would render the provisions of Town Law § 267-a, as suggested by Petitioners, impossible to apply.

Moreover, Petitioners are mistaken in their contention that "there was no application to the ... Building Inspector, for a permit to build this Project; and there was no denial filed to form the basis of an appeal to the ZBA in the record." To the contrary, by virtue of a "Request for Denial Letter" submitted by Applicants and by letter dated April 19, 2021, the Building Inspector set forth the necessary variances. Consequently, the Court finds the contention that the denial letter "do[es] not meet the legal requirements of Town Law §267-a(4) to serve as a basis for the ZBA's appellate jurisdiction" is without merit. Accordingly, the argument that the ZBA lacked jurisdiction to entertain Applicants' variance applications is unsupported by any applicable case law and is repudiated by the facts and law. The first cause of action is therefore dismissed.

V. A USE VARIANCE IS NOT REQUIRED FOR THE "ACCESSORY APARTMENTS"

Petitioners also repeat the contention of the County Department of Planning that a use variance is also required for the "accessory apartments." However, Petitioners and the County ignore the fact that Applicants sought approval for:

a. a two-family dwelling with two accessory apartments, semi-attached, Lot 1;
b. three-family dwelling with one accessory apartment, semi-attached, on Lot 2;
c. a three-family dwelling, semi-attached, on Lot 3;
d. and a two-family dwelling with two accessory apartments on Lot 4.

That description of the proposed use is contained in all relevant documentation, including the Notice of Intent to be Lead Agency, legal notices, application, narratives, layout plan, and Neg. Dec. Accordingly, the Petitioners' contentions in this regard are without merit.

VI. THE GML REFERAL FOR THE VARIANCE APPLICATION WAS NOT INCOMPLETE

Petitioners further contend, without any supporting authority, that the General Municipal Law referral of the variance application was incomplete because it did not contain a

copy of the Neg. Dec. First, although having numerous comments, including some related to SEQRA, the County Department of Planning did not assert that the referral was incomplete for the reason asserted by Petitioners. The Department of Planning's enumeration of recommendations without asserting that the referral was incomplete is significant. See Calverton Manor, LLC v. Town of Riverhead, 160 A.D.3d 833, 835, 75 N.Y.S.3d 586, 590 (2d Dept. 2018) ("There is no evidence in the record that the Planning Commission determined the Town Board's referral to be deficient in any respect."); see also Calverton Manor, LLC v. Town of Riverhead, 160 A.D.3d 842, 844, 76 N.Y.S.3d 72, 74 (2d Dept. 2018).

Moreover, the applicable statute undermines Petitioners' claim. General Municipal Law § 239-m(1)(c) requires the referring agency to provide to the County Department of Planning a "full statement of such proposed action," which is defined to mean "all materials required by and submitted to the referring body as an application on a proposed action, including a completed environmental assessment form and all other materials required by such referring body in order to make its determination of significance pursuant to the state environmental quality review act under article eight of the environmental conservation law and its implementing regulations." (emphasis added).

As is substantiated by the record, the PB conducted a coordinated review and, in its capacity as lead agency, undertook the environmental review and adopted a Neg. Dec., thereby completing the SEQRA process for the entire action, that is the Project and all of the discretionary approvals. Accordingly, the portion of General Municipal Law § 239-m(1)(c) which requires the submission of "materials required by such referring body in order to make its determination of significance pursuant" is inapplicable because the Zoning Board of Appeals was not required to make a SEQRA determination of significance because the Planning Board had previously adopted a Negative Declaration in a coordinated review.

VII. THERE IS NO MERIT TO DEFENDANTS' CONTENTION THAT THE ZBA COULD NOT GRANT A USE VARIANCE TO PERMIT ACCESSORY APARTMENTS IN THE R-15 ZONE

Petitioners next assert that the Zoning Board of Appeals could not grant a use variance to permit accessory apartments in the R-15 zone. It is asserted that "[n]owhere in the application, including Applicants' maps, is it identified that Applicants require a use variance to construct the desired accessory apartments." First, Petitioners never raised the argument to the Zoning Board of Appeals and, hence, the claim is precluded by virtue of Petitioners' failure to exhaust administrative remedies. Moreover, the ZBA application clearly states that the variances sought were "to permit the construction, maintenance and use of ... of a four-lot subdivision of a 1.05 acre parcel, a two-family dwelling with two accessory apartments, semi-attached, on Lot # 1; three-family dwelling with one accessory apartment, semi-attached, on Lot # 2; A three-family dwelling, semi-attached, on Lot # 3; and a two-family dwelling with two-accessory apartments, semi-attached on Lot # 4.

From a review of the ZBA and PB records, it appears that all relevant documentation, including the NOI, legal notices, application, narratives, layout plan and Neg. Dec., all related the same uses, including the accessory apartments and the necessity of obtaining a use variance. Mr. Lange's report, which accompanied the application indicated that a use and area variances were sought. The presentation before the Zoning Board of Appeals indicated that a use variance was sought and the proof substantiated Applicants' entitlement to a use variance. Indeed, recognizing that a use variance was sought, the County Department of Planning's first comment was addressed to the requirements for a use variance.

Accessory Apartments

Petitioners also appear to be arguing that a use variance is impermissible to permit accessory apartments in the R-15 zone because accessory apartments are not permitted in that zone. However, a use variance is precisely "the authorization by the zoning board of appeals for the use of land for a purpose which is otherwise not allowed or is prohibited by the applicable zoning regulations." Town Law § 267(1)(a). Thus, the Court rejects this claim.

Minimum Variance

Petitioners go on to assert that the use variance should be annulled because the ZBA's findings did not explicitly state that it was granting the minimum variance necessary. However, it does not follow that the "failure" to make one statutory finding renders a variance void. Analogous to a use variance, it is well-settled that when approving an area variance, the ZBA, "in applying the balancing test, is not required to justify its determination with supporting evidence for each of the five statutory factors as long as its determination balancing the relevant considerations is rational." Humphreys v. Somers Zoning Bd. of Appeals, 168 N.Y.S.3d 871, 872, (2d Dept. 2022) (internal citations omitted); King v. Town of Islip Zoning Bd. of Appeals, 68 A.D.3d 1113, 1115, 892 N.Y.S.2d 174, 176 (2d Dept. 2009).

The ZBA adopted fact-based findings of fact that provided the basis for its finding with respect to each of the four statutory use variance criteria. Consistent with the foregoing case law, although the ZBA was not required to have "justified" its determination with respect to the four statutory facts, it, in fact, did, albeit without specifically stating that the use variance was not the minimum required to alleviate the "hardship," something it is not "required" to do. The record reflects a serious and detailed examination of the use variance criteria by the ZBA. Although the case law confirms that findings need not specifically address each of the applicable considerations (and the ZBA did in this instance) the "minimum necessary variance" is not even one of the four statutory considerations required, but, is instead, a limitation on the extent of a variance.

Accordingly, it is clear that an explicit finding with respect to the "minimum variance necessary" was not required and that the Board's detailed findings of fact are more than sufficient to satisfy the provision of findings of fact. Moreover, the record fully substantiates that the requested use variance, in fact, is the absolute minimum that might enable Bluefield to break even-not even to realize a reasonable return. Mr. Beckmann testified in response to the question, "[A]re the variances sought, here, also, the minimum in order to attempt to obtain a reasonable return?" "Definitely, the minimum to attempt to a reasonable return."

In any event, even if the Court were to examine the issue more deeply, firmly established precedent counsels that remand is not mandatory, and that the merits of a proceeding may properly be reached provided the factual underpinnings for the decision are present elsewhere in the administrative record. See Siano v. City of Saratoga Springs Zoning Bd. of Appeals, 21 Misc.3d 1115(A), 873 N.Y.S.2d 515, 2006 WL 6091593 at 2 (Sup. Ct. Saratoga Co. 2006), aff'd, 41 A.D.3d 952, 835 N.Y.S.2d 922 (3d Dept. 2007); Fischer v. Markowitz, 166 A.D.2d 444, 445, 560 N.Y.S.2d 496, 497 (2d Dept. 1990); Matter of Concerned Citizens Against Crossgates v. Town of Guilderland Zoning Board of Appeals, 91 A.D.2d 763, 763, 458 N.Y.S.2d 13, 15 (3d Dept. 1982).

Mr. Beckmann's report and testimony opined that the variances requested are the minimum necessary. Even though the Applicants provided detailed expert testimony to support the use variance application (as compared to Petitioners', generalized objections presented to the ZBA), Petitioners contend that the record does not support approval of the use variance. Applying the limited review standard applicable here, the Court disagrees and finds that the ZBA record has sufficient evidence with respect to the need for the use variance, including inter alia, and thus, cannot find the granting of such a variance to have been arbitrary, capricious or unsupported by the record.

Good Faith Purchase

Petitioners expend significant energy to argue that the "lack of reasonable return" and "undue hardship" was a situation self-inflicted by Applicants because Grunwald's 2016 of the Site was not done in good faith and he overpaid for the Site.

As noted earlier, Mr. Grunwald purchased the subject property in February 2016 in what Applicants contend was a good faith, arms-length transaction, two years after the property had been approved for 20 dwelling units. Applicants claim that at the time of the purchase, Grunwald was under the "erroneous assumption" that the 2014 variance was valid, thus making the purchase price quite reasonable under the circumstances. Applicants further argue that Mr. Grunwald, a layman, could not have known that the 2014 use variance could

be challenged as defective, and that to ascertain the County Department of Planning's comments, made in e-mails to which Grunwald was not a party, was not tenable or possible.

While an argument can be made that a variance may be challenged up to six years after it is granted under certain circumstances, rather than the otherwise universally applicable 30-day statute of limitations, it is not unfathomable that Grunwald did not know this. Petitioners, on the other hand, argue that Mr. Grunwald should have known and should be chargeable with that knowledge. However, Mr. Grunwald's uncontradicted testimony was that he consulted with Construction Expediting, a firm which handles all aspects of land use approvals, and which obtained the original approvals, who advised him that the approvals were proper and remained valid.

Additionally, prior to purchasing the property, the record reflects that Mr. Grunwald obtained an appraisal for financing purposes which determined that the value of the property was $2,735,000, an amount approximately 10% lower than the actual sales price. Mr. Beckmann testified that a 10% difference between an appraised amount and an actual sale is common and accepted. Petitioners nevertheless insist that the Mr. Grunwald's purchase was not an arms-length transaction and that the purchase price was somehow, intentionally inflated. However, other than speculation by the Petitioners, there is no actual evidence that the Court can discern demonstrating that Grunwald was involved or had knowledge of any prior transactions or that the value of the Site was intentionally inflated at the time of the purchase. Thus, based on the record before it, the Court cannot find as a matter of fact that, Grunwald acted in bad faith or intentionally paid too much for the Site.

"Reasonable return"

Turning next to an analysis of the various "factors", with respect to the "reasonable return" factor, the Applicants provided a fully detailed report and testimony from an M.A.I. appraiser which demonstrated that the property could not obtain a reasonable return from each of the uses permitted in the R-15 zone. Pursuant to the Table of General Use Regulations for the R-15 zoning district, the following use are permitted by right:

a. Underground surface or overhead utilities, including gas, electrical and water transmission systems, including appurtenances thereto except transmission towers; telephone and cable lines, call boxes and other similar equipment and accessories necessary for furnishing of adequate service by public/private utilities; substations, pumping stations and other unmanned structures that harmonize with the neighborhood, having adequate fences and other safety devices, screening and landscaping;

b. 1-family detached residences, with not more than 1 principal residential building on a lot; Proof of a lack of reasonable return from permitted public uses is not required. See Village of Fayetteville v. Jarrold, 53 N.Y.2d 254, 440 N.Y.S.2d 908 (1981); Grimpel Associates v. Cohalan, 41 N.Y.2d 431, 393 N.Y.S.2d 373 (1977); Muller v. Williams, 88 A.D.2d 725, 451 N.Y.S.2d 278 (3d Dept. 1982); Rice, McKinney's Practice Commentaries, Town Law §267-b, p. 87;

c. Community residence facilities, subject to Town Board approval as to site selection, pursuant to § 41.34 of the Mental Hygiene Law;

d. The following agricultural operations, provided that there shall be no structures or storage of odor- or dust-producing substances within a distance of 250 feet of a lot line:

(a) Nurseries, greenhouses and other enclosed structures for growth and production of plants

(b) Open field agriculture, including orchards, truck gardening, vineyards and other field crops. None of the foregoing shall be construed to permit the raising of any livestock or agricultural industries such as cage-type poultry operations or processing of animal products;

e. 2-family detached residences, with not more than 1 principal residential building on a lot;

f. 1-family semi attached residences, with not more than 1 principal residential building on a lot; such use shall be limited to vacant land only and shall not be permitted on land which is occupied by existing construction;

g. Local house of worship;

h. Community house of worship.

The Beckmann Appraisal Report analyzed each of the foregoing uses and concluded that a reasonable return could not be obtained from any of the foregoing uses. In fact, Beckmann opined that, at most, Applicants would not even obtain a reasonable return if the variances were to be granted, but, at best, may break even.

Petitioners, on the other hand, contend that Mr. Beckmann failed to analyze use of the property as a school. However, because a school is a special permit use and not a use permitted as of right, it was not required to be analyzed. Lack of reasonable return need only be demonstrated for uses permitted by right. See Muller v. Williams, 88 A.D.2d 725, 726, 451 N.Y.S.2d 278, 279 (3d Dept. 1982) ("Petitioners mistakenly argue that the owners failed to offer proof relative to certain other uses.")

Mr. Lange's opined that, "[a]griculture is simply not viable in an urban environment. The return on investment for producing agricultural products is simply not an option nor would the lot be of sufficient size for efficient farming." Petitioner also points to uses such as libraries, museums, art galleries and childcare centers. However, once again, these are not allowed uses in the R. 15 zone. Like a school, these are special permit uses which are not includible under either the Otto or Fayetteville rules. 83 Am. Jur. 2d Zoning and Planning § 734 ("While an applicant for a variance must negate the economic viability of uses permitted by the ordinance, it is not necessary that he or she offer evidence to demonstrate that no reasonable return is possible from special permit uses ....") (citing Muller); Rice, McKinney's Practice Commentaries, Town Law §267-b, p. 87.

Nevertheless, although not required to analyze the use of the property as a school, Mr. Beckmann, in fact, testified that:

> In addition to that, on another report, we looked at schools. That was in a report dated -- to Terry Rice dated ... July 31, 2019 where the only viable sale we found was on Page 5 of the report where we had an existing building that sold for about $105.00 a square foot, again, proving no feasibility. We did the analysis on that and the school would not be appropriate for this site. See Exhibit "D".

From these facts, the Court cannot conclude that it was arbitrary or capricious for the ZBA to find undue hardship existed and that no reasonable rate of return could not be realized or that the Site should be limited to "as of right" uses.

"Uniqueness"

The Court must also consider whether the hardship at issue resulted from the unique characteristics of the Site. Uniqueness, however, does not require that the property which is the subject of a use variance application be the exclusive property affected by the condition which is alleged to create the hardship. See Douglaston Civic Association v. Klein, 51 N.Y.2d 963, 965, 435 N.Y.S.2d 705, 706 (1980); Collins v. Carusone, 126 A.D.2d 847, 847, 510 N.Y.S.2d 917, 917 (3d Dept. 1987); 2 N.Y. Zoning Law & Prac. § 29:8 ("While the hardship must be unique to the property for a use variance to be granted, that does not mean that the applicant must prove that the hardship effects no other parcel in the district or the neighborhood.).

Instead, what is required is "that the hardship condition be not so generally applicable throughout the district as to require the conclusion that if all parcels similarly situated were granted variances the zoning of the district would be materially changed." Douglaston Civic Association, 51 N.Y.2d at 965, 435 N.Y.S.2d at 705. Kettaneh v. Bd. of Standards & Appeals of City of New York, 85 A.D.3d 620, 622, 925 N.Y.S.2d 494, 496–97 (1st Dept. 2011). ("Although four nearby lots are also intersected by a zoning district boundary, it cannot be said that this condition is 'common to the whole neighborhood [internal citations omitted]'"); See also Vomero v. City of New York, 13 N.Y.3d 840, 841, 892 N.Y.S.2d 284, 285 (2009).

"In finding that uniqueness had been demonstrated, the courts have credited multiple minor distinctions [citation omitted], or singular distinguishing characteristics." McKinney's Practice Commentaries, Town Law § 267; see also Rice, Zoning and Land Use, 48 Syracuse L. Rev. 1075, 1109 (1998). Again, having found that the particular property is unique, it is not the role of this Court to second guess this fact-based determination provided it is not arbitrary and capricious.

With respect to the instant matter, Mr. Lange relayed in his report that:

> The property is nearly surrounded by multifamily uses and the unique size and shape of the property is not in evidence anywhere is the surrounding area/neighborhood. The property

> has only one means of ingress and egress and as such must provide a compliant turn around for emergency vehicles. This requirement uses a considerable amount of the 1.05-acre parcel. When added to the required road access and parking, little acreage remains for proposed development, particularly for an R-15 complaint development. (ZBA-622).

Petitioners contend that there are similarly shaped parcels and other properties that are "across the street" from multifamily housing. Based on the law, even if, for the sake of argument, "comparables" suggested by Petitioners were, in fact, comparable, the mere existence of a few similarly situated parcels does not mean that "the hardship condition be not so generally applicable throughout the district." And, although the high-rise apartment buildings referenced in the Findings and located in another zone, the fact of the matter is that the subject property is located in an R-15 zoning district adjacent to high rise apartment buildings (as well as other multifamily housing) and the ZBA found this fact together with the configuration of the property, renders the site unique. Petitioners do not agree with the ZBA finding on this score. However, it is the precise function of the ZBA to evaluate competing factual arguments and it is not the function of this Court to second guess the ZBA's actual finding. In addition, the record certainly substantiates the ZBA's finding of uniqueness and this Court cannot find that such finding was arbitrary and capricious or unsupported by the Record.

"Character of Neighborhood"

Petitioners allege that "the requested variances will alter the essential character of the R-15 Hillcrest neighborhood, which consists of one and two-family residents as the 'predominant land use' in the area." However, in contrast to this assertion, Mr. Lange's report and testimony conclude that the area is the characterized by large apartment buildings and multi-family housing at a density in excess of that which was approved by the ZBA, and the Record before the Court supports a finding that what was proposed and approved herein is consistent with the existing character of the neighborhood.

The 2004 Comprehensive Plan

Petitioners also point to the 2004 Comprehensive Plan which characterizes the R-15 zone as "transitional." However, the verbiage in a comprehensive plan is not enumerated by Town Law § 267-b(2) as a germane use variance consideration. In addition, an outdated comprehensive plan does not bind a community to adhere to antiquated recommendations. A community's comprehensive plan consists of all relevant evidence of a municipality's land use policies. See Asian Americans for Equality v. Edward Koch, 72 N.Y.2d 121, 131, 531 N.Y.S.2d 782, 787 (1988); Udell v. Haas, 21 N.Y.2d 463, 471, 288 N.Y.S.2d 888, 895 (1968); Rodgers v. Village of Tarrytown, 302 N.Y. 115, 122, 96 N.E.2d 731, 734 (1951).

A municipality is not required to act only in accordance with a previously adopted comprehensive plan if changed circumstances warrant different solutions. "[Z]oning is not static; the obligation is the support of comprehensive planning with recognition of the dynamics of the circumstances as they exist at the time of the Application, "not a slavish servitude to any particular plan" Kravetz v. Plenge, 84 A.D.2d 422, 430, 446 N.Y.S.2d 807, 812 (4th Dept. 1982); see also Town of Bedford v. Village of Mount Kisco, 33 N.Y.2d 178, 188, 351 N.Y.S.2d 129, 136 (1973), reargument denied, 34 N.Y.2d 668, 355 N.Y.S.2d 1027, (1974).

As Lange related it, the Site adjoins high-density apartment buildings and is across the street from scores of multi-family homes, consisting of four to six units per property, at a density of approximately 24 units per acre. Thus, Petitioners' objections notwithstanding, the ZBA conclusion that the variance is consistent with the character of the area and, consequently, not inconsistent with the Town's "comprehensive plan" cannot be found to be arbitrary and capricious. Indeed, Mr. Lange concluded that "the granting of the use variance will place this parcel in conformance with the majority of the surrounding neighborhood, rather than at odds with the current neighborhood."

The "Neighborhood" to be Considered

Petitioners further contend that the Board should have restricted the "neighborhood" to properties located in the Town of Ramapo, to the exclusion of adjoining properties and properties located in the immediate vicinity of the subject property. However, as Applicants correctly note, when one views the properties located adjoining a property and in the immediate vicinity, municipal boundaries are invisible and such artificial boundaries are meaningless. The apartment houses adjoining the subject property and multifamily dwellings in the immediate vicinity define the character of the neighborhood.

Moreover, as with all factual determinations, what constitutes the applicable "neighborhood" clearly is within the sound discretion of the Zoning Board of Appeals. See W. Houses Tenants' Ass'n. v. New York City Bd. of Standards & Appeals, 302 A.D.2d 230, 231, 755 N.Y.S.2d 377, 378 (1st Dept. 2003) ("in considering whether the variance would 'alter the essential character of the neighborhood or district in which the zoning lot is located' ..., the Board could look beyond the M1-5 zoning district to the surrounding neighborhood. There is no 'iron curtain' between districts."); SoHo All. v. New York City Bd. of Standards & Appeals, 95 N.Y.2d 437, 441, 718 N.Y.S.2d 261, 263, (2000) ("No inflexible rule exists which requires, as a matter of law, that an economic analysis to support a use variance must be restricted exclusively to data on properties within a particular zoning district.").

"Self-Created Hardship"

As Petitioners correctly point out, the Court did opine, in connection with a prior proceeding of the ZBA, that the need for a variance to create the opportunity for a reasonable return, was partly self-created. However, as noted previously, the Court did not address the merits of the matter in its prior decision.

Now, reaching the merits and reviewing the entire full record, the Court finds that while perhaps some more due diligence at the time of purchase would have uncovered some of the issues with the prior application process, that is purely speculative thus, as noted above, it would not be an arbitrary and capricious finding of the ZBA to conclude that it was

reasonable for Grunwald to rely on prior ZBA findings and the Waterstone appraisal and pay a purchase price commensurate with a Site that has approvals such as the ones previously granted by the ZBA. Petitioners' criticism of the appraisal, whether accurate or erroneous, is irrelevant because it reflects that Grunwald reasonably believed that he was paying fair market value for the property. In any event, Mr. Panico's subsequent questioning of his own appraisal, which based on his comments to Mr. Rice is suspect to begin with, was not known at the time of the Purchase.

Thus, it was entirely reasonable and supported by the record for the Zoning Board of Appeals to conclude that the hardship herein was not-self-created. Again, it is not the province of this Court to second-guess the Zoning Board of Appeals' conclusion in this regard.

In view of the Record before the Court, the Court cannot find that decision of the ZBA to grant the use variance was unsupported by the record or was arbitrary and capricious.

VIII. ISSUANCE OF THE AREA VARIANCES WAS NOT ARBITRARY, CAPRICIOUS OR UNSUPPORTED BY THE EVIDENCE

Because the Court finds the use variance to have been properly granted, the argument that the area variances must be deemed to be moot and annulled based on the defective use variance, must also, of necessity, fail. Moreover, the analysis and criteria for a use variance or area variance is different. Had the use variance been annulled, the area variances would not automatically be invalidated based on that fact alone. Once, Applicants demonstrated entitlement to the requested area variances, Applicants could, in such a case, reapply for the use variance for the same project and the area variances would continue to be in effect.

The Extent of the Variances Granted

Petitioners' next attack on the area variances is to allege that the percentage deviation from the purportedly applicable bulk requirements shows that the variances are substantial. Although one approach to analyzing this question is to look, as Petitioners did, solely at statistics and percentages, another approach is to view the totality of the circumstances and the overall effect of the granting of relief.

In Kleinhaus v. Zoning Board of Appeals of the Town of Cortlandt, N.Y.L.J. March 26, 1996, p. 37, col. 7 (Sup. Ct. Westchester Co.1996), although a variance application to erect a 120-foot amateur radio antenna was considered to be statistically substantial with respect to the applicable 35-foot height maximum, the Court determined that "substantial" is "relative" and could not be gauged in the abstract. In assessing the practical magnitude of the variance, the court related the deviation to the height above the tree line, 40 feet, instead of a gross differential of 85 feet. Although crediting the board's finding that the variance was substantial, the court, nonetheless, concluded that such a finding "begs the question as the deviation only becomes relevant if it relates to an adverse effect in the neighborhood...."

Similarly, in Raubvogel v. Board of Zoning Appeals of the Village of Brookville, N.Y.L.J. Dec. 27, 1995, p. 33, col. 2 (Sup. Ct. Nassau Co.1995), a dwelling with approximately 97,000 cubic feet was proposed, while a maximum building volume of 65,000 cubic feet was permitted. The court found that the underlying circumstances minimized the impact of the magnitude of the variance (45%), specifically relying on the fact that 66% of the properties in the subdivision did not comply with the requirement. Similarly, the denial of a variance to permit the expansion of church facilities having 44 parking spaces, while 123 spaces were required, was annulled because of the lack of any factual basis for the board's mechanical recitation of the statutory standards.

While not specifically discussing the obviously substantial nature of the deviation, the court in Korean Evangelical Church of Long Island v. Board of Appeals of the Village of Westbury, N.Y.L.J., Feb. 28, 1996, p. 31, col. 2 (Sup. Ct. Nassau Co.1996). emphasized that the parking requirement, aimed primarily at commercial establishments, was not rationally related to the church's intermittent use of the property and the fact that the expanded facilities would not increase the number of congregants. In WWA Realty Holding II LLC v. Board of Zoning Appeals of the Village of Lynbrook, N.Y.L.J. Feb. 17, 2004, p. 22, col. 1 (Sup. Ct. Nassau Co. 2004), a variance from a maximum height requirement of forty feet was sought in order to permit a 77-foot flagpole with a large America Flag in front of a car

dealership. The zoning board of appeals denied the variance, in part, because it found the 93 percent variance to be "quite substantial." The reviewing court noted that it "does weigh against petitioner ... that the variance sought is substantial." However, viewing the totality of the circumstances and considering the other applicable variance criteria, the court concluded that "under the circumstances, and in light of the subject matter, the court finds this factor standing alone is insufficient as a matter of law to deny the variance." (citing Sexton v. Zoning Board of Appeals of the Town of Oyster Bay, 300 A.D.2d 494, 497, 751 N.Y.S.2d 595, 598 (2d Dept. 2002).

In Aydelott v. Town of Bedford Zoning Board of Appeals, N.Y.L.J. June 25, 2003, p. 21, col. 4 (Sup. Ct. Westchester Co. 2003), the court criticized the zoning board of appeals' analysis in that it "was, primarily, concerned with the extent of the deviation from the standards established by the zoning code without considering the impact on the surrounding community." The Court concluded that:

> ZBA's consideration of this percentage deviation alone, taken in a vacuum, is not an adequate indicator of the substantiality of the Petitioner's Variance Application. Certainly, a small deviation can have a substantial impact or a large deviation can have little or no impact depending on the circumstances of the variance application. Substantiality must not be judged in the abstract. The totality of the relevant circumstances must be evaluated in determining whether the variance sought is, in actuality, a substantial one.

Id. (citing Rauvogel v. Board of Zoning Appeals of the Village of Brookville, N.Y.L.J. Dec. 27, 1995, p. 33, col. 2 (Sup. Ct. Nassau Co. 1995); Kleinhous v. Zoning Board of Appeals of the Town of Cortlandt, N.Y.L.J., March 26, 1996, p. 37, col. 7 (Sup. Ct. Westchester Co. 1996); see also Niceforo v. Zoning Board of Appeals of Appeals of the Town of Huntington, 147 A.D.2d 483, 537 N.Y.S.2d 579 (2d Dept. 1989), appeal denied, 74 N.Y.2d 612, 546 N.Y.S.2d 556, 545 N.E.2d 870 (1989).

Courts have consistently held that zoning boards of appeal generally should not, and courts often will not, view substantiality in the abstract. The totality of the relevant circumstances must be evaluated in determining whether a deviation truly is substantial. The

effect of the variance on the neighborhood, its true impact and the necessity for compliance with a regulation's mandate all are highly significant considerations in undertaking such an analysis. Rice, McKinney's Practice Commentaries, Town Law § 267-b p. 142 (West 2013).

In connection with the Project, the Applicants' attorney related to the Board that:

> This Board has, repeatedly, recognized that determining whether or not a variance is substantial is not a statistical computation but is a review of all the relevant facts and circumstances and ... for this Applicant to try and get some type of return, maybe, break even in order to build something that's consistent with the character of development in the area on a very difficult piece of property, the variances are not substantial under the circumstances.

The record in these cases fully supports the rational finding of the Zoning Board of Appeals that:

> The proposed variances are not substantial. Based on the previous approval, the applicant has scaled back the request variances and proposes less units than were previously requested and approved. In addition, when the totality of the circumstances are considered, including the fact that the proposal is consistent with the pattern of development in the neighborhood and at a density that is the same or less than that prevailing in the neighborhood, the relief requested is not substantial. In addition, as found by the Planning Board in adopting a Negative Declaration, the proposal will not have a significant adverse impact on the neighborhood.

And, as Mr. Beckmann testified, the requested variances are the minimum necessary to alleviate the "hardship" because the relief sought would, at best, enable the Applicant to break even on his investment (not to obtain a reasonable return).

The Impact on the Neighborhood

The first and fourth considerations involve essentially the same analysis, that is, "whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance"; Town Law § 267-b(3)(b)(1), and "whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district." Town Law § 267-b(3)(b)(4).

The Record before the Court confirms that the proposed development is consistent with the character of development in the neighborhood. The Record establishes that the neighborhood is overwhelming developed with multi-family housing. The property is adjacent to large apartment buildings and the balance of the area is characterized by three-family dwellings with multiple accessory apartments. Further, the Record is devoid of any evidence of substantial deleterious impacts from the proposed construction. Moreover, based upon the evidence before it, the PB adopted a well-reasoned Negative Declaration finding the absence of any adverse impacts.

Thus, the Court finds no means to overturn to ZBA conclusion that:

> An undesirable change will not be produced in the character of the neighborhood nor a detriment to nearby properties will be created by the granting of the area variances. The pattern of development in the area is characterized by multi-family housing including many three-family homes with three accessory and there are several large apartment complexes located adjacent to the site. Accordingly, the proposal is consistent with the character of the neighborhood and will not be a detriment to the area.

The Zoning Board of Appeals further concluded that:

> That the proposed variance will not have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district. The proposal is consistent with the pattern of development in the area and the engineering record substantiates that there will be no deleterious impacts from stormwater, municipal services, traffic or impact on community character. A negative SEQRA declaration was adopted by the Planning Board. Additionally, the area already has many multifamily developments in close proximity to the project.

Again, despite the contrary contention by the Plaintiffs, this conclusion has support in the Record and cannot be said to be arbitrary and capricious. Finally, it is undisputed that the Applicant worked with the Town Consultants for a year to arrive at [a] proposal with the minimum necessary variances.

The Record before the Court contains extensive written submissions, extensive testimony and demonstrates a review of the submissions and consideration by the ZBA of all

the required factors. It shows a weighing of the benefit to the Applicants as weighed against the detriment to the health, safety and welfare of the neighborhood or community. It is certainly not irrational for the ZBA to conclude that the proposal is consistent with the pattern of development in the area. There was no demonstration of any deleterious impacts.

IX. THE NEGATIVE DECLARATION

Petitioners contend that the Planning Board, in adopting a Neg. Dec., "exclude[d] [consideration of] necessary actions like ZBA variances...." First, the EAF describes exactly what was proposed, that is "4 lot subdivision. Lot 1 is a 2 family with 2 accessory apartments, semi-attached. Lot 2 is a 3 family with 1 accessory apartment, semi-attached. Lot 3 is a 2 family with 2 accessory apartments, semi-attached. Lot 4 is a 3 family, semi-attached." Second, under the heading "Governmental Approvals," the EAF answers "Yes" to the Question "City, Town or Village Zoning Board of Appeals" and answers "variances from ZBA" in response to "If Yes: Identify Agency and Approval(s) Required." Third, the Notice of Intent to Act as Lead Agency was sent to the Zoning Board of Appeals as an Involved Agency and, in addition to describing the project relates that "a use variance will be applied for. Area variances also will be applied for." Similarly, the Neg. Dec. also reflected the same. Accordingly, Petitioners are incorrect that the necessity for variances was not considered during the SEQRA process.

Moreover, the point is not the necessity for various approvals but, instead, the environmental impact of the "action," that is, the actual project. An "action" is defined in 6 NYCRR.2(b) to include:

> (1) projects or physical activities, such as construction or other activities that may affect the environment by changing the use, appearance or condition of any natural resource or structure, that:
> ...
> (iii) require one or more new or modified approvals from an agency or agencies....

Clearly, the requisite environmental analysis relates to the Project or physical activities that may produce environmental impacts. It is the Project or physical activities that may produce impacts, not the land use approvals. Confirming the foregoing, the SEQR handbook relates in

answer to the question "Is there a distinction between 'decisions' and 'actions' in applying SEQR? Yes. The action is the project or undertaking that is the subject of the agency's decision."

Petitioners also assert that the General Municipal Law review had some relevance at this early date. As is related above, sketch plat is a preliminary, essentially informal review and, as a result, as the Planning Board attorney correctly pointed out, the General Municipal Law review is unnecessary until the time of preliminary approval. Hence, the review was not germane at that juncture.

In Action 2, Petitioners contend that the Neg. Dec. should be annulled because, they allege, portions of the EAF were, in their opinion, inaccurate. Petitioners also challenge the substantive basis for the Planning Board's Neg. Dec. Petitioners also claim that the findings set forth in the Neg. Dec. are inadequate. Their contention that elaborate findings and references to all documents relied upon is required, however, is unsupported by SEQRA regulations or any case law. In fact, the SEQR Handbook answers the question, "What information must be contained in a negative declaration." As discussed in 617.12(a), a negative declaration must contain:

- A statement that it is a negative declaration for purposes of ECL Article 8;
- The name and address of the lead agency;
- The name, address, and telephone number of a person who can provide further information;
- The SEQR classification for the action;
- A brief and precise description of the nature, extent, and location of the action; and
- A brief statement of the reasoning that supports the determination.

Judicial review of SEQRA determinations "is limited to whether the [lead] 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." Riverkeeper, 9 N.Y.3d at 231. As

the Court of Appeals has explained, a Court's review of a SEQRA determination is "supervisory only"- the court may not "second-guess the agency's choice" of which environmental impacts, mitigation measures, or alternatives must be evaluated and how that review should be undertaken. Matter of Jackson v. New York State Urb. Dev. Corp., 67 N.Y.2d 400, 417, 503 N.Y.S.2d 298, 305, (1986). It is not the Court's role to substitute its judgment for that of the SEQRA lead agency. See Id. at 416; Matter of Village of Ballston Spa v. City of Saratoga Springs, 163 A.D.3d 1220, 1223, 82 N.Y.S.3d 179, 183 (3d Dept. 2018) ("The court's function is to assure that the agency has satisfied SEQRA, procedurally and substantively, not to evaluate data de novo, weigh the desirability of any particular action, choose among alternatives or otherwise substitute its judgment for that of the agency.") (internal citations omitted).

Further, "[t]he agency's substantive obligations under SEQRA must be viewed in light of a rule of reason." Eadie v. Town Bd. of Town of N. Greenbush, 7 N.Y.3d 306, 318, 821 N.Y.S.2d 142, 148, 854 N.E.2d 464, 470 (2006) (internal citations omitted). "[N]ot every conceivable environmental impact, mitigating measure or alternative, need be addressed in order to meet the agency's responsibility. The degree of detail - the reasonableness of an agency's action - will depend largely on the circumstances surrounding the proposed action." Neville v. Koch, 79 N.Y.2d 416, 425, 583 N.Y.S.2d 802, 806 (1992); see also Save the Pine Bush, Inc. v. Common Council of City of Albany, 13 N.Y.3d 297, 308, 890 N.Y.S.2d 405, 411 (2009) ("While it is essential that public agencies comply with their duties under SEQRA, some common sense in determining the extent of those duties is essential too."); Akpan v. Koch, 75 N.Y.2d 561, 570, 555 N.Y.S.2d 16, 20, 554 N.E.2d 53, 57 (1990) ("While judicial review must be meaningful, the courts may not substitute their judgment for that of the agency for it is not their role to 'weigh the desirability of any action or [to] choose among alternatives.'") (internal citations omitted).

The Neg. Dec. considered the entire "action" which includes all approvals necessary to consider the project and physical activities that constitute the action. The Neg. Dec., in fact, recites under "Description of Action" that "Two-and three-family semi-attached residences are not permitted in the R-15 zoning district. Therefore, the Project Sponsor will be applying for a use variance from the Ramapo Zoning Board of Appeals. Additionally, the Project Sponsor will be applying for area variances on each lot."

Although premature for sketch plat review, the Town forwarded the sketch plat application documents to the County Department of Planning pursuant to General Municipal Law § 239-n. Because the referral was premature, the Planning Board attorney properly opined that it was unnecessary to address the letter for purposed of General Municipal Law § 239-n until the time of preliminary plat review.

Moreover, to the extent the General Municipal Law comments were correct or germane to the SEQRA review, Petitioners merely assume that the Planning Board did not consider the contents of the County letter. They have not established that such is the case. Further, although premature, the Applicants' attorney did provide a response to the letter, noting:

> a. Comprehensive plan. As is related above, the 2004 comprehensive plan is outdated and the area has changed such that what is proposed is consistent with the character of the area, thereby being consistent with the Town's overall planning scheme.
> b. As demonstrated by the Lange report, the proposed use unquestionably is consistent with the character of the area.
> c. In adopting a Neg. Dec., the Planning Board considered the impact of the proposal, none of which are regional impacts.
> d. The comment on lot area calculation was incorrect.
> e. The Building Inspector previously determined the appropriate number of parking spaces.
> f. Although the Planning Board did not agree with the Highway Department suggestion, it does not imply that it was not considered.
> g. The comment on lot area calculation was incorrect.
> h. The Planning Board did consider the minimal statistical impact on traffic and public water supply.

Mr. Lange testified that approval of the variances will enable the property to be used in a manner consistent with the developed character of the neighborhood, in contrast to what

the area was like twenty years ago when the Comprehensive Plan was adopted. The SEQRA Findings state:

> The Project will not result in impacts to or be inconsistent with community plans on the growth or character of the existing community. The Project Sponsor commissioned a Planning Report prepared by Lange Planning and Consulting that evaluated the project in the context of the Town of Ramapo's community plans which included the Town's 2003 Comprehensive Plan and the current (2018-2021) comprehensive plan update being undertaken by the Town. In 2019, the Planning Board determined the project was consistent with the community plans. There have been no changes in the Project in regard to density, layout or design since the Planning Boards 2019 determination. The applicant will be seeking the same use and area variances from the Town of Ramapo Zoning Board of Appeals as previously applied for in 2019. In the event the Town of Ramapo Zoning Board of Appeals again grants the requested relief, the parcel will effectively be in full conformance with the use, bulk and area requirements of the R-15 Zoning District.

Relatedly, the Negative Declaration Findings also found that:

> The Project will not result in impacts on the growth or character of the existing community. In 2019, the Planning Board determined the project would have no adverse impact on growth or character of the community or neighborhood. There have been no changes in the Project regarding density, layout or design since the Planning Board's 2019 determination. The Project is not incompatible with the character of the surrounding neighborhood. A satisfactory landscaping and screening plan has been submitted and is illustrated on the site-specific landscaping Plan (Sheet 4 of 11) as prepared by Civil Tee Engineering and Surveying, last revised March 26, 2021 as revision 9.

It is certainly within the realm of rationality for the PB to conclude that the Applicant demonstrated that the area is characterized by multifamily housing, including adjoining high density apartment buildings and the proposal is consistent with the character of the area. To the extent Petitioners have submitted evidence to the contrary, it is the province of the Planning Board to resolve purported factual disputes and its conclusions may not be disturbed if there is a factual basis for the finding. See Supkis v. Town of Sand Lake Zoning Board of Appeals, 227 A.D.2d 779, 781, 642 N.Y.S.2d 374, 376 (3d Dept. 1996). Holimont, Inc. v.

Village of Ellicottville Zoning Board of Appeals, 112 A.D.3d 1315, 1315, 977 N.Y.S.2d 514, 514-15 (4th Dept. 2013). However, the record overwhelming demonstrates the multifamily character of the area. Based upon a review of the SEQRA Findings and the PB Record, the Court cannot substitute its Judgment, even if it might have reached a different conclusion, and thus, Neg. Dec. will be invalidated on this basis.

Traffic

Petitioners next contend that, based on the County's GML letter, that the approvals will create traffic issues and that the traffic issue wasn't fully and properly studied. The Court is perplexed by this assertion as Petitioners have not provided a traffic report which suggests any traffic issues. "Applying the doctrine of exhaustion of administrative remedies, courts have refused to review a determination on environmental matters based upon evidence or arguments not presented during the proceeding before the lead agency." Aldrich v. Pattison, 107 A.D.2d 258, 267-68, 486 N.Y.S.2d 23, 30 (2d Dept. 1985) (citing Candor v. Flacke, 82 A.D.2d 951, 952, 440 N.Y.S.2d 769, 771 (3d Dept. 1981); Natural Resources Defense Council v. City of New York, 112 Misc.2d 106, 108, 446 N.Y.S.2d 871, 873 (Sup Ct. New York Co. 1982); see also Long Island Pine Barrens Soc., Inc. v. Planning Board of Town of Brookhaven, 204 A.D.2d 548, 550, 611 N.Y.S.2d 917, 918-19 (2d Dept. 1994), lv. dismissed in part, denied in part, 85 N.Y.2d 854, 624 N.Y.S.2d 369, 648 N.E.2d 789 (1995).

As a result, application of the doctrine of exhaustion of administrative remedies mandates that a court limit its consideration to specific objections, supported by expert reports or evidence which were provided during the SEQRA process. See Pattison, supra; Preservation Association of Central New York, Inc. v. Marcoccia, 284 A.D.2d 948, 948, 725 N.Y.S.2d 915, 916 (4th Dept.2001); Forjone v. Bove, 280 A.D.2d 948, 720 N.Y.S.2d 869 (4th Dept. 2001); Congdon v. Washington County, 134 Misc.2d 765, 775, 512 N.Y.S.2d 970, 978 (Sup Ct. Washington Co. 1986), aff'd, 130 A.D.2d 27, 518 N.Y.S.2d 224 (3d Dept.), lv. denied, 70 N.Y.2d 610, 522 N.Y.S.2d 110, 516 N.E.2d 1223 (1987).

For support for these complaints about traffic, Petitioners again appear to rely on speculation and generalized community objections, both insufficient to raise an issue and provide no fact-based evidence that was presented to the ZBA for the Court to consider their claim that development of the site will "generate large volume of traffic (sic) is unsubstantiated and clearly erroneous. The proposal is for 10 units and five accessory units (which may not exceed 1500 square feet). Given the multi-family character of the area, any vehicular traffic that might be produced for these units will obviously be statistically insignificant.

Again, Petitioners provide no expert or cognizable basis to assert such a claim, other than their own speculation. Moreover, their citation to §376-9(A) of the Zoning Law clearly is inapplicable. Section 376-9 is the "objectives" section for site plan review. The instant application sought subdivision approval and variances. Site plan approval was neither necessary nor sought. Moreover, the provision upon which Petitioners rely, in any event, was merely the legislative declaration of the aims for site plan review and is not a self-operating review criteria.

Visual Impact/Height/Noise

Petitioners also assert that "no visual impact study was done related to the impact the proposed height of 3 stories will have on the existing 1 to 2 story buildings located in neighboring R-15 community." However, there is no indication in the record that a visual impact study was necessary or that Petitioners asserted any fact-based basis for such a "study." Accordingly, Petitioners again failed to exhaust their administrative remedies and the contention is barred on that ground alone.

Nevertheless, the Court notes that the Neg. Dec. concluded that:

> The Project will be visible from the public right of way. However, the vantage points are not from designated scenic or aesthetic resources... The Project Sponsor has been responsive regarding the potential impact to the visual character of the immediate area to the greatest extent practicable, by retaining existing vegetation where feasible, supplemented by new landscape tree species. A project-specific landscaping plan last revised March 26, 2021 and prepared by Civil Tec Engineering and Surveying submitted to the Town

> that illustrates proposed visual buffering when and where feasible. The final landscaping plan will to be reviewed during the preliminary and final subdivision review process. The proposed building will be set back from Union Road. The architectural design of the proposed building including fenestration, color palette and facade materials remains subject to the review and approval of the Town of Ramapo Architectural Review Board.

In any event, a height of 35 feet is permitted pursuant to all three potentially applicable use groups in the R-15 zone and no height variance was required or sought. Again, based on conjecture and genialized objections, but no fact-based report, Petitioners speculate that in this multi-family neighborhood, significant noise will be produced by the proposed development. Again, Petitioners neglected to provide any fact-based evidence to the PB to support this generalized objection or to adequately raise an issue.

Cumulative Impacts

Petitioners argue that the PB did not consider cumulative impacts; however, confirming that the Planning Board did consider cumulative impacts, the Neg. Dec. found that:

> In addition to the foregoing the Town of Ramapo Planning Board has also determined that the Project will not result in the following: ... Two or more related actions undertaken, funded, or approved by an agency, none of which has or would have a significant impact on the environment, but when considered cumulatively would meet one or more of the criteria in 6 NYCRR 617.7(c). No such cumulative impacts will occur.

Petitioners unspecific claim is not based on facts or evidence but is another unsubstantiated general objection, unsupported by the record. The Neg. Dec. concluded:

> The Project will not result in a significant impact on land. There will be the clearing of trees and land grading for buildings, roadways, parking lots and utility improvements. The total area of tree clearing, and grading is estimated to be approximately 1.05 acres. The completed Project will include new impervious surfaces (pavement and buildings). The Project is subject to the NYSDEC General Permit GP-0-20-001, New York State Stormwater Management Design Manual, Chapter 137 of the Ramapo Town Code and other state and local laws, codes and ordinances pertaining to stormwater runoff and controlling construction phase sediment and erosion controls. A project-specific stormwater pollution prevention plan (SWPPP) dated March 2021 and prepared by Civil Tee Engineers and Surveyors and plans last revised March 26, 2021, and prepared by Civil Tee Engineers and Surveyors addresses both construction phase erosion and sediment control and permanent water quality

> and quantity control measures to be employed. The SWPPP has been reviewed by the Town of Ramapo consulting engineer and will continue to be reviewed during the preliminary and final subdivision review process for compliance with state and local laws, codes and ordinances pertaining to stormwater runoff and controlling construction phase sediment and erosion controls. The SWPPP prepared by the Project Sponsor, if deemed technically correct and in conformance with the applicable standards, as determined by the Town's consulting engineer, the Town of Ramapo, as a traditional land-use MS4 will issue an MS4 SWPPP Acceptance Form. The Project Sponsor may then submit a Notice of Intent (NOI) to the NYSDEC for permit coverage at which time site disturbances may commence. The Project will be constructed as a single construction phase. The Project will limit impacts relating to construction by having work hours occurring during days and time periods allowed by and in accordance with Town of Ramapo local laws and ordinances. (PB138).

While the Court is crystal clear that Petitioners disagree with these findings, if the findings of the PB are rational and substantiated by the record, then neither Petitioners, nor the Courts, may second-guess such findings simply because they might have found otherwise.

As set forth above, the PB identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination. Consequently, Petitioners' assertion that the Planning Board should have required a DEIS is legally and factually baseless.

Involved Agencies

Petitioners contend that various other agencies should have been listed as Involved Agencies. However, Petitioners do not have standing to make such a claim. "[A] challenge [to lead agency status] may only be commenced by another involved agency." Hart v. Town of Guilderland, 196 A.D.3d 900, 903, 151 N.Y.S.3d 700, 706 (3d Dept. 2021) (quoting King v. County of Saratoga Indus. Dev. Agency, 208 A.D.2d 194, 201, 622 N.Y.S.2d 339, 344 (3d Dept.) [internal quotation marks and citation omitted], lv. denied, 85 N.Y.2d 809, 628 N.Y.S.2d 52 (1995); (citing Vil. of Poquott v. Cahill, 11 A.D.3d 536, 539, 782 N.Y.S.2d 823 (2004), lv. dismissed and denied, 5 N.Y.3d 819, 803 N.Y.S.2d 26, (2005)).

Moreover, Petitioners have not cited any basis to assert that the Town Highway Department and Department of Public Works are involved agencies, and, in fact, they are not. Union Road is a County road and, hence, the Town Highway Department has no permitting authority could not be an involved agency.

The County Department of Planning also is not an involved agency but is only authorized to make recommendations. See Headriver, LLC v. Town Board of the Town of Riverhead, 2 N.Y.3d 766, 768, 780 N.Y.S.2d 505, 505, 813 N.E.2d 585, 585 (2004) (The Court of Appeals determined that the recommendation of the county planning commission was "merely advisory" and that, as a result, the planning commission was not a necessary party to the proceeding); McEvoy Dodge West Ridge, Inc. v. Zoning Bd. of Appeals, 69 Misc. 2d 55, 329 N.Y.S.2d 171 (Sup. Ct., Monroe Co. 1972), (the Court concluded that the county planning council acting pursuant to General Municipal Law § 239-m is an advisory body whose determinations are non-final); Vanderveer v. Van Rouwendaal, 75 Misc. 2d 593, 598, 348 N.Y.S.2d 55, 60 (Sup. Ct. Dutchess Co. 1973) (characterizing the recommendation of a county planning agency as an "advisory act.").

Moreover, even if those agencies should have been listed as involved agencies, any such hypothetical error was harmless and excusable. "In various circumstances, a lead agency's nonprejudicial misstep in the SEQRA environmental review procedure may be excused as harmless." Rusciano & Son Corp. v. Kiernan, 300 A.D.2d 590, 590-91, 752 N.Y.S.2d 377, 378-79 (2d Dept. 2002) (citing Steele v. Town of Salem Plan. Bd., 200 A.D.2d 870, 872, 606 N.Y.S.2d 810, 813, (2d Dept. 1994) (mistaken classification of action as Type II harmless where agency in fact follows procedures applicable to Type I action); Jaffee v. RCI Corp., 119 A.D.2d 854, 855, 500 N.Y.S.2d 427, 429 (3d Dept. 1986) (classification of action as unclassified harmless where agency in fact follows procedures applicable to Type I actions; Assocs. v. Town Bd. of Town of Amherst, 185 A.D.2d 617, 585 N.Y.S.2d 895, ; see also Bd. of Managers of Plaza Condo. v. New York City Dep't of Transp., 131 A.D.3d 419, 420, 14 N.Y.S.3d 375, 376 (1st Dept. 2015); Hartford/N. Bailey Homeowners Ass'n ex rel. Pasztor

v. Zoning Bd. of Appeals of Town of Amherst, 63 A.D.3d 1721, 1723, 881 N.Y.S.2d 265, 267 (4th Dept.), *lv. denied*, 13 N.Y.3d 901, 895 N.Y.S.2d 290, 922 N.E.2d 876 (2009); Prospect Park E. Network v. New York State Homes & Cmty. Renewal, 125 A.D.3d 435, 436, 2 N.Y.S.3d 467, 468 (1st Dept. 2015); Town of Victory by Richardson v. Flacke, 101 A.D.2d 1016, 476 N.Y.S.2d 711 (1984).

Additionally, the agencies which Petitioners claim should have been listed as involved agencies were fully involved in the review process. The County Drainage Agency, County Sewer District and Department of Planning were sent the Planning Board's Notice of Intent to be Lead Agency (R208) as well as the Notice of Determination of Environmental Significance. The following agencies were sent copies of the relevant documentation and provided written comments which were considered by the Planning Board: Town Department of Public Works, County Highway Department, County Department of Planning and Sewer District. Accordingly, Petitioners lack standing to raise the purported interests of those agencies. To the extent any purportedly involved agency was not listed on the EAF, they were provided with the relevant materials and commented. Accordingly, to the extent any involved agency was not named in the EAF, any such purported error was harmless and, as a matter of law, is excused.

Site Plan Review, Timing of Neg. Dec. and Public Comment

Petitioners next contend that site plan review was required but did not take place. Section 376-90 of the Zoning Law provides that "No site development plan approval shall be required for one- or two- or three family residential uses or for additions, alterations or structures accessory thereto...." Accordingly, the contention that a SEQRA Determination of Significance should not have been made until after a site plan application had been reviewed is without merit.

Petitioners also argue that the adoption of a Neg. Dec. should not have occurred early in the review process, that is, when sketch plat approval was considered, but should have waited until the time of preliminary approval. To the contrary, the SEQRA regulations provide that "[T]he basic purpose of SEQR is to incorporate the consideration of environmental factors

into the existing planning, review and decision-making processes of state, regional and local government agencies at the earliest possible time." 6 NYCRR 617.1(c). The SEQRA regulations further provide that:

> As early as possible in an agency's formulation of an action it proposes to undertake, or as soon as an agency receives an application for funding or for approval of an action, it must do the following:
>
> > (i) Determine whether the action is subject to SEQR. If the action is a Type II action, the agency has no further responsibilities under this Part;
> > (ii) Determine whether the action involves a federal agency. If the action involves a federal agency, the provisions of section 617.15 of this Part apply;
> > (iii) Determine whether the action may involve one or more other agencies; and
> > (iv) Make a preliminary classification of an action as Type I or Unlisted, using the information available and comparing it with the thresholds set forth in section 617.4 of this Part. Such preliminary classification will assist in determining whether a full EAF and coordinated review is necessary.

The SEQR Handbook provides that review under SEQR should be started:

> • As soon as an agency receives an application to fund or approve an action, or
> • As early as possible in an agency's planning of an action it is proposing.

SEQR review should begin as soon as the principal features of a proposed action and its environmental impacts can be reasonably identified.

Although the conceptual philosophy for sketch plat approval is an initial screening of a "sketch" of a subdivision, as is dictated by the requirements of SEQRA and the practice in the Town of Ramapo and other municipalities, the documentation and plats required for sketch plat approval and a SEQRA determination of significance are the same as would be required for preliminary or final subdivision approval.

Petitioners characterize the consideration of the Neg. Dec. as insufficient and comment that the public was denied the right to participate. The SEQRA regulations, however, do not require a public hearing at any stage of the SEQRA process. Further, although not a SEQRA public hearing, the public was permitted to comment on any aspect of the application or

Project. Further, the PB and the public have reviewed and commented on the identical application on numerous prior occasions. The public, including Petitioners, was fully familiar with all aspects of the application and fully capable of commenting, as they did, at the public hearing.

Likewise, having reviewed the application on numerous prior occasions, in addition to its review of the current application, the PB was fully familiar with all of the facts. Town Law § 276 neither defines the term "sketch plat" nor incorporates the term into the statutory review and approval process of subdivisions. A "sketch plat" has been characterized as "a rough design map which provides the developer an opportunity to discuss his plans and make alterations before incurring the expense of a preliminary plat." Kmiec, Zoning and Planning Deskbook, Second Edition, § 9:3. In effect, a sketch plat permits a planning board to grant an unofficial imprimatur to the general lot layout and road configuration of a proposed subdivision before costly engineering plans are developed and submitted for a board's review.

The PB Neg. Dec. was adopted after review of all germane aspects of the application and environmental considerations and after the public had an opportunity to be and were heard. Contrary to Petitioners' assertions, it appears to this Court that the Notice of Determination was sent to the DEC Environmental Notice Bulletin on November 18, 2021 and was published in the Environmental Notice Bulletin on December 1, 2021. Thus, Petitioners' contentions in this regard are without merit. Section 617.12(C)(4) provides that a "Notice of a negative declaration must be incorporated once into any other subsequent notice required by law." The notice of hearing published by the ZBA did not include this notice. However, Petitioners have not alleged in what way they or anyone else has been prejudiced by the lack of such a recitation and the Court cannot fathom how there has been any prejudice from this omission. Thus, this omission constitutes harmless error and does not require an annulment or vacatur of the ZBA findings.

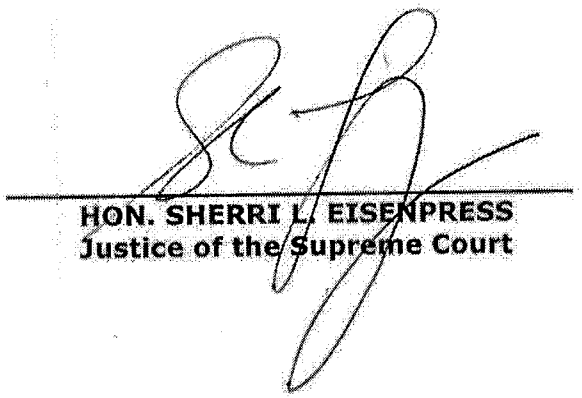
XIII. PETITIONERS ARE NOT ENTITLED TO COSTS

Finally, Plaintiffs seek costs. By its terms, Town Law § 267-c(2) authorizes an award of costs only "against the board of appeals...." As a result, in the first instance, the statute does not authorize an award of costs as against the Applicant. "The statute places the burden on the aggrieved petitioners to submit evidence showing that the conduct of the ZBA went beyond the commission of legal or factual error and requires either a showing of intent to do harm or such recklessness as would amount to the equivalent of intent." Gold v. Zoning Bd. of Appeals of Town of Oyster Bay, 28 Misc. 3d 1219(A), 957 N.Y.S.2d 636, 2010 WL 3118281 at 4 (Sup. Ct. Nassau Co. 2010). In light of the foregoing, and this Courts conclusion on the various claims asserted by Petitioners, it is axiomatic that Petitioners are not entitled to the costs incurred in prosecuting this action.

CONCLUSION

For the reasons set forth above, Petitioners' petitions (Actions #1 and #2) are denied and dismissed in their entirety.

Dated: New City, New York
April 13, 2023



HON. SHERRI L. EISENPRESS
Justice of the Supreme Court

TO:

All parties via NYSCEF