SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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LUCILLE and THOMAS MURPHY, JOSEPH MARINELLO, VLADIMIR ZOLOTTEV, SHAQUILLE GRIFFITHS, JOHN RABIUS, SUSAN DARDANO, and MARIA FALCONE-PALUMBO,

Petitioner-Plaintiffs,

-against,

PLANNING BOARD OF THE VILLAGE OF TUCKAHOE, BILL WILLIAMS, in his official capacity as BUILDING INSPECTOR OF THE VILLAGE OF TUCKAHOE, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, NEW YORK STATE DEPARTMENT OF HEALTH, and BILWIN DEVELOPMENT AFFILIATES LLC,

Respondent-Defendants,

For a judgment, pursuant to Articles 30 and 78 of the Civil Practice Law and Rules.

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FILED
AND
ENTERED

ON JULY 21, 2017

WESTCHESTER COUNTY CLERK

DECISION & ORDER

Index No. 67339/2016

SCHWARTZ, J.,

The Court has considered the following e-filed papers submitted in this hybrid Article 78 proceeding and declaratory judgment action, together with the exhibits attached thereto: the documents numbered 95, 99-100, 103, 105, 106, 233, 234, 239, 241, 243-246, 258 and 261. Because the Planning Board satisfied its SEQRA obligations when it issued the negative declaration, and because the claims against the DEC are untimely, all the Petitioners' claims are dismissed to the extent they seek Article 78 relief. Petitioners' fifth, sixth, ninth, and tenth causes of actions survive only to the extent they seek declaratory relief.

Facts

Petitioners commenced this hybrid Article 78 proceeding and declaratory judgment action to annul an October 19, 2016 negative declaration ("Negative Declaration") and a prior July 22, 2015 conditioned negative declaration ("CND") issued by the Respondent Planning Board of the Village of Tuckahoe ("Planning Board"). The Planning Board issued the declarations as SEQRA lead-agency for a project by Respondent Bilwin Development Affiliates LLC ("Bilwin") seeking to construct a hotel, restaurant and parking lot at a former

marble quarry and dump site (the "Site") in the Village of Tuckahoe. The Petitioners also seek to annul the July 18, 2016 Decision Document ("Decision Document") and its Remedial Action Work Plan ("RAWP") issued by the Respondent Department of Environmental Conservation ("DEC") as part of the Site's admission into the New York State Brownfield Cleanup Program ("BCP") for remediation of contamination at the Site.

The Site was originally a marble quarry from the late 19th century into the 1930s. From the 1950s to the 1980s the Site was used as a dump by businesses and municipalities. Bilwin purchased the Site in early 2014 and thereafter it conducted environmental testing which revealed concentrations of volatile organic compounds ("VOCs"), semi-volatile organic compounds ("SVOCs"), and inorganic compounds. Bilwin applied to the DEC in February 2014 for the site's admission into the BCP. The DEC approved Bilwin's application and the parties entered into a BCP agreement dated April 30, 2014 (Doc#147).

While Bilwin prepared to submit plans to the DEC for review as part of the BCP process, on Nov 21, 2014, it submitted an application for site plan approval with the Planning Board to construct a hotel on the Site as a permitted use. On December 16, 2014, the Planning Board declared itself lead-agency for SEQRA review of the project. After reviewing (1) a traffic impact study by the Village's planning consultant BFJ Planning ("BFJ"), (2) a DEC letter assessing environmental conditions, (3) the Environmental Assessment Form Parts I and II submitted by Bilwin pursuant to SEQRA, and (4) a memo from BFJ regarding the SEQRA review process, the Planning Board published a draft CND on July 21, 2015 for a 30-day comment period pursuant to SEQRA (*see* Ciaramell Aff. at Doc#139, ¶ 6 and notice of CND at Doc#228, VOT_0004163). On September 15, 2015, the Planning Board adopted the CND categorizing it as an unlisted action pursuant to SEQRA and with the condition that all DEC and Department of Health ("DOH") standards are met (Doc#226, VOT_0003919).[1]

From February through August 2015 Bilwin's environmental consultant, HES, investigated the Site pursuant to a Remedial Investigation Work Plan ("RIWP") approved by the DEC in November 2014. The RIWP required sampling of surface and sub-surface soils, onsite groundwater monitoring wells, and soil vapor probes. Based on the results the DEC and DOH concluded the Site posed a "significant threat" to health and the environment. In light of this conclusion, HES prepared a proposed Remedial Action Work Plan ("RAWP") and the DEC held a public session regarding the proposed plan on April 14, 2016. The Planning Board hired an environmental consulting firm, HDR, and one if its engineers, Michael Musso, submitted comments to DEC on the proposed RAWP on behalf of the Planning Board on April 21, 2016. HES revised the RAWP after receiving comments and on July 18, 2016 the DEC issued a decision document ("Decision Document") formally approving the RAWP. The final RAWP included specifications for the remediation of the contaminated soil, a community air monitoring plan ("CAMP"), and construction of a hotel and parking lot as a site cap. The Decision Document concluded that the remedy would "eliminate or mitigate all significant

[1] The DOH acts in an advisory capacity under the ECL to the DEC to ensure remedies selected as part of the BCP are protective of public health.

threats to public health and the environment presented by the contamination…" (Doc. #220, VOT_0000441).

Between October 2015 and October 2016, the Planning Board held six public meetings on the Site Plan and collected written public comments over that time. On October 10, 2016, the Planning Board amended the CND to a non-conditioned Negative Declaration citing, among other documents, the Decision Document and the included RAWP.

On November 18, 2016, Petitioners commenced the instant proceeding. On February 8, 2017, the Petitioners moved this Court by order to show cause for a temporary restraining order ("TRO") and preliminary injunction restraining respondents from proceeding with the project. The Court declined to issue the TRO and in a decision and order dated May 26, 2017, this Court (Schwartz, J.,) denied the application for a preliminary injunction.

Relevant Law

"A party has standing in a land-use matter if it shows that it would suffer direct harm (i.e., injury in fact) that is in some way different from that of the public at large. A property owner has standing to seek review of an agency's compliance with the State Environmental Quality Review Act if the owner has a significant interest in having the mandates of SEQRA enforced" (*Lo Lordo v Bd. of Trustees of Incorporated Village of Munsey Park*, 202 AD2d 506 [2d Dep't 1994] [internal citation omitted]).

In reviewing the actions of an administrative agency, courts must assess whether the actions at issue were taken without sound basis in reason and without regard to the facts (*see Matter of County of Monroe v. Kaladjian*, 83 NY2d 185, 189 [1994], citing *Matter of Pell v. Bd. Of Educ.,* 34 NY2d 222, 231 [1974]; *Apkan v. Koch*, 75 NY2d 561, 570-71 (1990); *Matter of Calvi v. Zoning Bd. of Appeals of the City of Yonkers*, 238 A.D.2d 417, 418 [2d Dept. 1997]). The agency's determination need only be supported by a rational basis (*Matter of County of Monroe v. Kaladjian, supra; Matter of Jennings v. Comm. N.YS. Dept. of Social Svcs*., 71 A.D.3d 98, 109 [2d Dept. 2010]). Unless the agency's determination was arbitrary and capricious, it must be sustained (*see Matter of Jennings v. Comm. N.Y.S. Dept. of Social Svcs.*, *supra*; *Matter of Cortlandt Nursing Care Center v. Whalen*, 46 NY2d 979, 980 (1979)).

If the determination is rationally based, a reviewing court may not substitute its judgment for that of the agency even if the court might have decided the matter differently *(Matter of Savetsky v. Zoning Bd. of Appeals of Southampton*, 5 A.D.3d 779, 780 (2d Dept. 2004); *Matter of Calvi v. Zoning Bd. of Appeals of the City of Yonkers*; *supra*). It is not for the reviewing court to weigh the evidence or reject the choice made by the agency where the evidence conflicts and room for choice exists (*Matter of Calvi v. Zoning Bd. of Appeals of the City of Yonkers*; *supra*, citing *Matter of Toys "R" Us v. Silva*, 89 NY2d 411, 424 (1996); *Apkan v. Koch*, *supra*).

The same standard of review applies to SEQRA determinations. It is well settled that judicial review of the SEQRA process is limited to whether "a determination was made in

violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion .... [I]t is not the role of the courts to weigh the desirability of any action or choose among alternatives, but to assure that the agency itself has satisfied SEQRA, procedurally and substantively" (*Matter of Jackson v. New York State Urban Dev. Corp.*, 67 NY2d 400, 416 (1986)). "The agency's 'substantive obligations under SEQRA must be viewed in light of a rule of reason' and agencies have 'considerable latitude in evaluating environmental effects and choosing among alternatives' [citation omitted]" (*Eadie v. Town Bd. of Town of North Greenbush*, 7 NY3d 306, 318 [2006]).

Although "[n]othing in the law requires an agency to reach a particular result on any issue, or permits the courts to second-guess the agency's choice, which can be annulled only if arbitrary, capricious or unsupported by substantial evidence," the courts in reviewing a lead agency's negative declaration must review the record to determine if the agency (1) identified the relevant areas of environmental concern, (2) took a "hard look" at them, and (3) made a "reasoned elaboration" of the basis for its determination (*New York City Coalition to End Lead Poisoning, Inc v* Vallone, 100 NY2d 337, 348 [2003]; *see also Matter of Jackson v. New York State Urban Dev. Corp.*, *supra* at 417; *Matter of Merson v. McNally*, 90 NY2d 742, 751-52 [1997]; *Apkan v. Koch*, *supra*; *City of Rye v. Korff*, 249 A.D.2d 470, 471-472 (2d Dept. 1998), *lv. denied*, 92 NY2d 808 [1998]; *Aldrich v. Pattison*, 107 A.D.2d 258, 265-266 [2d Dept 1985]).

A negative declaration is a written determination by a lead agency that implementation of a proposed action will not result in any significant adverse environmental impacts (*see* 6 NYCRR § 617.2[y]). 6 NYCRR § 617.7(e) provides that a negative declaration may be amended:

> (1) At any time prior to its decision to undertake, fund or approve an action, a lead agency, at its discretion, may amend a negative declaration when substantive:
>
> (i) changes are proposed for the project; or
>
> (ii) new information is discovered; or
>
> (iii) changes in circumstances related to the project arise; that were not previously considered and the lead agency determines that no significant adverse environmental impacts will occur.

The SEQRA regulations outline what must be considered when a lead agency analyzes the environmental significance of a proposed action. 6 NYCRR § 617.7 states:

> (b) For all Type I and Unlisted actions the lead agency making a determination of significance must:
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> (1) consider the action as defined in sections 617.2(b) and 617.3(g) of this Part;

> (2) review the EAF, the criteria contained in subdivision (c) of this section and any other supporting information to identify the relevant areas of environmental concern;
>
> (3) thoroughly analyze the identified relevant areas of environmental concern to determine if the action may have a significant adverse impact on the environment; and
>
> (4) set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation.

A CND is a negative declaration where conditions imposed by the lead agency will modify the proposed action so that no significant adverse environmental impacts will result. (*see* 6 NYCRR § 617.2[h]). "The period of limitations for a SEQRA review that determines a conditioned negative declaration is appropriate begins at the end of the 30-day public comment period as required by 6 NYCRR § 617.7(d)(1)(iv)" (*see Stop-The-Barge v Cahill*, 1 NY3d 218, 224 [2003]). "As determined in *Stop–The–Barge,* the agency's determination is deemed final, under SEQRA review, (1) once the agency determines the type of SEQRA review needed (concluding all analysis, investigation and public commentary periods) and (2) at the point where the applicant can carry on with the project without issuing an environmental impact statement." (*State of Vermont v New York State Dept. of Envtl. Conservation*, 15 Misc 3d 1145(A) [Albany Sup Ct 2006]. "…[C]ommencing the period of limitations from the finality of the CND is consistent with the policy of resolving environmental issues and determining whether an environmental impact statement will be required at the early stages of project planning." (*Stop-the-Barge* at 224; *See also Matter of Long Is. Pine Barrens Socy. v Planning Bd. of Town of Brookhaven*, 78 NY2d 608 [1991]).

"In a hybrid proceeding and action, separate procedural rules apply to those causes of action which are asserted pursuant to CPLR article 78…and those which seek declaratory relief... Thus, where no party makes a request for a summary determination of the causes of action which seek damages or declaratory relief, it is error for the Supreme Court to summarily dispose of those causes of action" (*Lake Street Granite, Inc. v Town/Village of Harrison*, 106 AD3d 918 [2d Dept 2013]; *see also East West Bank v L&L Assoc. Holding Corp.*, 144 AD3d 1030 [2d Dept 2016]) (*internal citations omitted*).

Discussion

As a threshold matter, Petitioners have standing to seek review of the Planning Board's compliance with SEQRA. They allege environmental harms different from that of the public at large—that they reside in or are occupying property near the Site that could potentially be affected by the release of contaminants disturbed during the Site's remediation (*see Lo Lordo* at 506-507).

Turing to the merits of the claims for Article 78 relief, the Planning Board satisfied its obligations under SEQRA when it issued the Negative Declaration in its October 19, 2016 resolution. It is undisputed the board identified the relevant environmental issue—the need to safely remediate the hazardous conditions present at the Site. The record demonstrates the Planning Board, with the assistance of its environmental consultant, took a "hard look" at the RAWP and the Decision Document issued by the DEC and determined that, together with the lengthy list of conditions set forth in the October 16, 2016 resolution and the Environmental Easement, the Site Plan "would not have any significant adverse environmental impacts" (Doc#217, VOT_0000014). The board made a reasoned elaboration of its determination when it referred to these documents which include the DEC's determination in the Decision Document that Bilwin's plans for the remediation and capping of the Site was "protective of public health and the environment" (Doc# 5, p.4) (*see Gabrielli v Town of New Paltz*, 93 AD3d 923, 925 [3d Dept 2012]). There is substantial evidence that the Planning Board, employing a rule of reason, reasonably determined the remediation plan approved by the DEC and as incorporated into the Site Plan will have no adverse effect on the environment (*see Matter of Jackson, supra,* at 418).

Petitioners argue the Negative Declaration must be annulled because SEQRA regulations do not allow the amendment or recession of a CND issued unless the SEQRA lead agency subsequently determines a *positive* declaration is appropriate.[2] This argument is unpersuasive. First, the applicable regulations 6 NYCRR §§ 617.7(d)(2) and (f)(1) do not prohibit amendments to a CND that remove conditions. They do require a rescission of a negative declaration and a CND, respectively, if due to substantive new information or changes the lead agency determines a significant *adverse* environmental impact may result (*see id.*). Here, neither the DEC review or the Planning Board's review of the DEC Decision document found a significant adverse environmental impact by the planned remediation and capping of the Site.

Second, the SEQRA regulations specifically provide for the amendment of a negative declaration "[a]t any time prior to its decision to undertake, fund or approve an action…at its discretion" (6 NYCRR § 617.7[e]). Despite the Petitioners' arguments to the contrary, a conditioned negative declaration *is* a type of negative declaration (*see* 6 NYCRR § 617.2[h]). Therefore, it was rational and within the Planning Board's discretion to deem the DEC's Decision Document, formally approving the RAWP, new information and changed circumstances substantial enough to warrant an amendment of the CND. Since the amendment was a proper exercise of the Planning Board's discretion, the Court's analysis is limited to a consideration of whether the board (1) identified the relevant areas of environmental concern, (2) took a "hard look" at them, and (3) made a "reasoned elaboration" of the basis for its determination (*see New York City Coalition to End Lead Poisoning* at 348). As set forth above, the Planning Board did so. Accordingly, the Petitioners' first cause of action is dismissed.

[2] Pursuant to 6 NYCRR § 617.7(d)(2) an amendment of a CND to a positive declaration would require the drafting of an environmental impact statement.

Petitioners cite their experts and argue the Planning Board failed to take a hard look at evaluating the environmental impact of the proposed methods to be used to excavate the hazardous materials at the site. In fact, the substantive challenge against the Planning Board raised by Petitioners in this proceeding is not that remediation will have an adverse environmental impact, but that the *methods* selected by Respondents to remediate and monitor the Site are unsafe. However, the record demonstrates that the Planning Board considered and rejected methods recommended by Petitioners' experts after public meetings and written submissions. Even if the Court were to credit the affidavits of Petitioners' experts, at most, there would be a disagreement among experts which is not grounds to overturn the Planning Board decision to issue the Negative Declaration and approve Bilwin's Site Plan and the methods chosen and approved by the DEC with input from the Planning Board (*see E. End Prop. Co #1, LLC v. Kessel,* 46 A.D.3d 817, 822, 851 NYS2d 565 (2d Dep't 2007)].[3] Accordingly, the Petitioners' second cause of action is dismissed.

Petitioners argue that the Site Plan approval must be annulled because it unlawfully deferred discretionary public health and safety decisions to the building inspector. However, the resolution approving the site plan does not defer such decisions to the building inspector. Instead, the resolution sets forth a reasonable process by which the Building Inspector, in consultation with HDR, must ensure Bilwin's future work plans implement the remediation and monitoring requirements required by the Site Plan and the Decision Document. A SEQRA review can properly be terminated before the end of various permitting processes (*see Matter of Riverkeeper, Inc. v Planning Bd. Town of Southeast*, 9 NY3d 219, 234 (2007). Accordingly, Petitioners' third cause of action is dismissed.

To the extent the Petition challenges the issuance of the CND, the Petitioners' challenge is untimely. The period of limitations to challenge the CND began to run at the conclusion of the 30-day public comment period following its publication pursuant to 6 NYCRR § 617.7(d)(1)(iv) (see *Stop-the-Barge* at 223). Since the CND was published by the Planning Board on July 21, 2015, the period of limitations began to run on August 20, 2015, and the four-month period for commencing an Article 78 proceeding to challenge the CND expired on December 20, 2015 (*see* CPLR § 217[1]). "Commencing the period of limitations from the finality of the CND is consistent with the policy of resolving environmental issues and determining whether an environmental impact statement will be required at the *early stages* of project planning" (*Stop-the-Barge* at 224) (*emphasis added*). The conclusion of the public comment period is the point where the Planning Board had reached a definitive position that Bilwin's remediation of the Site as part of the BCP program would have no significant adverse impacts and would therefore not require an environmental impact statement (*see id.; see also Application of Metro. Museum Historic Dist. Coalition v De Montebello,* 3 Misc 3d 1109(A) at 7 [NY County Sup Ct 2004], *affd sub nom. Metro. Museum Historic Dist. Coalition v De Montebello*, 20 AD3d 28 [1st Dept 2005]).

[3] It is not clear the law even required the Planning Board to engage in a SEQRA review of remedies selected by the DEC for the Site as part of the BCP (*see Bronx Committee for Toxic Free Schools*, 20 NY3d 148, 157-160 [2012, Read J., concurring]).

This proceeding, commenced on November 18, 2016, was almost 11 months too late to challenge the CND. Accordingly, the Petitioners' fourth, sixth, and seventh causes of actions are dismissed. The Petitioners' fifth cause of action is dismissed to the extent it seeks Article 78 relief.

Petitioners argue the Decision Document should be annulled because it fails to protect the public health and safety. Petitioners essentially argue CAMP is an insufficient means of monitoring the site to ensure activities do not spread contaminants offsite. However, considering the DEC's expertise and experience using CAMP throughout the state to monitor such sites, its decision to require CAMP here was rational and not arbitrary or capricious (Doc#212, ¶ 4). Accordingly, Petitioners' eighth cause of action is also dismissed.

Petitioners' ninth and tenth causes of action, to the extent they seek Article 78 relief, are dismissed as untimely. The DEC admitted the Site into the BCP, with Bilwin as volunteer, in April 2014. Petitioners' time to challenge these decisions expired in or around August 2014 (*see* CPLR §217[1]).

Petitioners' eleventh cause of action is also dismissed. Enforcement actions involve the exercise of judgment and discretion and courts are not empowered to provide mandamus relief directing an agency to engage in enforcement actions against a party (*see New York Civil Liberties Union v State*, 4 NY3d 175 (2015).

To the extent the fifth, sixth, ninth, and tenth causes of action seek declaratory relief, they survive as the Supreme Court is not permitted to summarily dispose of claims for declaratory relief absent a dispositive motion by a party (*see Lake Street Granite, Inc*. at 918 and *East West Bank* at 1030).

This constitutes the decision and order of the Court.

Dated: White Plains, New York
July 21, 2017

HON. LARRY J. SCHWARTZ, A.J.S.C.

TO: ALL PARTIES BY E-FILING