SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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In the Matter of

JOHN and STEFANIE HEALY, JOHN FITZGERALD, KAREN BENEDETTO, RICHARD and KAREN WILKINS,

IAS PART 17
Index No. 3214/2017

Mot # 1

Petitioners,

-against-

DECISION AND ORDER

TOWN OF HEMPSTEAD BOARD OF APPEALS, SOUTH NASSAU HELLENIC COMMUNITY, INC.,

Respondents.

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.

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LEONARD D. STEINMAN, J.

The following papers, in addition to any memoranda of law submitted by the parties, were reviewed in preparing this Decision and Order:

Petitioners' Notice of Petition, Petition & Exhibits 1
Respondents' Verified Answers & Exhibits 2
Affirmation of William F. Bonesso.....3

The South Nassau Hellenic Community, Inc. (SNHC) operates Saint Demetrios, a Greek Orthodox Church and religious education center located in Merrick, New York. SNHC now desires to build a 25,806 square foot, two-story cultural center next to the church. Construction of the center is opposed by various residents who live in the area, and the resulting controversy led to a full-day, well-attended administrative hearing before the Town of Hempstead Board of Appeals concerning SNHC's applications for various special exceptions and variances. With certain conditions attached, the Board

granted SNHC's zoning applications in a decision dated June 14, 2017. The Board also determined that the center would not have a significant impact on the environment; in particular, the character of the existing community. Three homeowners residing across the street from the proposed center have brought this Article 78 petition seeking to annul the Board's determinations.

The petitioners make three principal arguments in support of the application. First, petitioners argue that the Board's written decisions are, in effect, facially deficient because they fail to contain the required proper analyses with respect to: (1) the determination under the New York State Environmental Quality Review Act (SEQRA) that the proposed construction would not have a significant effect on the environment; (2) the grant of use and area variances; and (3) the failure to preserve existing trees on the site. Second, petitioners argue that the Board gave excessive deference to the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc. Finally, petitioners assert procedural objections relating to the conduct of the administrative hearing and the potential conflict of interest of one of the Board members.

The petitioners are correct that the Board's SEQRA declaration is fatally flawed. The Board was required to strictly follow SEQRA procedures and substantive provisions. Although the Board is to be commended for the time, effort and thought it put into the hearing and its zoning decision, its SEQRA declaration lacks a required explanation. The Board did take a "hard look" at the project, but did not provide a "reasoned elaboration" of the basis for its SEQRA determination. *See WEOK Broadcasting Corp. v. Planning Bd. of Town of Lloyd*, 79 N.Y.2d 373, 383 (1992). And the Board's zoning decision reveals that the purported negative SEQRA declaration issued by the Board was, in truth, at best a conditioned negative declaration. Therefore, the Board's zoning decision cannot support its environmental determination.

Because the Board's SEQRA declaration must be vacated, its zoning resolutions cannot stand. *See Chinese Staff and Workers Ass'n v. City of New York*, 68 N.Y.2d 359, 369 (1986). As a result, this court need not reach the other grounds advanced by petitioners to vacate such resolutions except one: the procedural validity of the June 1,

2017 public hearing. The court sees no infirmity concerning the conduct of the hearing mandating a new hearing based solely on such alleged flaws.

THE APPLICATIONS

Saint Demetrios is located on Hewlett Avenue between Merrick Road to the south, a busy four lane road, and Annette Avenue to the north, a residential street. Hewlett Avenue is described by the Board as a secondary arterial road. SNHC owns adjoining parcels to the church that are on Annette Avenue and Kenny Avenue, another residential street to the church's east. The adjoining parcels are occupied by houses. SNHC desires to construct the cultural center and related parking on the adjoining parcels that front Annette Avenue, after demolishing some of the houses. It desires to convert a house on Kenny Avenue for office use. All of the zoning relief sought by SNHC relates to the construction of the cultural center, including, in pertinent part, special exception variances, lot area variances and parking variances.

LEGAL ANALYSIS

A. Procedural Objections

Before turning to the adequacy of the substance of the Board's SEQRA declaration the court shall first review petitioners' procedural objections concerning the conduct of the Board's public hearing held on June 1, 2017. The hearing lasted approximately 12 hours and the Board heard testimony from sixteen witnesses in support of the applications and twenty-four witnesses in opposition. At least two attorneys appeared in opposition to the application, including one representing the local homeowners' association. Notwithstanding that the petitioners were given ample notice of the hearing, and significant time to present their opposition to SNHC's applications following SNHC's presentation, petitioners assert that the manner in which the hearing was conducted—including their inability to cross-examine SNHC's witnesses—violated their due process rights.

A zoning board of appeals is not constrained by the rules of evidence and may conduct informal hearings. *Matter of Von Kohorn v. Morrell,* 9 N.Y.2d 27 (1961); *Stein v. Board of Appeals of Town of Islip*, 100 A.D.2d 590 (2d Dept. 1984). The Board's hearings are not quasi-judicial in nature and do not require the swearing of witnesses or cross-

examination of them. *Aprile v. Lo Grande*, 89 A.D.2d 563 (2d Dept. 1982). The court has reviewed the hearing testimony and procedure and finds that petitioners' objections concerning the conduct of the hearing unpersuasive. Extensive comments and testimony in opposition to the applications, including expert testimony, were presented. Exhibits, including photographs, were submitted to the Board by objectants. Petitioners do not identify any testimony or exhibits that they were denied from presenting that may have impacted the Board's decision. Although petitioners may argue that the hearing was not perfect, it certainly was fair—their position was heard loud and clear over the course of a 12-hour hearing.

Petitioners' assertion that Board Member Katuria D'Amato had an apparent conflict of interest does not advance their cause. The conflict allegedly exists because Ms. D'Amato is the sister-in-law of an attorney who *used* to be a member of the law firm representing SNHC, and because that law firm's current managing partner was a campaign manager for her estranged husband. But petitioners point to no violation of Article 18 of the General Municipal Law and identify no pecuniary or material interest—direct or indirect—of Ms. D'Amato in the outcome of the applications. For this reason, *Tuxedo Conservation & Taxpayers Assn. v. Town Bt. Of Town of Tuxedo*, 69 A.D.2d 320 (2d Dept. 1979) is distinguishable. Nor did she cast the deciding vote, which was unanimous. Finally, the managing partner of SNHC's law firm, Jeffrey Forchelli, Esq., did not represent SNHC at the hearing.

B. SEQRA Declaration

As described by the Court of Appeals in *Jackson v. N.Y. State Urban Development Corp.*, 67 N.Y.2d 400 (1986), SEQRA represents an attempt to strike a balance between social and economic goals and concerns about the environment. It ensures that "agency decision-makers—enlightened by public comment where appropriate—will identify and focus attention on any environmental impact of a proposed action." *Id.* at 414-15.

SEQRA dictates that a lead agency must review proposed actions "that might affect the environment." 6 NYCRR § 617.2[B][1]. Here, the Board acted as the lead

agency. Pursuant to SEQRA, the Board was required to "determine whether the proposed action[s] may have a significant impact on the environment." 6 NYCRR § 617.2(v). If so, an Environmental Impact Statement is required.

On January 28, 2016, SNHC filed a Short Environmental Assessment Form (SEAF). On March 17, 2016 the Board, as the lead agency, determined that the proposed action may result in one or more potentially large or significant adverse impacts. The Board identified two concerns: that the proposed action may result in a change in the use or intensity of the land (it unquestionably would); and the proposed action may impair the character or quality of the existing neighborhood. Thereafter, on March 8, 2017, the Board determined that the applications were "unlisted actions" under SEQRA and that the SEQRA determination would be made after hearing testimony and reviewing the evidence submitted at the public hearing.

Following the hearing, the Board's charge was clear: to identify and focus on the environmental impact of the construction of the cultural center and the requested variances; decide if they would have a significant impact on the environment; and articulate the basis for its decision. *Jackson v. N.Y. State Urban Development Corp.*, 67 N.Y.2d at 415.

On June 14, 2017, the Board passed a one paragraph resolution declaring that the center and accompanying use and area variances "will not have a significant effect on the environment...." That is the entire pertinent scope of the Board's declaration. No explanation. No rationale. No articulation of the basis of its determination.

The issue before the court is whether this negative declaration was "affected by an error of law, arbitrary and capricious or an abuse of discretion." *Village of Chestnut Ridge v. Town of Ramapo*, 99 A.D.3d. 918, 925 (2d Dept. 2012). Judicial review of the Board's determination is limited to "whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination." *N.Y. City Coalition to End Lead Poisoning, Inc. v. Vallone*, 100 N.Y.2d 337, 348 (2003). Where a lead agency fails to set forth a reasoned

elaboration the determination may be annulled. *Merson v. McNally*, 90 N.Y.2d 742, 751-52 (1997). Here, no reasoned elaboration was formulated.

Respondents argue that support for the Board's determination can be found in the record and, therefore, this court should not second-guess the Board's determination. This argument ignores a "bedrock principle of administrative law," that judicial review of an administrative determination is limited to the grounds invoked by the agency or board. *Matter of National Fuel Gas Distribution Corp. v. Public Service Commn. of the State of N.Y.*, 16 N.Y.3d 360, 368 (2011). The grounds for the administrative decision must be contained within the determination reviewed so that the court can "discern the rationale for the administrative action taken and undertake intelligent appellate review thereof." *Office Building Associates, LLC v. Empire Zone Designation Board*, 95 A.D.3d at 1405. A court "cannot search the record for a rational basis to support the [b]oard's determination, substitute its judgment for that of the [b]oard or affirm the underlying determination upon a ground not invoked by the [b]oard in the first instance." *Id.* at 1404-05; *see Rodriguez v. Weiss*, 149 A.D.3d 842 (2d Dept. 2017). This court is therefore compelled to decline the respondents' invitation to search the voluminous record in this matter, supply an appropriate analysis that should have been articulated by the Board, and affirm the Board's findings. The Board's decision must rise or fall based upon its own weight.

The respondents also point to the Board's zoning decision to support the Board's SEQRA determination. If the Board intended for its zoning decision to provide the rationale for its SEQRA determination, this is bad practice and is not judicially favored. The Court of Appeals has already cautioned that a SEQRA review may not serve as a vehicle for determining zoning issues. See *WEOK Broadcasting Corp. v. Planning Bd. Of Town of Lloyd*, 79 N.Y.2d at 382. Similarly, zoning determinations are no substitute for the separate analysis focusing on the environment required by SEQRA. In all events, the Board's zoning decision does not supply an appropriate rationale for its unconditional negative SEQRA declaration. That is because the zoning decision is not unconditional.

The Board's decision approving the zoning variances is subject to various conditions. For example, the cultural center, once built, may not simultaneously be used when the church is being used and vice-a-versa. No ingress or egress is allowed on Annette Avenue. Church employees may not park on the street. These conditions, the Board states in its decision, are designed to mitigate traffic and parking problems in the mostly residential neighborhood, thereby preserving its character—an environmental concern identified by the Board in the SEAF.

Therefore, assuming the Board effectively conflated its SEQRA and zoning analyses, it cannot be said that the negative declaration is unconditional, even though on its face it purports to be. Instead, it is a conditioned negative declaration. *See* 6 NYCRR 617.2(h). SNHC concedes as much, by arguing in its memorandum of law that the "implementation of these conditions sufficiently justified the Board's determination that granting the seven (7) [variance] cases would not have a significant effect on the environment. SNHC Memorandum of Law, p. 40.

But the Board did not follow the procedures outlined in 6 NYCRR 617.7(d) for the issuance of a conditioned negative declaration for unlisted actions. For example, a full Environmental Assessment Form was not completed—a short form was used. And the imposed conditions themselves do not appear in the Board's declaration. The Board was required to comply strictly with SEQRA's prescribed procedures and it did not. *See Jackson v. N.Y. State Urban Dev. Corp.*, 67 N.Y.2d at 417, 429. As a result, its purported unconditional negative declaration is improper.

Furthermore, the Board's implicit SEQRA determination that the residential character of the existing community will not be significantly impacted relies upon certain anticipated actions by SNHC. But these future actions were not *conditions* of approval in either the zoning or SEQRA decisions. For example, SNHC presently intends to preserve certain houses on Kenny Avenue and was granted area variances (Cases 351 and 352) allowing it to do so on "lesser" lots. The Board stated: "Granting these area variances will mitigate any undesirable change in the neighborhood or detriment to nearby properties...." But now suppose that SNHC does not take advantage of the variances and

instead demolishes the houses. We do not know if the Board would still conclude that the character of the existing community is not significantly impacted.

The Board's failures to (i) provide a reasoned elaboration for its SEQRA determination, (ii) strictly follow procedural requirements, and (iii) identify with clarity in its declaration the conditions imposed upon the proposed actions, are fatal flaws necessitating the vacatur of the Board's SEQRA determination and the various special exceptions and variances it granted. *See Chinese Staff and Workers Assoc. v. City of New York*, 68 N.Y.2d at 369. As a result, the Verified Petition is granted and the Board's determinations are vacated.

This constitutes the Decision and Order of the court.

Dated: August 28, 2018
Mineola, New York

ENTER:

LEONARD D. STEINMAN, J.S.C.