To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
ENVIRONMENTAL CLAIMS PART
NINTH JUDICIAL DISTRICT, COUNTY OF WESTCHESTER

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In the Matter of the Application of

CITY OF RYE, JOSEPH A. SACK and RICHARD MECCA,

Petitioners,

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

Index No.: 61197 / 16
Motion Date: 9/28/16

-against-

WESTCHESTER COUNTY BOARD OF LEGISLATORS, WESTCHESTER COUNTY PLANNING DEPARTMENT and STANDARD AMUSEMENTS LLC,

DECISION, ORDER AND JUDGMENT

Respondents.

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WALSH, J.

In this Article 78 proceeding, Petitioners City of Rye ("City"), Joseph A. Sack ("Sack") and Richard Mecca ("Mecca") (together "Petitioners") seek a judgment against the Westchester County Board of Legislators (the "Board") and the Westchester County Planning Department (the "Planning Department") (together the "County Respondents")[1] annulling: (1) the Environmental Assessment Form ("EAF") of January 6, 2016 prepared by the Planning Department; (2) the Negative Declaration issued by the Planning Department on January 7, 2016 and adopted and ratified by the Board on May 3, 2016; and (3) Resolution 53-2016, Act 118-2016 (Bond) Acts 119, 120, 121, 122, 123-126 and any related amendments thereto ratified by the Board. Petitioners further request that this Court issue an order requiring the Board to engage in coordinated review (including consultation with the City) as required by the State Environmental Quality Review Act ("SEQRA").

[1]Standard is not named as a respondent in the Verified Petition, but was added as a respondent in the Amended Verified Petition. The validity of the Amended Verified Petition is one of the issues raised in this proceeding.

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FACTUAL AND PROCEDURAL HISTORY

Rye Playland Park ("Playland Park") consists of approximately 280 acres located in the City of Rye, County of Westchester (the "County"), State of New York. Playland Park, which includes an amusement park that has been in continuous operation since 1928, as well as other amenities, is owned and is currently operated by the County.

In August 2010, Respondent Westchester County Board of Legislators (the "Board"), announced a request for proposals, which it described as an attempt to answer "this question: How does [the County] reinvent iconic and historic Playland Park to thrive in the 21st century?" (Request For Proposals to: Develop, Manage, Operate and Maintain and/or Propose Other Options for Playland Park ["RFP"], a copy of which is annexed to the Affirmation of Edward F. McTiernan, Esq. ["Affirmation in Support] as Ex. A, at 1).

According to the RFP:

> The purpose of this solicitation is to tap the creativity of the private sector to explore what, if any, options may exist to redevelop Playland Park in a way that maximizes its resources and location, while reducing the financial burden to taxpayers of operating Playland Park.

(*id.* at 3).

In October 2012, the Board announced that it had selected Sustainable Rye Playland, Inc. ("Sustainable Playland"), a non-profit corporation, to manage and operate Playland Park. This arrangement was memorialized in an agreement dated July 2013 (the" 2013 Agreement"). One of the projects considered in the 2013 Agreement was the construction of a field house and sports fields (the "Field House Project").

By correspondence dated March 20, 2014, the attorney for the City, Michael B. Gerrard, Esq. of Arnold & Porter LLP,[2] advised the County Attorney for Westchester County that in his opinion, the Field House Project would require various approvals and permits from the City, "[t]hus, there is more than one City agency that is an 'involved' agency under the SEQRA regulations ... [and]

[2]Arnold & Porter LLP is the attorney of record for Petitioners in this proceeding.

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[t]he City Council currently intends to declare itself as the lead agency" (March 20, 2014 correspondence from Arnold & Porter LLP [the "Field House Letter"], a copy of which is annexed to the Affirmation in Support as Ex. E, at 2).

By correspondence dated May 16, 2014, the City's attorney wrote to the Commissioner of the New York State Department of Environmental Conservation (the "DEC Commissioner") and invoked the dispute resolution procedures of 6 NYCRR § 617.6(b)(5), by requesting that the DEC Commissioner designate the City as the lead agency (May 16, 2014 correspondence from Arnold & Porter LLP, a copy of which is annexed to the Affirmation in Support as Ex. F, at 1).

The 2013 Agreement was terminated prior to its scheduled commencement date and Sustainable Playland never undertook management or operation of Playland Park. Petitioners allege that "Rye agreed to withdraw its lead agency dispute without prejudice" (Verified Petition at ¶52), but there is no allegation or evidence as to how or when that withdrawal was effectuated or that the City's request to be designated lead agency was ever addressed by the DEC Commissioner.

In June 2015, the Board authorized the County to enter into an agreement with Respondent Standard Amusements LLC ("Standard").

Petitioners allege that "Respondent County Legislature and Standard Amusements, negotiated, executed and delivered an agreement dated August 10, 2015" (Verified Petition at ¶53), which Petitioners contend is evidenced by Exhibit G. However, Exhibit G consists only of a copy of an undated document entitled Playland Management Agreement (the "2015 Agreement") that bears a purported execution on behalf of Standard on April 13, 2015, but does not bear a purported execution on behalf of the County (*see* 2015 Agreement at 31).

The 2015 Agreement provided that Standard would undertake various projects involving "restorations, renovations and improvements to Playland Park as outlined in Schedule 'C' ...." (2015 Agreement at 4, Section 2[A]).

Those projects were outlined as follows:

Painting
Wood Replacement
Pavement Work
Study Parking Lot/Entrance Reconfiguration
Landscaping
Signage

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Food Stands/Equipment
Lawn and Fields
Bathhouse Renovation
Picnic Area
Pool/Fountain Improvements
Restoration of Historic Rides
Interactive Children's Water Elements
Double Aqua Loop Slide
Unicoaster
Other New Rides/Attractions
3-Point Basketball Game

(*id.*, Schedule C).

On January 6, 2016, the Director of Environmental Planning for the Planning Department prepared a Full Environmental Assessment Form ("EAF"). Part 1 of the EAF described the project as "Playland Renovations-Parking, Plaza and Game Structures" (EAF, a copy of which is annexed to the Affirmation in Support as Ex. J, at 1, Part 1). Part 3 of the EAF stated "[t]his project will result in no significant adverse impacts on the environment, and, therefore, an environmental impact statement need not be prepared. Accordingly, this negative declaration is issued" (EAF Part 3 at 2).

By memorandum dated January 7, 2016, the Planning Department advised the Associate County Attorney that it had reviewed the current capital projects for Playland Park pursuant to SEQRA and that:

> Capital projects RP006, RP010, RP23B, RP23F, RP025, RP028 (Arcades, Bathrooms, Employee areas and Food Structures), RP031, RP033 and RP040 have been classified as Type II actions. A single SEQR status sheet has been prepared for these projects.
>
> Capital projects RP042, RP047 and RP028 for Games are classified as Type I actions. As such, a Full Environmental Assessment Form, incorporating these three projects, has been prepared for consideration by the Board of Legislators.

(SEQRA DOCUMENTATION FOR PLAYLAND CAPITAL PROJECTS, a copy of which is annexed to the Affirmation in Support as Ex. I).

Between February 2, 2016 and May 2, 2016, these capital projects were discussed at five joint meetings of various committees of the Board, three regular pubic meetings of the full Board

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and at a public hearing held by members of the Board at Rye City Hall on April 26, 2016. The Court has viewed the on-line recordings of each of those meetings and of the public hearing as identified in the Certified Record.[3]

By resolution dated May 2, 2016, the Board resolved that it had reviewed the EAF and found "that there will be no significant adverse impact on the environment from the Capital Project [as described in Part 1 of the EAF]" (Resolution 53-2016, Record at 05424). The Board also authorized its clerk "to sign the Determination of Significance [*i.e.*, Part 3 of the EAF and] to issue a 'Negative Declaration' on behalf of this Board pursuant to Article 8 of the Environmental Conservation Law" (Record at 05425). The Determination of Significance was executed by the Board on May 2, 2016 (Record at 05452).

On May 3, 2016, the County and Standard executed a document entitled Restated and Amended Playland Management Agreement (the "2016 Restated Agreement"), a copy of which is annexed to the Supplemental Affirmation of Edward F. McTiernan, Esq. ("Supp. Aff.") as Exhibit N.

The 2016 Restated Agreement provided that Standard would undertake various projects involving "restorations, renovations and improvements to Playland Park" (2016 Restated Agreement at 17, Section 2-a). According to the 2016 Restated Agreement, those projects were identified in "Schedule 'C-1'" (*see id.* at 10-11, 17, 20) as follows:

Painting
Wood Replacement
Pavement Work
Study Parking Lot/Entrance Reconfiguration
Landscaping
Signage
Food Stands/Equipment
Lawn and Fields
Bathhouse Renovation

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[3]The Certified Record (the "Record") consists of a collection of documents with bates numbers 00001 to 05465, as well as a DVD and references to on-line recordings of joint committee meetings and of public meetings of the full Board, all of which the Court has considered. The Court viewed the public hearing held at Rye City Hall on the City of Rye web site.

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Picnic Area
Pool/Fountain Improvements
Restoration of Historic Rides
Water Attractions
New Rides Games
Other

(*id.*, Schedule C-I).

By letter dated July 18, 2016, the City's attorney advised the County Attorney that the City objected to "the County unilaterally declar[ing] itself lead agency and purport[ing] to issue determinations of significance." The City further took issue with the fact that it had not received the required notice from the County in advance of the May 2, 2016 vote and that the County had failed to publish notice of its negative declaration in DEC's Environmental Notice Bulletin (*see* Letter dated July 18, 2016 from Arnold & Porter LLP, a copy of which is annexed to the Affirmation in Support as Ex. K, at 1-2).

By letter dated July 22, 2016, the *Director of Planning for the Planning Department* issued notice of the Board's negative declaration to "INVOLVED/INTERESTED AGENCIES." The City was one of the agencies to whom the notice was distributed (*see* July 22, 2018 correspondence [the "Negative Declaration"], a copy of which is annexed to the Affirmation in Support as Ex. L). Notice of the Negative Declaration was published in the DEC, Environmental Notice Bulletin on July 27, 2016 (*see* Environmental Notice Bulletin, a copy of which is annexed to the Affirmation in Support as Ex. M, at 2).

Petitioners commenced this Article 78 on August 10, 2016 by filing a Notice of Petition and Verified Petition with the Westchester County Clerk, via the New York State Courts E-Filing system ("NYSCEF"). In their Petition, Petitioners seek a judgment against the County Respondents annulling the EAF, the Negative Declaration, Resolution 53-2016 and related legislation, and directing the Board "to engage in coordinated review as required by SEQRA and in consultation with Petitioner Rye" (Verified Petition at 30). Petitioners also seek an award of their costs and attorneys' fees pursuant to CPLR 7806 and 8601 (*id.*).

The Verified Petition contains five separately numbered causes of action, each of which pleads a violation of SEQRA. In their First Cause of Action, Petitioners allege that the Board

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improperly engaged in an impermissible segmentation (Verified Petition at ¶¶ 97-102). In their Second Cause of Action, Petitioners allege that the Board's determinations with respect to the EAF and Negative Declaration are arbitrary and capricious (*id.* at ¶¶ 103-114). In their Third Cause of Action, Petitioners allege that the Board's failure to designate the alleged restoration activities as a Type I Action was arbitrary, capricious and unlawful (*id.* at ¶¶ 115-121). For their Fourth Cause of Action, Petitioners allege that the Board's failure to engage in a coordinated review (*i.e.*, failing to include the City in the SEQRA analysis) was arbitrary and capricious and unlawful (*id.* at ¶¶ 122-130). Finally, for their Fifth Cause of Action, Petitioners allege that the Board's failure to properly file and publish their Negative Declaration was arbitrary, capricious and unlawful (*id.* at ¶¶ 131-142).

On September 2, 2016, Petitioners filed via NYSCEF an Amended Notice of Petition and First Amended Article 78 Verified Petition (the "Amended Petition") wherein Standard is added as a respondent and the Fifth Cause of Action is withdrawn, but in all other respects, the Amended Petition is identical to the Petition.

On September 23, 2016, the County Respondents filed via NYSCEF their Verified Answer (the "County Answer"), papers in opposition, and the Record. In addition to denying the material allegations to the Amended Petition, the County Answer pleads eight separately stated and numbered defenses and objections in point of law. In their First Defense and Objection in Point of Law, the County Respondents assert that the Amended Petition is a nullity because it was filed without leave of Court as required by CPLR 401 (County Answer at ¶77). In their Second Defense and Objection in Point of Law which is predicated on their First Defense and Objection in Point of Law being successful, the County Respondents contend that the Verified Petition should be dismissed with prejudice based on Petitioners' failure to join a necessary party (*i.e.*, Standard) (*id.* at ¶79). In their Third Defense and Objection in Point of Law, the County Respondents argue that "[t]he City of Rye is not an Involved Agency, and is not entitled to any special consideration as such" (*id.* at ¶81) In their Fourth Defense and Objection in Point of Law, the County Respondents assert that "[t]he City of Rye lacks standing" (*id.* at ¶83). For their Fifth Defense and Objection in Point of Law, the County Respondents argue that Petitioners Joseph A. Sack and Richard Mecca lack standing (*id.* at ¶85). In their Sixth Defense and Objection in Point of Law, the County Respondents argue that the Verified Petition and the Amended Petition fail to state a cause of action against the Planning

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Department (*id.* at ¶87). In their Seventh Defense and Objection in Point of Law, the County Respondents argue that the Board's determinations which Petitioners challenge were not arbitrary, capricious or unlawful (*id.* at ¶¶ 88-93). Finally, for their Eighth Defense and Objection in Point of Law, the County Respondents argue that the Board "properly and timely filed and published the Negative Declaration in accordance with applicable law" (*id.* at ¶95).

On September 23, 2016, Standard filed via NYSCEF its Verified Answer (the "Standard Answer") and papers in opposition. In addition to denying the material allegations of the Amended Petition, Standard pleads four separately stated and numbered objections in point of law. In its First Objection in Point of Law, Standard argues that the Amended Petition fails to state a cause of action upon which relief can be granted (Standard Answer at 25). In its Second Objection in Point of Law, Standard asserts that each of the Petitioners lacks standing (*id.*). As its Third Objection in Point of Law, Standard argues that "the Amended Petition is barred by CPLR 401 because Petitioners failed to seek leave of court before attempting to join Standard Amusements as a Respondent" (*id.*) Finally, for its Fourth Objection in Point of Law, Standard contends that the Board's determinations were not arbitrary, capricious or unlawful, and that the Negative Declaration was "properly and timely filed and published" (*id.*)

On September 27, 2016, Petitioners filed via NYSCEF their Reply Memorandum of Law, but they did not file a pleading in reply to the Answers. The Petition was deemed fully submitted on September 28, 2016, the original return date in the Amended Notice of Petition.

LEGAL DISCUSSION

THE COUNTY RESPONDENT'S SIXTH DEFENSE AND OBJECTION IN POINT OF LAW SHALL BE GRANTED

In their Sixth Defense and Objection in Point of Law, the County Respondents argue that the Westchester County Planning Department is improperly named a Respondent in this action because the two determinations that are the subject of this proceeding were issued by the Board and, therefore, there is no determination from the Planning Department for this Court to review. Petitioners' reply is devoid of any opposition to this defense. Thus, because Petitioners have not

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opposed this defense, the Court shall dismiss this proceeding to the extent it is asserted against the Planning Department (*see Matter of Agoglia v Benepe*, 84 AD3d 1072, 1075 [2d Dept 2011]; *see also Allan v DHL Express (USA), Inc.*, 99 AD3d 828, 832 [2d Dept 2012]; *Sanchez v Village of Ossining*, 271 AD2d 674, 675 [2d Dept 2000]).

THE COUNTY RESPONDENTS' FIRST DEFENSE AND OBJECTION IN POINT OF LAW THAT THE AMENDED PETITION IS A NULLITY SHALL BE GRANTED

Pursuant to CPLR 401, following commencement of a special proceeding "no party shall be joined . . . except by leave of court." Here, Petitioners' failure to comply with the requirements of CPLR 401 by serving and filing the Amended Petition, which added respondent Standard without leave of court, renders the Amended Petition a nullity (*Matter of Czajka v Dellehunt*, 125 AD3d 1177, 1181 [3d Dept 2015]; *Matter of Bd. of Educ. of Florida Union Free Sch. Dist. v De Pace*, 301 AD2d 521, 522 [2d Dept 2003], *lv denied* 99 NY2d 511 [2003]). Accordingly, the Court shall grant the County Respondents' First Defense and Objection in Point of Law and the Amended Petition shall be dismissed.

THE COUNTY RESPONDENTS' SECOND DEFENSE AND OBJECTION IN POINT OF LAW THAT THE VERIFIED PETITION SHOULD BE DISMISSED FOR FAILURE TO JOIN A NECESSARY PARTY SHALL BE DENIED

Pursuant to CPLR 1001(a) "[p]ersons who . . . might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." Because an entity to which a municipal contract has been awarded ("contract vendee") would be inequitably affected if the contract were nullified as a result of a court's annulment of a negative declaration, the contract vendee is a necessary party respondent (*see Matter of Jim Ludtka Sporting Goods, Inc. v City of Buffalo School Dist.*, 48 AD3d 1103, 1104 [4th Dept 2008], *lv denied* 11 NY3d 704 [2008]; *Matter of Long Is. Contrs.' Assn. v Town of Riverhead*, 17 AD3d 590, 593 [2d Dept 2005]). The 2016 Restated Agreement is a municipal contract, the nullification of which would inequitably affect Standard. Furthermore, Petitioners seek a judgment annulling Resolution 53-2016 and related legislation, which would have the consequential effect of nullifying the 2016 Restated Agreement. Therefore, Standard is a

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necessary party.

However, dismissal of the Verified Petition is not the proper remedy for the failure to join Standard. Pursuant to CPLR 1001(b), "[w]hen a person who should be joined under subdivision (a) has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned." In such circumstances, the court may not dismiss and must order the petitioner to summon the absent party (*see Windy Ridge Farm v Assessor of Town of Shandaken*, 11 NY3d 725, 726-727 [2008]; *Matter of Alexy v Otte*, 58 AD3d 967, 967-968 [3d Dept 2009]). As a signatory to the 2016 Restated Agreement, Standard is subject to the court's jurisdiction (*see* CPLR 302[a][1]). Furthermore, the Amended Petition, though defective, was filed prior to the expiration of the statute of limitations period and Standard voluntarily answered such Amended Petition and did not raise a statute of limitations defense. Thus, the proper remedy would be to direct joinder (*see Schwimmer v Wetz*, 56 AD3d 541, 544 [2d Dept 2008]) rather than dismiss the proceeding (*see Matter of Town of Preble v Zagata*, 250 AD2d 912 [3d Dept 1998]).[4]

Nevertheless, given this Court's ultimate determination with regard to this proceeding, rather than delay it to permit the filing and serving of an Amended Notice of Petition and Amended Petition to include Standard as a respondent, since it is clear that even without joinder of Standard, the action need not be dismissed, the Court shall proceed to determine the County Respondents' other Defenses and Objections in Point of Law without Standard since Standard's interests are sufficiently represented by the County Respondents in this action (*see Matter of Long Is. Contrs.' Assn. v Town of Riverhead*, 17 AD3d 590 [2d Dept 2005]).

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[4]In *Town of Preble*, the Commissioner of Conservation granted Preble Aggregate Inc. ("Preble") a mining permit. The Town of Preble opposed the permit grant on the ground that it would result in the loss of prime agricultural land and commenced an Article 78 proceeding seeking to annul the permit grant. Petitioner joined the Commissioner, but failed to join Preble as a respondent in the proceeding. Preble appeared and moved to dismiss the action for failure to join a necessary party, or alternatively, for permission to intervene. The trial court dismissed the proceeding for failure to join a necessary party and the Appellate Division, Third Department, reversed the trial court's dismissal holding that Preble's voluntary appearance in the proceeding by moving to dismiss it meant that it had "sufficient notice such that joinder was the appropriate remedy" (*Town of Preble, supra* 250 AD2d at 913).

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In *Matter of Long Is. Contrs.' Assn.*, in October 1994, the Town of Riverhead and the DEC entered into a settlement requiring the Town to close down a municipal solid waste landfill. After many years of study, in February 2001, the DEC approved the Town's landfill reclamation project which involved the Town's reclamation of the landfill by mining the land and using the mined materials for asphalt to be produced at a mobile plant at the site. The Town, as lead agency, thereafter declared the landfill reclamation project to be a Type II action and issued a negative declaration (*i.e.*, the project would not have a significant effect on the environment). In connection with the reclamation project, the Town awarded a municipal contract to Grimes Contracting to perform the project and Grimes subcontracted with GL Paving Products to install and operate the temporary asphalt plant at the reclaimed landfill. In their Article 78 proceeding challenging the sufficiency of the SEQRA review, petitioners sued the Town, but petitioners failed to join Grimes and GL Paving as respondents.

Affirming the trial court's denial of the branch of respondents' motion to dismiss based on petitioners' failure to join a necessary party, the Appellate Division, Second Department held that while Grimes and GL Paving were necessary parties and while Grimes and GL Paving could not be added as the statute of limitations had run and the relation-back doctrine was inapplicable, the action could nevertheless proceed in their absence since "the interests of the named party and the nonjoined party are so intertwined that there is virtually no prejudice to the nonjoined party ... The interests of Grimes and GL Paving will be adequately protected by the appellants, for, to a large extent, their interests in the issues presented by this proceeding, i.e., the validity of the negative declaration and the Town's compliance with state and local laws in approving the siting of the asphalt plant, are identical" (*Matter of Long Is. Contr., Assn., supra* 17 AD3d at 594). The relationship between the Board and Standard in this action is indistinguishable from the relationship between the Town and Grimes and GL Paving in *Matter of Long Is. Contrs.' Assn.* Accordingly, because failure to join Standard does not require the dismissal of this action, the Court shall deny the County Respondents' Second Defense and Objection in Point of Law.

THE COUNTY RESPONDENTS' FIFTH DEFENSE AND OBJECTION IN POINT OF LAW THAT PETITIONERS JOSEPH A. SACK AND RICHARD MECCA LACK STANDING SHALL BE GRANTED

In order to assert a claim that an administrative body or officer has failed to comply with or acted in contravention of law, a petitioner must demonstrate that as a result of such action or non-compliance it has sustained or will sustain an injury-in-fact, which injury is within the zone of interests promoted or protected by the statutory provision under which the administrative body or officer has acted, and that the harm the petitioner suffered from such injury is different in some way from that suffered by the public at large (*Matter of Society of Plastics Indus., Inc. v County of Suffolk*, 77 NY2d 761, 772-775 [1991]).

Generally, the zone of interests promoted or protected by a particular statute corresponds with and may be gleaned from the legislative purpose behind its enactment (*see Matter of Gizzo v Town of Mamaroneck*, 36 AD3d 162, 167-168 [2d Dept 2006], *lv denied* 8 NY3d 806 [2007]). As stated in ECL 8-0101:

> It is the purpose of [SEQRA] to declare a state policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of the ecological systems, natural, human and community resources important to the people of the state.

Therefore, to establish standing to maintain a claim under SEQRA, a petitioner must demonstrate that the injury-in-fact he has sustained or will sustain is "environmental" in nature (*see Matter of Mobil Oil Corp. v Syracuse Indus. Dev. Agency*, 76 NY2d 428, 433 [1990]). The harm suffered must be direct, not merely potential or general (*see Matter of Brunswick Smart Growth, Inc. v Town of Brunswick*, 73 AD3d 1267, 1268 [3d Dept 2010]). And where, as here, the issue of standing is disputed, "perfunctory allegations of harm" are insufficient; petitioners "must prove that their injury is real and different from the injury most members of the public face" (*Matter of Save the Pine Bush, Inc. v Common Council of City of Albany*, 13 NY3d 297, 306 [2009]). Petitioners' pleadings and averments as to the locations of Sack's and Mecca's properties are not sufficient to prove that either has sustained or will sustain an injury within the zone of interest SEQRA was enacted to protect.

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It is well settled that an owner of property that is located in close proximity to the site of the project to which the challenged action relates is presumed to be adversely affected by the action and, accordingly, need not allege a specific, non-public harm (*Matter of Vil. of Chestnut Ridge v Town of Ramapo*, 45 AD3d 74, 90 [2d Dept 2007], *lv dismissed* 15 NY3d 817 [2010]; *Matter of Long Island Pine Barrens Socy., Inc. v Planning Bd. of the Town of Brookhaven*, 213 AD2d 484, 485 [2d Dept 1995]). In the Verified Petition, Petitioners allege that Sack and Mecca are Rye residents and homeowners (Verified Petition at ¶¶6 and 7). Sack avers that his "residence is just over one mile from Rye Playland" (Verification by Joseph A. Sack of Article 78 Petition ["Sack Verification] at ¶3). Mecca avers that his "residence is approximately 150 feet from Rye Playland" (Verification by Richard Mecca of Article 78 Petition ["Mecca Verification"] at ¶3). Both Sack and Mecca aver that they will be injured by the projects contemplated in the 2016 Restated Agreement "[a]s a result of the close proximity of [their] homes to Rye Playland" (Sack Verification at ¶3 and Mecca Verification at ¶3).

For the purpose of the presumption, proximity to a petitioner's property is measured from the actual site of the project at issue, not from the nearest boundary line of the parcel of property on which the site is located (*Matter of Tuxedo Land Trust, Inc. v Town Bd. of Town of Tuxedo*, 112 AD3d 726, 728 [2d Dept 2013]). Petitioners did not proffer in support of the Verified Petition any allegations or evidence as to the specific locations of Sack's or Mecca's properties relative to the sites of the projects contemplated in the 2016 Restated Agreement. In contrast, in opposition to the Petition, the County Respondents have submitted two maps: one showing that the distance between Sack's property and the closest project is 5,335 feet (*see* Westchester County Geographical Information Systems Map ["First GIS Map "], a copy of which is annexed to the Affirmation of Melissa-Jean Rotini, Esq. ["Rotini Aff."] as Ex. 4), and a second showing that the distance between Mecca's property and the closest project is 1,756 feet (*see* Westchester County Geographical Information Systems Map ["Second GIS Map"], a copy of which is annexed to the Rotini Aff. as Ex. 5). Because Petitioners have failed to respond in their reply with evidence that the distances identified by the County Respondents are incorrect, these factual assertions have been left unrebutted.

"[I]n a CPLR article 78 proceeding (as opposed to a plenary action), a failure to reply to new matter presented as an affirmative defense is the equivalent of an admission thereof" (*Matter of Piela v Van Voris*, 229 AD2d 94, 96 [3d Dept 1997]). Thus, Petitioners' failure to reply to the County

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Respondent's Defense and Objection in Point of Law as supported by the Rotini Affirmation and the evidentiary exhibits annexed thereto[5] constitutes an admission that Sack's property is 5,335 feet and Mecca's property is 1,756 feet, from the nearest project site. It is well settled that such distances do not constitute the close proximity required for the presumption of injury necessary for SEQRA standing (*see, e.g., Matter of Riverhead Neighborhood Preserv. Coalition, Inc. v Town of Riverhead Town Bd.*, 112 AD3d 944 [2d Dept 2013] [holding that property owners were not entitled to presumption of injury from proposed mall located "approximately 1,300 feet to approximately 2,000 feet away"]). Accordingly, neither Sack nor Mecca is entitled to the benefit of the presumption and Petitioners must demonstrate that Sack and/or Mecca has sustained or will sustain a special injury-in-fact (*see Matter of Save the Pine Bush, Inc., supra* 13 NY3d at 306; *Matter of Mobil Oil Corp., supra* 76 NY2d at 433).

To constitute an injury-in-fact sufficient to confer standing, the injury complained of must at least be related to if not a direct consequence of the action being challenged (*see Society of Plastics Indus., Inc. v County of Suffolk, supra*; *Matter of Open Space Council, Inc. v Town of Brookhaven*, 245 AD2d 378, 379-380 [2d Dept 1997]). In terms of the allegations concerning injury, Mecca avers that he "can see the lights from the rides and other daily events, visitors illegally park along the streets in my neighborhood, and the creation of traffic jams right in front of my house all impact my day-to-day activities" (Mecca Verification at ¶3). But those alleged injuries are a result of conditions that already exist at Rye Playland as of the date Mecca executed his verification on (August 9, 2016) – *i.e.*, they are not related to, or a consequence of, the execution of the 2016 Restated Agreement or the projects contemplated therein.

The only allegations in the Verified Petition as to the injuries that Sack and Mecca will sustain are:

> Respondents' actions have injured [Sack and Mecca] by committing Respondents to a course of action that will result in increased traffic, noise, solid waste, water use and run-off and that will reduce [their] ability to enjoy the environment and [their] community ... [and they will be directly and adversely impacted by any adverse environmental impacts such as congestion, noise, light and storm water run-off.

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[5] "[A]n objection in point of law is akin to an affirmative defense" (*Matter of Hop-Wah v Coughlin*, 118 AD2d 275, 277 [3d Dept 1986] *revd on other grounds* 69 NY2d 791 [1987]).

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(Verified Petition at ¶¶95-96; *see also* Sack Verification at ¶3 and Mecca Verification at ¶3). However, these allegations are not based upon or supported by any competent evidence, research, study or expert analysis – such as, for example, a traffic, noise, light or hydrology study – or even personal experience or observation. Rather, they represent Petitioners' apprehensions and conclusory opinions as to what *might happen* – in other words, mere speculation of a hypothetical harm. As such, Petitioners have failed to allege that either Sack or Mecca will sustain an injury-in-fact that is related to or a consequence of the execution of the 2016 Restated Agreement because allegations founded on mere speculation of a hypothetical harm are insufficient to demonstrate an actual injury (*see Roberts v Health and Hospitals Corp.*, 87 AD3d 311, 318-319 [1st Dept 2011], *lv denied* 17 NY3d 717 [2011]; *Matter of Niagara County v Power Auth. of State*, 82 AD3d 1597, 1598-1599 [4th Dept 2011], *lv dismissed in part and denied in part* 17 NY3d 838 [2011]). Accordingly, the County Respondents' Fifth Defense and Objection in Point of Law is granted and the proceeding is dismissed to the extent it is brought on behalf of Petitioners Sack and Mecca.

THE COUNTY RESPONDENTS' THIRD AND FOURTH DEFENSES AND OBJECTIONS IN POINT OF LAW THAT THE CITY IS NOT AN INVOLVED AGENCY AND THAT IT LACKS STANDING SHALL BE GRANTED

A. Petitioners Have Failed to Articulate a Specific Municipal Interest in Potential Environmental Impacts

Since Playland Park is wholly located within its borders, the City is in close proximity to one or more of the projects contemplated in the 2016 Restated Agreement. However, the inference from proximity that would support the standing of an individual or nongovernmental entity does not operate in the same way to confer standing upon a municipal entity.

As noted by the Appellate Division, Second Department in *Chestnut Ridge*:

> The residents near a road that will receive substantial additional traffic from a significant development, or the neighbors of an industrial facility that will give rise to smoke or noise, are clearly affected directly by those impacts in a way that others are not ... A municipality, however, does not suffer from that traffic or noise in the same way. A municipality, as such, neither breathes foul air, nor hears loud noises, nor waits in traffic. As a result, since a municipality is limited to asserting rights that are its own, and is not permitted to assert the collective rights of its residents, it cannot be presumed to have suffered environmental injury by reason of its proximity to the

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> source of the impacts. A municipality thus cannot establish its standing merely on that basis.

(*Chestnut Ridge, supra* 45 AD3d at 91 [citations omitted]).

Thus, to have standing to challenge a lead agency's alleged failure to comply with SEQRA, a municipal entity must articulate a specific municipal interest in the potential environmental impacts of the action being challenged. Such an interest can be established in several ways,[6] one of which is for the municipality to demonstrate that the potential impacts may adversely affect the ability of the municipality to provide or maintain public facilities or services (*see Matter of Town of Coeymans v City of Albany*, 284 AD2d 830, 833 [3d Dept 2001]), or "to protect [its] unique governmental authority to define [its] community character" (*Chestnut Ridge, supra* 45 AD3d at 91).

Courts have conferred SEQRA standing on municipalities where the following municipal interests were involved: (1) where the town board had failed to consider the impact on the town's community character in connection with the approval of a Wal-Mart Supercenter (*see Matter of Wellsville Citizens ex rel. Responsible Dev., Inc. v Wal-Mart Stores, Inc.*, 140 AD3d 1767 [4th Dept 2016]); (2) where proposed amendments to the town's comprehensive plan and zoning laws would almost quadruple the current allowable density and were inconsistent with the surrounding rural density zones in adjacent villages (*see Village of Pomona v Town of Ramapo*, 94 AD3d 1103, 1106 [2d Dept 2012]); (3) where the proposed actions would lead to substantial residential development in the adjoining town (*see Chestnut Ridge, supra* 45 AD3d at 94-95); (4) where the New York State Department of Transportation proposed to construct and operate a 30,000-square-foot hangar and an 8,000-square-foot office facility at a local airport (*see Matter of Town of Babylon v New York State Dept. of Transp.*, 33 AD3d 617, 618-619 [2d Dept 2006]); (5) where the proposed construction of a landfill would violate a local law prohibiting the importation of solid waste into the town and the town's public use facilities would be adversely affected by potential contamination of an aquifer and other water resources (*see Matter of Town of Coeymans, supra* 284 AD2d at 833).

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[6]For example, just as a member of the public may have standing as an interested property owner, a municipal entity may have a specific municipal interest based upon its ownership of property affected by such impacts (*see Chestnut Ridge, supra* 45 AD3d at 86). However, Petitioners do not plead, and it is not otherwise alleged, that the City is the owner of property that would be adversely affected by any of the projects contemplated in the 2016 Restated Agreement.

By contrast, in this action, the alleged injuries arising from the Board's alleged failure to comply with SEQRA are that the Board's actions "have materially diminished Rye's ability to promote, protect and improve the quality of life for its residents and to protect and, where possible, enhance the environment" (Verified Petition at ¶93) and "have violated Rye's city code and undermined Rye's efforts and plans to enhance and promote its status as a coastal city on Long Island Sound by protecting natural resources through application of its codes and regulations governing development" (*id.* at ¶94). Other than these conclusory assertions, Petitioners have not identified any potential impacts or alleged, for example: (1) how such impacts would materially diminish the City's abilities to foster quality of life and enhance the environment for its residents; (2) how the City's efforts and plans to protect and promote its status as a coastal city would be undermined; or (3) how any of the projects contemplated in the 2016 Restated Agreement would adversely affect anyone's view or enjoyment of Long Island Sound or other natural resources or, for that matter, any other aspect of the existing environment in and around Playland Park or the City. Thus, Petitioners have failed to allege, much less demonstrate, what or how potential environmental impacts from the 2016 Restated Agreement or the projects contemplated therein would adversely affect the City's municipal interests.

Municipal entities are subject to the same general rules of standing as apply to individual litigants (*see Chestnut Ridge, supra* 45 AD3d at 91). Accordingly, allegations founded on mere speculation of a hypothetical harm are not sufficient to establish standing for a municipal entity (*cf. Roberts, supra* 87 AD3d at 319; *Matter of Niagara County, supra* 82 AD3d at 1599). Here, Petitioners' conclusory, speculative allegations are insufficient to demonstrate that the City has standing based upon a specific municipal interest in its ability to provide or maintain public facilities or services, or to define its community character.

Turning to the County Respondents' Defense and Objection in Point of Law based on the City not being an involved agency, a municipality that is an "involved agency" within the meaning of 6 NYCRR § 617.2(s) has a specific municipal interest sufficient to confer SEQRA standing to such a municipality (*see Chestnut Ridge, supra* 45 AD3d at 91-92). Thus, a municipal entity that is also an involved agency need not demonstrate that it has sustained or will sustain an injury-in-fact as a consequence of the challenged action. Pursuant to 6 NYCRR§ 617.2(s) an "'involved agency' means an agency that has jurisdiction by law to fund, approve or directly undertake an action."

Petitioners do not contend that the City has any jurisdiction by law to fund or undertake either

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the execution of the 2016 Restated Agreement or any of the projects contemplated therein. Rather, Petitioners contend that the City has jurisdiction to approve the projects by virtue of its local zoning and other land use laws. To that end, Petitioners plead the following:

> Land development and redevelopment within the municipal boundaries of Rye are subject to the Code of the City of Rye (Verified Petition at ¶37).
>
> Rye Playland is located in the WR, Waterfront Recreation, zoning district duly established by Rye in 1991 as part of the Rye Waterfront Revitalization Program (*id.* at ¶43).
>
> Land development and redevelopment within the municipal boundaries of Rye including all state actions and all federal agency actions are subject to Rye's LWRP (*id.* at ¶44).
>
> Based upon Rye's position concerning the aborted Field House Development [*i.e., the Field House Letter*] Respondents knew, or should have known, that Rye expected to participate in any SEQRA analysis concerning Rye Playland (*id.* at ¶129).

(*see also* Affirmation in Support at ¶¶8- 9). Although Petitioners do not specifically allege that the City is an involved agency (*see generally* Verified Petition and Affirmation in Support), the foregoing allegations are sufficient to raise the issue. However, for the reasons that follow, the City is not an "involved agency" within the meaning of 6 NYCRR § 617.2(s).[7]

B. The Projects Contemplated in the 2016 Restated Agreement are Exempt from the City's Local Zoning and Land Use Laws

"A dispute between governmental entities regarding whether one entity is exempt from the local regulations of the other is resolved by balancing the public interests" (*Town of Fenton v Town of Chenango*, 91 AD3d 1246, 1250 [3d Dept 2012], *lv denied* 18 NY3d 898 [2012]). "[A]mong the sundry related factors to be weighed in the test are: 'the nature and scope of the instrumentality seeking immunity, the kind of function or land use involved, the extent of the public interest to be

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[7]While the City is not an involved agency, it does fit within the definition of an "interested agency" (*see* 6 NYCRR §617.2[t]). However, "interested agency" status is insufficient to confer standing under SEQRA (*see Chestnut Ridge, supra* 45 AD3d at 86 [holding that the right of a neighboring municipality that is an "interested agency," but not an "involved agency," to challenge a SEQRA determination is the same but no greater than that of any other interested party]).

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served thereby, the effect local land use regulation would have upon the enterprise concerned and the impact upon legitimate local interests'" (*Matter of County of Monroe [City of Rochester]*, 72 NY2d 338, 343 [1988] [citations omitted]; *see also Matter of Crown Communication New York, Inc. v Dept. of Transp. of State*, 4 NY3d 159, 165-166 [2005]).

The test is neither rigid nor formalistic, and the list of factors to be considered is neither prescriptive nor exhaustive. For example, in *County of Monroe, supra*, the Court of Appeals found "[e]qually significant [the following] additional public interest factors": (1) whether the project at issue is related to an existing use such that there is no other practical location outside the boundaries of the host municipality; (2) whether the project was subjected to oversight approval, including public hearings and public comment in which the host municipality could have participated; (3) whether the host municipality has any express oversight authority pursuant to state law; and (4) whether there would be any detriment to adjoining landowners as opposed to competing political interests[8] (*County of Monroe [City of Rochester], supra* 72 NY2d at 344).

Applying the test to the facts as presented in the Verified Petition, the Affirmation in Support and the Record, this Court finds that the balancing of public interests favors exemption of the 2016 Restated Agreement and the projects contemplated therein from the City's local zoning and land use laws, including its Local Waterfront Revitalization Program ("LWRP").

Playland Park has been in continuous operation, serving the interests of the citizens of Westchester County and other visitors since 1928 - *i.e.*, 14 years before the City came into existence. Petitioners have not identified any state law pursuant to which the City has express authority to permit, approve or regulate the Board's use of Playland Park, much less any of the projects contemplated in the 2016 Restated Agreement. Furthermore, the City points to only one instance during the entire 65 years of its existence wherein the City had attempted to assert its purported zoning or land use jurisdiction over projects undertaken by the Board in Playland Park – *i.e.*, the Field House Letter in 2014 (*see* Verified Petition at ¶¶50, 129).

[8]After considering these factors, the Court of Appeals found that the County's plan for expansion of the Greater Rochester International Airport was exempt from the City of Rochester's site plan approval requirements (*County of Monroe [City of Rochester]), supra.* at 344-345).

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Since the projects contemplated in the 2016 Restated Agreement are specific to Playland Park and its operations, it is indisputable that there is no location outside the City's boundaries in which they may be pursued. Nor would exemption from the City's local laws mean that the Board's actions would be exempt from any oversight (*cf. Volunteer Fire Assn. of Tappan, Inc. v Town of Orangetown*, 54 AD3d 850, 851 [2d Dept 2008] [finding that exemption was not in the public interest because absent local jurisdiction "there would be no equivalent review by any other entity"]). In fact, the 2016 Restated Agreement was subjected to a vigorous oversight process, including public hearings and comment in which the City could have participated – one of which public hearings was conducted in the City's own Rye City Hall. While the Record is replete with comments from members of the public, there is no indication that the City participated on its own behalf; such quiescence is itself a factor indicating that the balancing of public interests favors exemption (*see, e.g., Town of Fenton, supra* 91 AD3d at 1250-1251 [finding petitioner's decision to cease participation in discussions with respondent and the DEC was a factor in favor of exemption]).

Finally, there are no landowners whose properties adjoin the sites of any of the projects contemplated in the 2016 Restated Agreement. Indeed, as noted, *supra*, Petitioners have failed to demonstrate that the projects would be detrimental to any landowners. Instead, it appears that the City's attempt to assert jurisdiction is motivated by its desire to qualify as an involved agency under SEQRA. But neither a municipality's desire to qualify as an involved agency nor its expectation that it would be recognized as such (*see* Verified Petition at ¶129) is a factor disfavoring exemption (*cf. Matter of City of Ithaca v Tompkins County Bd. of Representatives*, 164 AD2d 726, 730 [3d Dept 1991]).

Therefore, the 2016 Restated Agreement and the projects contemplated therein are exempt from the City's local zoning and land use laws, including its LWRP. Consequently, the City is not an involved agency under SEQRA and does not have automatic standing to maintain the above-captioned proceeding.

In light of the determinations that the Amended Petition is a nullity and that none of the Petitioners has standing to maintain the above-captioned proceeding, the County Respondents' Seventh and Eighth Defenses and Objections in Point of Law have been rendered academic.

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CONCLUSION

The Court has read the following papers with regard to this proceeding:

(1) Notice of Petition and Verified Petition dated August 9, 2016; Affirmation of Edward T. McTiernan, Esq. dated , together with the exhibits annexed thereto; Memorandum of Law dated August 10, 2016;
(2) Amended Notice of Petition dated September 2, 2016; First Amended Verified Petition dated September 2, 2016; Supplemental Affirmation of Edward T. McTiernan, Esq., together with the exhibit annexed thereto;
(3) Verified Answer of the Westchester County Board of Legislators and the Westchester County Planning Department dated September 23, 2016; Memorandum of Law dated September 23, 2016;
(4) Verified Answer of Standard Amusements LLC dated September 23, 2016;
(5) Reply Memorandum of Law dated September 27, 2016; and
(6) Certified Record.

Based on the foregoing papers and for the reasons set forth above, it is hereby

ORDERED that the First Defense and Objection in Point of Law of Respondents, Westchester County Board of Legislators and Westchester County Planning Department is granted and it is hereby ADJUDGED that the First Amended Article 78 Verified Petition filed in the above-captioned special proceeding is dismissed as a nullity, and it is further

ORDERED AND ADJUDGED that the Second Defense and Objection in Point of Law of Respondents Westchester County Board of Legislators and Westchester County Planning Department is denied, and it is further

ORDERED that the Third Defense and Objection in Point of Law of Respondents Westchester County Board of Legislators and Westchester County Planning Department is granted and it is hereby ADJUDGED that Petitioner City of Rye is not an involved agency within the meaning of 6 NYCRR § 617.2(s); and it is further

ORDERED that the Fourth Defense and Objection in Point of Law of Respondents Westchester County Board of Legislators and Westchester County Planning Department is granted and it is hereby ADJUDGED that Petitioner City of Rye lacks standing to maintain this proceeding and the Verified Petition, to the extent it is asserted on behalf of Petitioner City of Rye, is hereby dismissed; and it is further

ORDERED that the Fifth Defense and Objection in Point of Law of Respondents Westchester County Board of Legislators and Westchester County Planning Department is granted

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and it is hereby ADJUDGED that Petitioners Joseph A. Sack and Richard Mecca lack standing to maintain the above-captioned special proceeding and the Verified Petition, to the extent it is asserted on behalf of Petitioners Joseph A. Sack and Richard Mecca, is hereby dismissed; and it is further

ORDERED that the Sixth Defense and Objection in Point of Law of Respondents Westchester County Board of Legislators and Westchester County Planning Department is granted and it is hereby ADJUDGED that Petitioners' Verified Petition as asserted against the Westchester County Planning Department is dismissed for failure to state a cause of action; and it is further

ORDERED that the remaining defenses and objections in point of law of Respondents Westchester County Board of Legislators and Westchester County Planning Department are denied as academic, and it is further

ORDERED AND ADJUDGED that the Verified Petition is dismissed.

The foregoing constitutes the Decision, Order and Judgment of the Court.

Dated: White Plains, New York
March 20, 2017

ENTER:

HON. GRETCHEN WALSH, J.S.C.

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