MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 10

GAYLE LOMBARDI,

Petitioner,

- against -

TOWN OF SOUTHAMPTON, NEW YORK
TOWN BOARD OF SOUTHAMPTON,

Respondents.

By: Justice Joseph A. Santorelli

INDEX No. 1883/2020
Mot. Seq. # 001 MotD;CDISPSJ

Motion Date: 8/7/20
Submit Date: 1/28/21

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In this Article 78 proceeding, the petitioner seeks a judgment annulling and vacating the decision of respondent Town Board of the Town of Southampton to adopt the Findings Statement in connection with the Supplemental Generic Environmental Impact Statement (SGEIS) for the Hampton Bays Downtown Overlay District (HBDOD) Form Based Code (Article XXXII, Sections 330-421 through 330-439), and Town Board Resolution 2020-288, dated February 25, 2020, formally adopting the HBDOD Form Based Code.

This matter arises in the context of respondent's adoption of the HBDOD with the purpose of revitalizing the area of the business district of Hampton Bays known as the Hamlet Center. The boundaries of the HBDOD are currently zoned Village Business under the Southampton Code, and the HBDOD would be invoked by landowners and developers in the future to develop such area. On November 12, 2013, respondent accepted the Findings Statement in connection with the Hampton Bays Generic Environmental Impact Statement (GEIS), Corridor Strategic Plan and Cumulative Impact of Build-Out Study pursuant to Town Board Resolution 2013-1024. The Hampton Bays Corridor Strategic Plan provided for coordinated zoning, planning, and capital improvement recommendations to guide

development along 1,500 acres of Montauk Highway in Hampton Bays. The goal for the Hamlet Center was to provide future zoning and capital improvements that created a vibrant hub, while maintaining the small-sale character that is "quintessential Hampton Bays."

In 2013, respondent accepted the Findings Statement in connection with the Hampton Bays Corridor Strategic Plan GEIS and Cumulative Impact of Build-Out Study. In 2016, the Southampton Town Administration conducted community meetings and an online survey to gather community preferences for the design of the Hampton Bays Business District, and in 2017, it published the summary of the responses from the community. In June 2017, it published a "Pattern Book," which attempted to codify the results of the community online survey, public meetings, and results of studies of other Main Street areas in the region. In September 2018, respondent prepared a SGEIS, which was supposed to update and supplement the GEIS prepared for the duly-adopted Hampton Bays Corridor Strategic Plan. In May 2019, respondent set combined public hearings for the draft SGEIS and the HBDOD, and in January 2020, it accepted and filed notice of completion of the Final SGEIS related the HBDOD pursuant to Town Board Resolution 2020-110. On February 25, 2020, respondent adopted the Findings Statement in connection with the SGEIS for the adoption of the HBDOD pursuant to Town Board Resolution 2020-287, and adopted the HBDOD pursuant to Town Board Resolution 2020-288.

The petitioner is an individual homeowner who resides in close proximity to the boundaries of the HBDOD. By her amended petition, petitioner alleges that respondent violated the State Environmental Quality Review Act (SEQRA) by adopting the SEQRA Findings Statement when it knew, inter alia, the facts included in the SGEIS for the public water supply was outdated and incomplete, that the findings of the Master Plan for the Hampton Bay Water District prepared under its authorization was not included in the SGEIS, and that the results of the investigation of the State Superfund site located in the boundaries of the HBDOD was pending. She alleges that respondent violated SEQRA by segmenting the environmental impact assessment of the HBDOD action from the Hampton Bays Corridor Strategic Plan and Cumulative Build-Out Study in preparation of the SGEIS. Petitioner further asserts that respondent's decision to permit substandard off-street parking under the HBDOD is arbitrary and capricious, as it is contrary to the principles set forth under Southampton Town Code Article 330, and that it violated SEQRA by failing to assess the environmental impact on the surrounding community, and that respondent violated SEQRA by failing to provide and assess a range of reasonable alternatives to the HBDOD action. In addition, she alleges that respondent's decision to permit, inter alia, standalone multifamily buildings and 3.5 story buildings, resulting in increased residential and non-residential density is contrary to the principles and policies set forth in the Southampton Town Code.

SEQRA represents an attempt by the New York State Legislature to strike a balance between social and economic goals and concerns about the environment (***Matter of Jackson v New York State Urban Dev. Corp.***, 67 NY2d 400, 414, 503 NYS2d 298 [1986]; see ECL 8-0103). Its primary purpose is to inject environmental considerations directly into governmental planning, and to insure environmental review and decision making at the earliest possible time so that social, economic and environmental factors are considered together when reaching decisions on proposed activities (see ECL 8-0103 [7]; ***Matter of Neville v Koch***, 79 NY2d 416, 583 NYS2d 802 [1992]; ***Matter of Coca Cola Bottling Co. of N.Y. v Board of Estimate***, 72 NY2d 674, 536 NYS2d 33 [1988]; ***Matter of Coalition for Future of***

Stony Brook Vil. v Reilly, 299 AD2d 481, 750 NYS2d 126 [2d Dept 2002]). SEQRA requires the preparation of an environmental impact statement ("EIS") for any government-sponsored or government-approved action that may have a "significant effect" on the environment, including the adoption of a new zoning ordinance (*see* ECL 8-0109 [2]). The creation of a new zoning district is, in and of itself, a Type 1 action, as it commits a Town Board to a definite course of future decisions, and future applications to re-zone to the newly created district will generate significant environmental impacts (*see* ECL 8-0109 [2]; ***Matter of New York Canal Improvement Assn. v Town of Kingsbury***, 240 AD2d 930, 658 NYS2d 765 [1997]; ***Matter of Kirk-Astor Drive Neighborhood Assn. v Town Bd.***, 106 AD2d 868, 483 NYS2d 526 [4th Dept 1984]). Therefore, applying the SEQRA review criteria to the proposed zoning amendment is required, whether or not a related site plan exists at the time of the zoning amendment proposal (*see* ***Matter of Riverhead Bus. Improvement Dist. Mgmt. Assn. v Stark***, 253 AD2d 752, 677 NYS2d 383 [2d Dept 1998]; ***Matter of New York Canal Improvement Assn. v Town of Kingsbury***, *supra*).

Described as the "heart of SEQRA" (***Matter of Jackson v New York State Urban Dev. Corp.***, *supra*), the EIS is a detailed statement setting forth, among other things, a description of the proposed action and its environmental setting; the environmental impacts of the proposed action, including both long-term and short-term effects; any adverse environmental impacts which cannot be avoided if the action is implemented; alternatives to the proposed action; and mitigation measures proposed to minimize the environmental impact (ECL 8-0109 [2]; 6 NYCRR 617.9 [b]; *see* ***Matter of Munash v Town Bd. of Town of East Hampton***, 297 AD2d 345, 748 NYS2d 160 [2d Dept 2002]; ***Matter of Citizens Against Retail Sprawl v Giza***, 280 AD2d 234, 722 NYS2d 645 [4th Dept 2001]). There is a relatively low threshold for the preparation of an EIS, as the statute mandates that agencies prepare an impact statement or cause such statement to be prepared when a proposed action "may" have a significant impact on the environment (*see* ECL 8-0109 [2]; ***Matter of Munash v Town Bd. of Town of E. Hampton***, *supra*; ***Matter of S.P.A.C.E. v Hurley***, 291 AD2d 563, 739 NYS2d 164 [2d Dept 2002], lv denied 98 NY2d 615, 752 NYS2d 1 [2002]; ***Matter of Omni Partners v County of Nassau***, 237 AD2d 440, 654 NYS2d 824 [2d Dept 1997]). Moreover, an agency may require an applicant to submit an environmental report to assist the agency in carrying out its responsibilities, including the initial determination and preparation of an EIS. The agency may request such other information from an applicant necessary for the review of environmental impacts. Notwithstanding any use of outside resources or work, agencies are required to make their own independent judgment of the scope, contents, and adequacy of an EIS (*see* ECL 8-0109 [3]).

In assessing an agency's compliance with the substantive mandates of SEQRA, the courts review the final EIS to determine 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 (*see* ***Matter of New York City Coalition to End Lead Poisoning v Vallone***, 100 NY2d 337, 348, 763 NYS2d 530 [2003], *quoting* ***Matter of Jackson v New York State Urban Dev. Corp.***, *supra*; *see* ***Chinese Staff & Workers Assn. v City of New York***, 68 NY2d 359, 509 NYS2d 499 [1986]). "[L]iteral compliance with both the letter and spirit of SEQRA is required and substantial compliance will not suffice" (***Matter of Holmes v Brookhaven Town Planning Bd.***, 137 AD2d 601, 603, 524 NYS2d 492 [2d Dept 1988]; *see* ***Matter of Coalition for Future of Stony Brook Vill. v Reilly***, *supra*). "The mandate that agencies implement [SEQRA] procedural mechanisms to the fullest extent possible reflects the Legislature's view

that the substance of SEQRA cannot be achieved without its procedure, and that departures from SEQRA's procedural mechanisms thwart the purposes of the statute. Strict compliance with SEQRA guarantees that environmental concerns are confronted and resolved prior to agency action and insulates rational agency determinations from judicial second-guessing" (***Matter of New York City Coalition to End Lead Poisioning v Vallone***, *supra* at 350, 763 NYS2d 530, *quoting* ***Matter of King v Saratoga County Bd. of Supervisors***, 89 NY2d 341, 347, 653 NYS2d 233 [1996]).

Judicial review of the SEQRA process is limited to whether an agency's determination was made in violation of proper procedures, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion (*see* ***Akpan v Koch***, 75 NY2d 561, 555 NYS2d 16 [1990]; ***Matter of Coalition for Future of Stony Brook Vil. v Reilly***, *supra*; ***Matter of Silvercup Studios v Power Auth. of State of New York***, 285 AD2d 598, 729 NYS2d 47 [2d Dept 2001]). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (***Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamoroneck, Westchester County***, 34 NY2d 222, 231, 356 NYS2d 833 [1974]). Substantial evidence has been defined as "being such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact or the kind of evidence on which responsible persons are accustomed to rely in serious affairs" (***Matter of WEOK Broadcasting Corp. v Planning Bd. of the Town of Lloyd***, 79 NY2d 373, 383, 583 NYS2d 170 [1992]). "Although a particular kind or quantum of 'expert' evidence is not necessary in every case to support an agency's SEQRA determination, . . . SEQRA mandate[s] that a balance be struck between social and economic goals and concerns about the environment" (***Matter of WEOK Broadcasting Corp. v Planning Bd. of the Town of Lloyd***, *supra at* 384-385, *citing* ***Matter of Jackson v New York State Urban Development Corp.***, *supra*).

The petitioner contends that respondent adopted the SEQRA Findings Statement with full knowledge that the results of the State Superfund site investigation was pending and that findings of the Master Plan was not included in the environmental impact. Here, the SGEIS noted that three public water supply wells at the HBWD, closed due to local groundwater contamination stemming from a materials release at the Hampton Bays Fire Department, have been reopened, and that there is ongoing monitoring and remedial investigations to correct the issue. It also states that respondent should continue to support efforts by the NYSDEC to remediate soil and groundwater contamination stemming from the Superfund site to restore and protect the Ponquogue Avenue well field. However, deferring resolution of the remediation is improper as it shields the remediation plan from public scrutiny (*see* ***Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast***, 9 NY3d 219, 851 NYS2d 76 [2007]; ***Penfield Panorama Area Community, Inc. v Town of Penfield Planning BD.***, 253 AD2d 342, 688 NYS2d 848 [4th Dept 1999]). While the SGEIS includes a public notice from the NYSDEC stating that people "are not drinking contaminated water because the public water supply that serves the area is treated to remove contaminants before the water is distributed to consumers," it does state that after its investigation, the NYSDEC will develop a draft cleanup plan. It is unclear whether the NYSDEC's investigation is complete and if such cleanup plan was warranted or implemented. Furthermore, respondent authorized the preparation of a 10-year Capital Plan for the HBDW on March 26, 2019 pursuant to a Town Board Resolution, and the petitioner contends that the plan raised concerns related to the public water supply. While the SGEIS refers to the 10-year Capital Plan and appeared to have considered it, the plan was not included in the SGEIS. In addition, such plan was not included in

respondent's return. By deferring resolution of the remediation issue and failing to include the 10-year Capital Plan in its SGEIS, respondent failed to take the requisite hard look at this area of environmental concern.

With regard to petitioner's claim of improper segmentation, segmentation is defined as "the division of the environmental review of an action such that various activities or stages are addressed under this Part as though they were independent, unrelated activities, needing individual determinations of significance (6 NYCRR 617.2 [ah]). Segmentation can be found in two contexts: (1) where a proposed action has significant environmental impact requiring the preparation of an EIS but the agency attempts to divide it into smaller projects that do not require an EIS; and (2) where a proposed action entails different projects at different times and the agency excludes one project in order to evade SEQRA review and the preparation of a separate EIS (*see* Gerrard, Ruzow &Weinberg, *Environmental Impact Review in New York*; § 5.02 [1], Matthew Bender & Company [1993]; *see also* ***Matter of Long Is. Pine Barrens Socy. v Planning Bd. of Town of Brookhaven,*** 204 AD2d 548, 611 NYS2d 917 [2d Dept 1994]). Moreover, 6 NYCRR 617.7 (c) (2) states that a "lead agency must consider reasonably related long-term, short-term, direct, indirect and cumulative impacts, including other simultaneous or subsequent actions which are...included in any long-range plan of which the action under consideration is a part."

Here, the petitioner claims that segmentation has occurred because the respondent provided an updated build-out based on the zoning permitted under the HBDOD, which is significantly greater than the projected build-out in the 2013 Cumulative Impact of Build-Out Study adopted in 2013. She further argues that respondent prepared the environmental impact assessment for HBDOD based solely on its build-out and segmented the environmental impact assessment from other planned projects in the SGEIS. The HBDOD is undisputedly a part of the Hampton Bays Corridor Strategic plan, and as such, the regulatory provision requires that reasonably related long-term, short-term and cumulative effects, including other simultaneous or subsequent actions included in an long-range plan that are likely to be undertaken as a result thereof, be considered (see ***Matter of Long Is. Pine Barrens Socy. v Planning Bd. of Town of Brookhaven***, *supra*; ***Matter of Village of Westbury v Department of Transp.***, 75 NY2d 62, 550 NYS2d 604 [1989]). Furthermore, the record reveals that the HBDOD itself was classified as a Type I Action which is presumed likely to have a significant adverse impact on the environment (*see* 6 NYCRR 617.4 [a] [1]). Respondent contends that the SGEIS for the HBDOD Form Based Code is a supplement to the previous GEIS and expands upon the previous Cumulative Impact of Build-Out Study and focuses on significant environmental impacts not previously addressed. However, such a narrow review improperly separated the impact of one phase from the impact of other phases included in the long-range plan, as if they were independent, unrelated activities, needing individual determinations of significance (*see* ***Matter of Schultz v Jorling***, 164 AD2d 252, 255-256, 563 NYS2d 876 [3d Dept 1990]). While a lead agency may choose "in its discretion, not to examine the cumulative impact of separate applications within the same geographic area" (***Matter of Save the Pine Bush v City of Albany***, 70 NY2d 193, 205, 518 NYS2d 943 [1987]), the decisive factor here "is the existence of a 'larger plan' for development" (***Matter of North Fork Envtl. Council v Janoski***, 196 AD2d 590, 59, 601 NYS2d 178 [2d Dept 1993]). As the HBDOD is clearly a part of the Hampton Bays Corridor Strategic Plan, the SGEIS improperly segmented the assessment of the plans by not sufficiently evaluating the cumulative impacts of all phases of the plan (*see* ***Matter of East End Prop. Co. #1, LLC v Kessel***, 46 AD3d 817,

851 NYS2d 565 [2d Dept 2007]; ***Sun Co. v City of Syracuse Indus. Dev. Agency***, 209 AD2d 34, 625 NYS2d 371 [4th Dept 1995]; *cf* ***Save the Pine Bush, Inc. v Albany***, *supra*; ***Maidman v Incorporated Vill. of Sands Point***, 291 AD2d 499, 738 NYS2d 362 [2d Dept 2002]).

As to petitioner's claim that respondent's decision to permit substandard parking was arbitrary and capricious, the SDGEIS includes in its appendix a parking study which identified peak parking periods for the subject area and noted the available parking spaces. The study found that after analyzing the parking accumulation results, it was determined that under current conditions, only a few parking areas are highly utilized during the weekdays and weekends. It went on to say that most parking areas are highly underutilized and that from the parking data, Downtown Hampton Bays has "adequate parking to support existing conditions and allow for additional growth within the study area." As to petitioner's remaining contentions, not every conceivable environmental impact, mitigating measure or alternative must be identified and addressed before a FEIS will satisfy the substantive requirements of SEQRA, and the degree of detail with which each factor must be discussed obviously will vary with the circumstances and nature of the proposal (*see* ***Matter of Jackson v New York State Urban Dev. Corp.***, *supra*; ***Webster Assoc. v Town of Webster***, 59 NY2d 220, 464 NYS2d 431 [1983]).

As to petitioner's claim that respondent failed to assess a range of reasonable alternatives, according to 6 NYCRR 617.9 (b) (5) (v), an EIS must contain a range of alternatives which includes the no action alternative. Here, the SGEIS included the "No Action" plan, which is required by the SEQRA, as well as a second alternative analyzing a 10-year build condition under the existing Village Business zoning. A rule of reason is applicable to the discussion of alternatives in an FEIS (*see* ***Akpan v Koch***, 75 NY2d 561 at 570, 555 NYS2d 16 [1990]), and alternatives that do not fulfill the plan's objectives need not be analyzed (see 6 NYCRR 617.9 (b) (5) (v); *see also* ***Webster Assoc. v Town of Webster***, *supra*). Furthermore, where there has been such a reasonable consideration of alternatives, the judicial inquiry is at an end (*see* ***Matter of Town of Dryden v Tompkins County Bd. of Representatives***, 78 NY2d 331, 333–334, 574 NYS2d 930 [1991]; ***Matter of Halperin v City of New Rochelle***, *supra*). Thus, as respondent has considered a reasonable range of alternatives, there was no violation of SEQRA with respect to this cause of action.

Finally, while the petitioner contends the community overwhelmingly expressed that stand-alone multifamily dwellings were not preferred in the Community Preference Survey Future Design of the Hampton Bays Business District, the survey merely asked those taking the survey to rank in order of importance what they would like to see in downtown Hampton Bays, with 1 being most important and 10 being least important. The members of the community who responded to the survey gave the choice stand-alone multifamily dwellings a ranking of 8, which only demonstrates that it was not as important as other choices, including landscape improvement, mix of uses, and pedestrian activity, and sidewalk cafes. Furthermore, the petitioner's contention that permitting stand-alone multifamily buildings under the HBDOD is contrary to the Hampton Bays Corridor Strategic Plan is rejected. While the plan did state that its goals were to revitalize the downtown into a walkable, well-defined hub for retail, restaurants, pocket parks, sidewalk cafes, and cultural attractions, it also recommended shifting residential density to the Hamlet Center with the goal of addressing revitalization. Thus, it was consistent with the overall land use policies and development plans enunciated in the Hampton Bays Corridor Strategic Plan and was adopted for the legitimate governmental purpose (*see* ***Nicholson v***

Incorporated Vil. of Garden City, 112 AD3d 893, 978 NYS2d 288 [2d Dept 2013]; ***Matter of Bergami v Town Bd. of the Town of Rotterdam***, 97 AD3d 1018, 949 NYS2d 245 [3d Dept 2012]).

Based on the foregoing, the petition herein is granted and the decision of respondent Town Board of the Town of Southampton to adopt the Findings Statement in connection with the SGEIS for the HBDOD Form Based Code (Article XXXII, Sections 330-421 through 330-439), and Town Board Resolution 2020-288, dated February 25, 2020, formally adopting the HBDOD Form Based Code, is annulled.

Submit judgment

Dated: JUL 20 2021

HON. JOSEPH A. SANTORELLI
J.S.C.

X FINAL DISPOSITION **____ NON-FINAL DISPOSITION**