

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
IN THE MATTER OF THE APPLICATION OF
LENA BODIN, LYNDIA GELLIS, LAUREI GESSNER,
JOHN PORTA, CHONCH LUDMIR, CHEDVA
LUDMIR, SANDRA SOLOMON, WILLIAM
ABRAMSKY, BARBARA ABRAMSKY, ELF
LAWRENCE AHEARN, HILCREST FIRE COMPANY
No. 1, BARRON WALL, SUSAN HITO SHAPIRO,
as Executor for the Estate of SONYA SHAPIRO,
and SUSAN HITO SHAPIRO, as Executor for the
Estate of MILTON B. SHAPIRO

DECISION & ORDER

INDEX # 322/16

MOTION #1

Petitioners-Plaintiffs,

-against-

THE PLANNING BOARD OF THE TOWN OF RAMAPO,
THE TOWN BOARD OF THE TOWN OF RAMAPO,
THE TOWN OF RAMAPO, SCENIC
DEVELOPMENT, LLC, 46-52 WADSWORTH TERRACE
CORP., NEWFIELD ESTATES, INC., SCENIC
DEVELOPMENT SM, LLC and KEY BANK NATIONAL
ASSOCIATION

Respondents-Defendants.
-----X

The background of the Patrick Farm development is set forth in the Court's
October 18, 2011 decision on a prior proceeding in which many of the same petitioners
challenged the Planning Board's preliminary subdivision approval of the project.

On December 27, 2011 the Planning Board granted the applications for final subdivision
approval of the Patrick Farm project, final site approval for the Patrick Farm condominiums and
final site plan approval for the Patrick Farm volunteer housing filed by the Scenic Development,
LLC (hereinafter SCENIC) and that action was challenged in an Article 78 proceeding
commenced by a group of petitioners many of whom are Petitioners in the instant proceeding.

The Article 78 Petition in that proceeding alleged many of the same claims alleged here. In a Decision and Order dated September 10, 2012 this Court rejected all of Petitioner's claims but one: the Court annulled the Planning Board's decisions because the Planning Board had improperly deferred review by the Community Design Review Committee (the CDRC). [See Bodin v. Planning Board of the Town of Ramapo, Index #149/2012 (*Bodin I*)].

After subsequent referral to the CDRC and further proceedings, the Planning Board, in three decisions dated March 22, 2013, again granted Scenic's request for final subdivision approval and final site plan approval for the project condominiums and volunteer housing. By Notice of Petition dated April 19, 2013 a group of petitioners, many of whom are Petitioners in the instant proceeding, commenced an Article 78 proceeding. [See Bodin v. Planning Board of the Town of Ramapo, Index # 726/2013 (*Bodin II*)]. In a Decision and Order dated May 19, 2014 this Court denied all of petitioners applications to annul the Planning Board's March 22, 2013 decisions, but stayed the implementation of those decisions and remitted the matter to the Planning Board in order for it to determine whether the approvals should be confirmed, rescinded or conditioned in any way.

In this Article 78 proceeding, the petitioners seek to: (1) annul, vacate and set aside four determinations of the Planning Board of the Town of Ramapo, which were filed with the Town Clerk of the Town of Ramapo on January 28, 2016, in connection with applications for the Patrick Farm Project sponsored by Scenic Development and Scenic Development LLC for:

(a) revised final subdivision approval for the Project entitled Patrick Farm Subdivision

(b) revised final site plan approval for a Project entitled Patrick Farms Condominiums

(c) final site plan approval for a Project entitled Patrick Farm Volunteer Housing collectively, with the Final Plat approval and the Condominium Site Plan approval

(d) findings statement under the State Environmental Quality Review Act (hereinafter SEQRA)

(2) compelling Respondents to engage in review of the Project's potential impacts in complete conformance with the requirements of the Town Code; (3) compelling Respondents to engage in lawful SEQRA review of the Project's potential environmental impacts; enjoining Respondents, or any other agents or assigns, from conducting any demolition, site preparation, and/or development activities whatsoever on the Site until they have complied with all applicable land use and environmental review laws and procedures, including SEQRA and the Town Code; (4) enjoining the Planning Board and/or other Town agencies and/or officials from issuing any approvals or permits in connection with the Site until it has complied with all applicable land use and environmental review laws and procedures, including SEQRA and the Town Code, (5) awarding Petitioners the costs and disbursements of this action and (6) granting such other and further relief as this Court deems just and proper;

The following sets of papers numbered 1 to 16 were considered on the Petitioners' application:

PAPERS

NUMBER

NOTICE OF VERIFIED ARTICLE 78 PETITION AND COMPLAINT
DATED FEBRUARY 26, 2016/SUMMONS/VERIFIED ARTICLE 78
PETITION AND COMPLAINT/AFFIDAVIT OF STEPHEN M. GROSS
IN SUPPORT OF VERIFIED PETITION AND COMPLAINT/AFFIDAVIT
OF PETER GESSNER/AFFIDAVIT OF PAUL A. RUBIN/EXHIBITS (A-F)

1

NOTICE OF VERIFIED AMENDED 78 PETITION AND COMPLAINT/
VERIFIED ARTICLE 78 PETITION AND COMPLAINT/ALL ATTACHED
AFFIDAVITS AND EXHIBITS

2

VERIFIED ANSWER OF SCENIC DEVELOPMENT, LLC AND SCENIC DEVELOPMENT SM, LLC	3
RESPONDENT SCENIC DEVELOPMENT, LLC AND SCENIC DEVELOPMENT SM, LLC'S MEMORANDUM OF LAW IN OPPOSITION TO ARTICLE 78 PETITION	4
AFFIRMATION OF TERRY RICE, ESQ./AFFIDAVIT OF YECHIEL LEBOVITS/AFFIDAVIT OF DENNIS ROCKS/EXHIBITS (A-G)/AFFIDAVIT OF ANN CUTIGNOLA - ATTACHMENTS (A-C)/AFFIDAVIT OF FRANK GETCHELL (INDEX #1792/2015)/REPLY AFFIDAVIT OF FRANK GETCHELL (INDEX # 1792/2015)	
VERIFIED ANSWER AND OBJECTIONS IN POINT OF LAW TO PETITION AND COMPLAINT BY TOWN OF RAMAPO ET AL.	5
AFFIRMATION OF ALAN BERMAN, ESQ./EXHIBITS (A-F)	6
VERIFIED ANSWER AND OBJECTIONS IN POINT OF LAW TO AMEND PETITION/COMPLAINT	7
AFFIRMATION OF ALAN BERMAN, ESQ IN OPPOSITION TO AMENDED PETITION/EXHIBITS (A-F)	8
RESPONDENT - THE PLANNING BOARD OF THE TOWN OF RAMAPO, THE TOWN BOARD OF THE TOWN OF RAMAPO and THE TOWN OF RAMAPO MEMORANDUM OF LAW IN OPPOSITION TO PETITION	9
RECORD AND RETURN VOLUME I/RECORD AND RETURN VOLUME II	10
SUPPLEMENTAL RECORD AND RETURN	11
PLANNING BOARD FINDINGS STATEMENT JANUARY 14, 2016	12
PETITIONERS REPLY MEMORANDUM IN FURTHER SUPPORT OF AMENDED ARTICLE 78 PETITION AND COMPLAINT	13
REPLY AFFIDAVIT OF FRANK GETCHELL TO AMENDED PETITION	14
REPLY AFFIDAVIT OF JAMES QUINN	15
REPLY AFFIDAVIT OF PAUL A. RUBIN/EXHIBITS (A-E)	16

Upon review of the foregoing, the petitioners' applications to annul, vacate and set aside the four determinations of the Planning Board of the Town of Ramapo are denied. Further, all of Defendants related relief sought in the instant Article 78 Petition is also denied.

In this proceeding, in six causes of action, the petitioners allege that the Planning Board failed to (1) take a "hard look" as required by SEQRA; (2) fulfill site development plan duties required by Town Zoning Code; (3) comply with the Town's Aquifer and Well Field Protection Zone Law; (4) implement the conditions that the Town Board attached to its approval of the rezoning of the property; (5) comply with Town Scene Road District Law; (6) have jurisdiction to grant final plat approval.

Many of the issues raised by the petitioners in this proceeding were raised in the earlier proceedings ("*Bodin I*" and *Bodin II*). The petitioner's contend that the Court's rulings on the Planning Board's preliminary approval of the project are not binding with respect to final approval, and that the Planning Board should have addressed new evidence before it. *Res judicata* and collateral estoppel aside, the Court finds that the issues raised by the petitioners in this proceeding were fully aired before the Planning Board, and that the Planning Board's determinations with respect to these issues had a rational basis and were not arbitrary or capricious.

First Cause of Action (Wetlands/SEQRA - Failure to Take a Hard Look)

The petitioners contend that under SEQRA, the Planning Board should have required the preparation of a Supplemental Environmental Impact Statement ("SEIS") relating to the wetlands and threatened species. Scenic contends that there have been no significant changes in the

project since its inception, and that there is no need for a supplemental environmental impact statement ("SEIS").

The wetlands issue is not a new one. In *Bodin I*, the Court stated as follows:

The Planning Board...had before it, however, a November 13, 2009 delineation from the New York State Department of Environmental Conservation ("DEC"), which has state jurisdiction over wetlands. That delineation was certified for 10 years. The Army Corps of Engineers ("ACOE"), which has federal jurisdiction, had issued a determination that the project could proceed under a nationwide general permit. Accordingly, there was a substantial basis for the Planning Board to find that the project would not impact wetlands. In addition, further approval of the project is contingent upon compliance with DEC and ACOE regulations.

The petitioners' opinion about the requirement for a SEIS has been repeated throughout the Planning Board process. Any review of an agency's determination under SEQRA 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. [*Matter of Jackson v. New York State Urban Dev. Corp.*, 67 NY2d 400, 417 (1986)]. A determination not to obtain a SEIS will only be annulled if it is arbitrary, capricious and unsupported by the evidence. [*Riverkeeper, Inc. v. Planning Bd. of Town of Southeast*, 9 NY3d 219 (2007)]. "In a statutory scheme whose purpose is that the agency decision-makers focus attention on environmental concerns, it is not the role of the courts to weigh the desirability of any action or choose among alternatives, but to assure that the agency itself has satisfied SEQRA, procedurally and substantively. [*Matter of Jackson v. New York State Urban Dev. Corp.*, 67 NY2d at 416]. Here, the Planning Board fulfilled its obligations under SEQRA by taking a hard look at the environmental impacts of the entire proposed Patrick Farms Site. Further, seeking a SEIS is

discretionary and the decision to prepare a SEIS based on newly discovered information requires a determination of the importance and relevance of the information and the present state of the information in the EIS. [6 NYCRR 617.9[a][7][ii]; *Riverkeeper, Inc. v. Planning Bd of Town of Southeast*, 9 NY3d 219 (2007)]. Accordingly, the Planning Board's determination that an SEIS is not warranted should not be disturbed. [See *Muir v Town of Newburgh*, 49 AD3d 744, 746 (2d Dept 2008)].

Second Cause of Action (Public Safety - Fire Concerns)

The petitioners correctly point out that one of the factors in the approval of a project under §376-91 of the Town Code is public safety. That provision reads, in pertinent part, as follows:

In considering and acting upon site plan development plans, the Planning Board shall take into consideration the public health, safety and welfare, the comfort and convenience of the public in general and of the prospective occupants of the proposed development and of the immediate neighborhood in particular and may prescribe such appropriate conditions and safeguards as may be required in order to further the expressed intent of this chapter....

The focus of the petitioners' safety concerns are the issues expressed by emergency service responders, including Hillcrest Fire Company No. 1.

Respondent Scenic submits that there are no legitimate fire safety concerns that were presented by Petitioners. Further, Scenic avers that despite petitioners insistence that the fire fighters expressed concerns about the project no fact-based concerns were voiced about the Patrick Farms Site and instead "information was presented which has no relationship or bearing or context to the subject land use applications."

The petitioners are wrong to say that the Planning Board gave inadequate consideration to the fire company's concerns. Several changes were made to accommodate those concerns, including the widening of driveways to 26 feet (which was reviewed by the fire department's consulting engineer without criticism), the removal of landscaped islands from the plans, and the addition of more off-street parking to the condominium site plan to avoid the potential for visitors blocking driveways.

It is reasonable that the fire company would wish optimal conditions for fire-fighting under various scenarios, and many would no doubt agree that constructing residences in proximity to a natural gas pipeline is problematical. Nonetheless, the project is code-compliant and, there is no basis to say that the Planning Board's approval of the project, after having duly considered these concerns, was arbitrary and capricious.

Third Cause of Action (Aquifer and Well Field Protection Zone Law)

In *Bodin I*, the petitioners argued that the Patrick Farm project was subject to Ramapo's Aquifer and Well Field Protection Zone Law. In that proceeding, the Court stated that

the Planning Board found, and the Court agrees, that the Aquifer and Well Field Protection Zone Law (Local Law No. 8-2004) is not applicable to a subdivision plan where the project is connected to publicly-owned treatment facilities.

The petitioners raise this issue again, arguing that the Patrick Farm project involves two regulated activities under the law: "storage of Internal combustion vehicles;" and "underground storage and piping." According to the petitioners interpretation, the parking of motor vehicles by residents constitutes the "storage of internal combustion vehicles;" and ordinary basement

plumbing constitutes “underground storage and piping” within the meaning of the statute. The Court agrees with the respondents that the petitioners’ interpretation of the statute is tortured; and the Court reiterates its prior finding that the Aquifer and Well Field Protection Zone Law is inapplicable to this development. The Court notes that this same argument was also raised in *Bodin II* and denied at that time.

Fourth Cause of Action (Failure to Implement Conditions of Site Rezoning)

The petitioners contend that on or about January 25, 2010 the Town Board adopted a Resolution re-zoning portions of the Patrick Farms Site to MR-8 zoning. Further, petitioner asserts that the re-zoning resolution attached conditions to the re-zoning including the following: (1) that the Planning Board “shall approve a plan for the administration of [the rental housing allocated for emergency service workers as part of its site plan approval process], (2) that the Planning Board “shall approve a plan for development and sales of [workforce housing] so as to achieve the goal of providing affordability of home ownership], (3) that the site would be developed subject to a coordinated phased construction along with the development of the single family homes to be constructed around its perimeter in a manner similar to that proposed in the FEIS in the construction sectioning plan...so as to achieve the desired buffer at the earliest possible stage and to minimize impacts with the surrounding areas. Petitioners assert that the Planning Board failed to effectuate these conditions in the Subject Decisions.

The Court finds no merit to the petitioners’ contention that the Planning Board failed to provide for coordinated phased construction as required by the Town Board. According to the respondents, the SEQRA an representations in the DEIS were premised on a specific phasing

plan which provides for construction of the varying types of residences based on location, but specifically single family homes around the perimeter. This phasing plan was approved by the Town Board and is based on the SEQRA review and findings.

As to the petitioners allegation that the Planning Board did not comply with the condition of arranging a plan for the administration of the workforce and emergency responder housing, that is also contradicted by the final site plan approvals. Since December 2011 each time the Planning Board granted final site plan approval for the condominiums and volunteer housing projects the plan the approval was conditioned on a plan which provided for longer term affordability provisions. As to the January 27, 2016 approval by the Planning Board of the Revised Final Site Plan for the condominiums and volunteer housing projects, the findings and determinations from the prior approval of March 22, 2013 were referred to and adopted and incorporated those findings and determinations into the new 2016 approval.

Therefore the conditions imposed by the Town Board were complied with and petitioners assertions are without merit.

Fifth Cause of Action (Scenic Roads District Law)

The petitioners contend that the Town's Scenic Roads District Law requires a finding by the Planning Board that important scenic and natural features if the site will be substantially preserved. [Town Code §215-4(A)(3)]. The petitioners allege that the Planning Board's finding that the "proposed plan preserves a number of substantial areas" is not the finding under the Scenic Road Law. Further, petitioners assert that the applicant's subdivision plans show that the majority of the Patrick Farms Site will be "clearcut, re-graded and permanently disturbed and

does not provide the “substantial preservation required by the Scenic Roads District Law.

Petitioners aver that Section 215-4A(4)(e) of the Scenic Roads District Law states that “[e]xisting vegetation shall be preserved to the maximum extent possible” and that cutting is to be limited to maintain native vegetation for the purpose of screening. As such petitioners allege that the Planning Board’s decisions and the development authorized at the Patrick Farm Site directly contradicts the vegetation preservation requirement of Section 215 4 A (4)(e). Additionally, petitioner indicates that Section 215-4(A)(4)(f) prohibits the “[c]utting of all trees in a single contiguous area exceeding 20,000 square feet.”

The resolutions adopted by the Planning Board clearly indicate that, in the Planning Board’s opinion, it has already addressed the project’s compliance with the Scenic Roads Law. In the Planning Board’s January 28, 2016 decision, the Planning Board stated

The Planning Board previously determined that the project was in compliance with the Scenic Roads Law (then in effect), and this was confirmed by decision of the Supreme Court (Rockland County). The Scenic Roads Law was thereafter amended to eliminate the requirement of a determination of architectural compatibility where Architectural Review by the CDRC is required, and to remove restrictions of contiguous area tree cutting in certain circumstances as stated in Section 215-4(f) of said law. The Planning Board readopts its findings with, however, the deletion of findings no longer required due to the law’s amendment of architectural compatibility and of contiguous tree cutting limits..

The Planning Board found after a detailed analysis that the approvals comply with the Scenic Roads District Law. While the petitioners may disagree with the accuracy of the Planning Board’s finding, the mitigation measures built into the project, including the preservation of the naturalized areas on the site which are to remain undisturbed, the perimeter of single family houses (with increased setbacks along Route 202) combined with a “Landscape Plan” which will

be developed as the planning process proceeds and includes screening of the multifamily area along with the natural vegetation, provide a rational basis for the Planning Board's finding of compliance with the Scenic Roads District Law.

The Court notes that petitioner raised the issue of the prohibition of the cutting of trees in a contiguous area exceeding 20,000 square feet without addressing that the Scenic Roads District Law has been amended. The court is required to apply the law as amended as the controlling law existing at the time the decisions were made. [*Lombardi v. Habicht*, 293 AD2d 474, 475 (2d Dept 2002)]. The amended Scenic Roads District Law provides that the cutting of trees in a contiguous area does not apply to the MR-8 zoning district and does not "apply (1) to roadways draining structures and utility easements in approved subdivisions, or (2) in subdivisions which have been subject to review by means of an environmental impact statement." The restriction placed on the contiguous tree cutting is therefore inapplicable to the plans for Patrick Farm Site.

Sixth Cause of Action (Planning Board Lacked Jurisdiction to Grant Final Plat Approval)

Petitioners assert that the Revised Final Subdivision Approval was improper and in violation of Town Subdivision Regulations § 376-22 since it occurred more than one year after Preliminary Approval was granted.

At the outset the Court notes that in their argument petitioners fail to acknowledge that at each stage of the approval process for the Patrick Farm Site the petitioners (singly and as a group) have filed numerous Article 78 petitions which have stayed the approval process through the years and also required further action by respondents through the years. Additionally, there appears to be not acknowledgment that the respondent Scenic during this same time period has

submitted several applications for Final Subdivision Approval and Revised Subdivision Approval.

Briefly, as to the history a Preliminary Subdivision approval was initially granted in January 6, 2011, an amended Preliminary Subdivision approval was granted on March 8, 2011 and a Final Subdivision Approval was granted on December 27, 2011. Subsequent to those approvals an Article 78 proceeding was commenced to challenge the final approval which resulted in this Court's September 10, 2012 Decision and Order that annulled a portion of the approval. Again on March 22, 2013 Final Subdivision approval was granted, which was challenged by an Article 78 proceeding. This Court by Decision and Order dated May 19, 2014 suspended the approval and remanded the matter to the Planning Board to consider the impact that new information had on the wetlands issue. This issue was addressed and the applicant submitted a new application for Revised Final Subdivision approval which was granted on January 27, 2016. The instant Article 78 proceeding challenges the January 27, 2016 decision of the Town Planning Board.

Respondents submit that at the time that the final approval was suspended and not vacated or annulled Town Subdivision Regulation § 376-22 was not triggered as there was a "suspension" pending. Further respondents assert that during the suspension they obtained the mandated jurisdictional determination and revised the development proposal in accordance with the jurisdictional determination, all of which took a long period of time. Subsequently respondents aver they returned to the Planning Board and received approval, which is the subject of the instant Article 78 proceeding. A second argument raised by respondent Scenic is that Town Law §276(5)(H) adopted in or around 1992 is inconsistent with the Subdivision

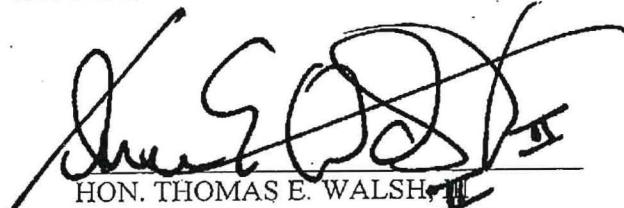
Regulations that the petitioner relies upon and that the newer Town Law was intended to and did supercede the inconsistent local provision.

The petitioners are correct that the initial preliminary approval for the Patrick Farm Site occurred in 2011 and the most recent Final Approval was not made until January 2016, but it is clear to the Court that the delay related to the extensive litigation in the instant action. Further, the inconsistent provision in the Subdivision Regulations were preempted by Town Law § 276(5)(H) amendment from 1992. Therefore, petitioners reliance on the requirements of the Subdivision Regulations is misplaced.

This decision shall constitute the order of this Court.

ENTER

Dated: New City, New York
June 30, 2016



HON. THOMAS E. WALSH, III
JUSTICE OF THE SUPREME COURT

ZARIN & STEINMETZ
81 Main Street, Suite 415
White Plains, New York 10601

MICHAEL KLEIN, TOWN ATTORNEY
Town of Ramapo
237 Route 59
Ramapo, New York 10901

RICE & AMON
4 Executive Boulevard, Suite 100
Suffern, New York 10901

SUSAN H. SHAPIRO, ESQ.
75 N. Middletown Road
Nanuet, New York

DORIS F. ULMAN, VILLAGE ATTORNEY
134 Camp Hill Road
Pomona, New York 10970