

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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IN THE MATTER OF THE APPLICATION OF
HILCREST FIRE COMPANY No. 1, LENA BODIN,
JOHN PORTA, WILLIAM ABRAMSKY, ELF
LAWRENCE AHEARN, SANDRA SOLOMON, SUSAN
HITO SHAPIRO, as Executor for the Estate of
MILTON B. SHAPIRO

DECISION & ORDER

INDEX # 1791/2015

Petitioners-Plaintiffs,

For a Judgment pursuant to Article 78 of the CPLR

-against-

TOWN OF RAMAPO, THE TOWN BOARD OF THE TOWN OF RAMAPO, THE
PLANNING BOARD OF THE TOWN OF RAMAPO,

Respondents-Defendants,

-and-

SCENIC DEVELOPMENT, LLC, SCENIC
DEVELOPMENT SM, LLC, FORTY-SIX-FIFTY-TWO
WADSWORTH TERRACE CORP., NEWFIELDS
ESTATES, INC.
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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.

On or about April 1, 2015 applications were submitted by the Nominal Defendants for (a) revised final subdivision approval, (b) revised final site plan approval for Patrick Farms Condominiums and (c) for revised final site plan approval for Patrick Farm Volunteer Housing, which were referred to the CDRC for review. On April 16, 2015 the revised plans were reviewed and a report was prepared indicating that the applicants were directed to review the comments and when submitted the applications would be scheduled for another CDRC review.

A Findings Addendum was submitted to the Town on September 11, 2015 from Time Miller Associates on behalf of the applicants. The Findings Addendum was reviewed by the

Towns' Planning Consultant, David Stolman of Frederick P. Clark Associates on September 11, 2015 and recommended the Town adopt the Findings Addendum. On September 17, 2015 the Town Board by Resolution No. 2015-404 adopted the Findings Addendum dated September 17, 2015 regarding the Patrick Farm Site.

In this Article 78 proceeding, the petitioners seeks the following relief:

(1) rescinding, annulling and vacating the determination of the Town Board of the Town of Ramapo ("Town") designated as Resolution No. 2015-404, dated September 17, 2015 ("Resolution"), in connection with a development project, referred to as Patrick Farm (the "Project"), proposed for real property located on the east side of Route 202, 0 feet south of Route 306, which is known and designated on the Ramapo Tax Map as Sections 32.11-1-12, 32.11-1-13, 32.11-1-14, 32.11-1-16, 32.11-1-2, 32.11-1-3, 32.11-1-4 and 43.14-2-3 (the "Site"), together with the Findings Addendum," referenced and purportedly adopted by said Resolution (the Resolution and the Findings Addendum are annexed to the Verified Amended Article 78 Petition as Exhibits A and B);

(2) compelling Respondents to prepare a Supplemental Environmental Impact Statement ("SEIS") in connection with the Project's unstudied potential significant adverse environmental impacts, based on Project changes, new information, and/or changes of circumstance pursuant to the New York State Environmental Quality Review Act ("SEQRA");

(3) compelling Respondents to engage in a review of Project's potential impacts, based on Project changes, new information and/or changes of circumstance, in complete conformance with the requirements of the Town Code;

(4) enjoining Respondents, or any of their 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;

(5) enjoining the Planning Board and/or other Town agencies and/or officials from issuing any approvals or permits in connection with the Project and/or the Site until they have complied with all applicable land use and environmental review laws and procedures, including SEQRA and the Town Code,

(6) awarding Petitioners the costs and disbursements of this action; and

(7) granting such other and further relief as this Court deems just and proper.

The following sets of papers numbered 1 to 5 were considered on the Petitioners' application:

PAPERS

NUMBER

NOTICE OF VERIFIED ARTICLE 78 PETITION DATED DECEMBER 23, 2015/VERIFIED AMENDED ARTICLE 78 PETITION/AFFIDAVIT OF SUSAN HITO SHAPIRO IN SUPPORT OF THE VERIFIED PETITION - EXHIBIT 1/AFFIDAVIT OF SANDRA SOLOMON IN SUPPORT OF THE VERIFIED PETITION/AFFIDAVIT OF STEPHEN M. GROSS IN SUPPORT OF VERIFIED PETITION AND COMPLAINT/AFFIDAVIT OF WILLIAM ABRAMSKY IN SUPPORT OF VERIFIED AMENDED PETITION/AFFIDAVIT OF JOHN PORTA IN SUPPORT OF VERIFIED AMENDED PETITION/AFFIDAVIT OF HILCREST FIRE COMPANY NO. 1 PRESIDENT PETER GESSNER IN SUPPORT OF VERIFIED AMENDED PETITION- EXHIBITS (1-4)/ AFFIDAVIT OF ELF AHEARN IN SUPPORT OF VERIFIED AMENDED PETITION/AFFIDAVIT OF LENA BODIN IN SUPPORT OF VERIFIED AMENDED PETITION/AFFIDAVIT OF PAUL RUBIN IN SUPPORT OF VERIFIED AMENDED PETITION-EXHIBITS (A-C)/ EXHIBITS (A-Q)	1
VERIFIED ANSWER OF SCENIC DEVELOPMENT, LLC	2
AFFIRMATION OF TERRY RICE, ESQ. IN OPPOSITION/EXHIBITS (A-D)/ AFFIDAVIT OF FRANK GETCHELL/AFFIDAVIT OF ANN CUTIGNOLA/ AFFIDAVIT OF YECHIEL LIEBOVITS/AFFIDAVIT OF GREG M. FLEISCHER-EXHIBIT (A)/AFFIDAVIT OF HY GARFINKEL/AFFIDAVIT OF DENNIS ROCKS-ATTACHED EXHIBITS/MEMORANDUM OF LAW	3

OF DENNIS ROCKS-ATTACHED EXHIBITS/MEMORANDUM OF LAW 3

AFFIRMATION OF ALAN BERMAN, ESQ. IN OPPOSITION/EXHIBITS (A-D)/MEMORANDUM OF LAW/RECORD AND RETURN/
FINDINGS ADDENDUM 4

PETITIONER'S REPLY MEMORANDUM OF LAW/REPLY AFFIRMATION
OF SUSAN H. SHAPIRO, ESQ.- EXHIBITS (1-4)/REPLY AFFIDAVIT OF
STEPHEN M. GROSS-EXHIBITS (A-C)/REPLY AFFIDAVIT OF PAUL
A. RUBIN-EXHIBITS (A-G)/AFFIDAVIT OF DEBORAH SEIDMAN
MUNITZ/EXHIBITS (A-T) 5

Upon review of the foregoing, the petitioners' applications to annul, vacate and set aside Resolution No. 2015-404, dated September 17, 2015 is denied. Further, all of Defendants related relief, as delineated above, sought in the instant Article 78 Petition is also denied.

In this proceeding, in four causes of action, the petitioners allege that the Planning Board (1) failed to obtain a Supplemental Environmental Impact Statement (SEIS) on unmapped wetlands in violation of SEQRA; (2) failed to obtain a SEIS for newly designated threatened species in violation of SEQRA; (3) amended findings relating to the aquifer that are arbitrary and irrational in violation of SEQRA and (4) failed to obtain a SEIS on additional population in violation of SEQRA.

Many of the issues raised by the petitioners in this proceeding were raised in the earlier proceedings ("*Bodin I*" and *Bodin II*) and also raised in a subsequent proceeding still pending Index # 322/2016 (*Bodin III*). *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 and Second Cause of Action (SEQRA - SEIS required on impacts to unmapped wetlands and SEIS required for newly designated threatened species)

The petitioners contend in their First and Second Causes of Action allege a violation of SEQRA for the failure to require the preparation of a SEIS relating to wetlands, threatened species, the aquifer and population count. 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 including the new wetlands delineation and the change in status of the Northern Long-eared Bat. 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)].

Third Cause of Action (Amended findings relating to aquifer are arbitrary and irrational)

The petitioners contend that the Proposed Patrick Farms project overlies the Mahwah River Valley aquifer and allege that the Planning Board "critically erred" when they "without question or investigation" certified in the Findings Addendum that the Patrick Farm Site does not overlie the Mahwah River Valley aquifer. Petitioners assert that the statement is false and contrary to Applicant's prior submissions, federal and state determinations.

In opposition respondents state that the petitioner's allegations regarding the applicant's prior submissions are misleading and contradicted by the affidavit of Frank Getchell, the applicant's hydrologist and environmental geologist. Further, respondents assert that the conclusions upon which petitioner's expert based their statements are "without hydrogeologic

basis and fail to provide evidence supporting the determinations.

The Planning Board's determination that an SEIS was not warranted will not be disturbed unless it was arbitrary or capricious, or unsupported by the evidence. *See Muir v Town of Newburgh*, 49 AD3d 744, 746 (2d Dept 2008). The petitioners have not identified any significant changes in the proposal between the review by the Town Board, the review by the Planning Board or the certified Findings Addendum other than an unsupported statement in an Affidavit never before the Planning Board from Paul A. Rubin that Mr. Getchell's information is "erroneous" as to the aquifer. However, the petitioners point to several sources of what they consider to be newly discovered information or mis-information, and fault the Planning Board for not addressing, questioning or investigating the issues raised. The petitioners argument is without merit based on the Decision of the Planning Board regarding the Findings Addendum.

Contrary to the petitioners' argument, the Environmental Impact Statements ("EIS") thoroughly addressed the issue of water quality and the aquifer over the numerous years of litigation and including after this Court's remand for involvement of the Army Corp of Engineers ("ACOE"). With respect to the aquifer, the Draft Environmental Impact Statement, ("DEIS") contains an erosion and sediment control plan, a water quality mitigation plan, a water quality attenuation plan, and a groundwater recharge plan. The Town Board also found that the groundwater mitigation would result in zero loss of recharge. Further, the Final Environmental Impact Statement ("FEIS") included comments from the public about mitigation of the adverse impacts of the water-groundwater quality and quantity which were each addressed and an explanation was provided.

Given the "state of the information in the EIS," it was not arbitrary or capricious of the

Planning Board to decline the development of an SEIS. Further, 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 Court concludes that the issue of the water quality and the existence and effect on the aquifer have been reviewed numerous times throughout the many years of the litigation in this matter. The Court has previously found and continues to find that the respondents have given a "hard look" to all of the issues presented regarding the aquifer in compliance with SEQRA. The record is devoid of any new facts for which challenges the Court's previous determination.

The Court would interject at this point that newly discovered information refers to information which was before the Planning Board during its review process. Many of the affidavits submitted by the petitioners from Stephen M. Gross, Paul A. Rubin, Peter Gessner and the individual petitioners, were not before the Planning Board, and are therefore if they were not submitted before the Planning Board then they are not entitled to consideration by the Court in this proceeding. See *Kaufman v Incorporated Village of Kings Point*, 52 AD3d 604 (2d Dept 2008). To that extent, Scenic's application to "strike" those affidavits not previously submitted to the Planning Board is granted and those affidavits (and only those affidavits) were not considered by the Court in its determination.

Fourth Cause of Action (SEIS required on additional population)

The petitioners allege that the September 17, 2015 Findings Addendum failed to address new facts that came about after the DEIS/FEIS Architectural Review. According to petitioner the

new facts support their conclusion that the population projections for the Patrick Farms Site were significantly underestimated. Specifically, petitioners submit that the architectural plans show that the multi-family housing within the Site have seven or eight potential bedrooms instead of the four bedrooms that were considered as part of the SEQRA review.

In opposition respondents state that the alleged “new facts” are not new facts, as the plans submitted to the Architectural Review Board are substantially the same as included in the FEIS in 2009 as part of the Housing Demand Market Analysis. According to Ann Cutignola in her Affidavit as part of respondent Scenic’s opposition, the proposed floor plans have been available since 2009 and the petitioners have failed to raise any objections to the proposed floor plans in the years of prior proceedings. Further, respondents submit that based on petitioners delay in challenging the FEIS, which has been available for years, the petitioners time to challenge the FEIS has expired. Respondent Town indicates that the Town Board accepted the FEIS as complete on January 6, 2010 and then on January 25, 2010 adopted a written finding statement. As such, respondents submit that petitioners challenge to the proposed floor plans is untimely pursuant to Civil Practice Law and Rules § 217.

This Court notes that the petitioners have previously raised before this Court objections to the population projections, which were denied. [*Shapiro v. Planning Board*, Index # 735/2013]. As stated previously by this Court, 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 including the population projections. 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)]. The proposed floor plans questioned by the petitioners have been available since 2009 and the Court is hard pressed to join in the petitioner’s assertion that they are “new evidence.” Further, the Court agrees with respondents that any challenge at this late date would be untimely pursuant to *Civil Practice Law and Rules* § 217. Accordingly, the Planning Board’s determination that a SEIS is not warranted should not be disturbed. [See *Muir v Town of Newburgh*, 49 AD3d 744, 746 (2d Dept 2008)].

Further, respondents again raise the issue of fire service in the context of the proposed population challenged and have alleged that is based upon “new information.” The petitioners are wrong to say that the Planning Board gave inadequate consideration to the fire company’s concerns regarding the density of the population and access to emergency services. 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. 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 all of the public safety and fire department concerns, was arbitrary and capricious.

This decision shall constitute the order of this Court.

ENTER

Dated: New City, New York
June 29, 2016

A large, stylized handwritten signature in black ink, appearing to read 'Thomas E. Walsh, III', is written over the printed name and title.

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

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