STATE OF NEW YORK
SUPREME COURT: COUNTY OF CORTLAND

VICTOR LAMOUREAUX, on behalf of FRIENDS FOR RESPONSIBLE VESTAL ZONING, an unincorporated Association,

Petitioner,

against

TOWN OF VESTAL TOWN BOARD; LCD ACQUISITIONS, LLC; and BHL VENTURES, LLC

Respondents.

Index No.: EF22-260

RJI No.: 2022-0160-M

MEMORANDUM OF LAW IN OPPOSITION TO PETITIONER'S ARTICLE 78 PROCEEDING

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POINT I

THE TOWN BOARD CONDUCTED AN EXTENSIVE AND COMPREHENSIVE SEQR REVIEW AND MADE A REASONED ELABORATION FOR THEIR NEGATIVE DECLARATION

Judicial review of a SEQR determination involves an inquiry 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,* Aldrich v. Pattison, 107 A.D.2d 258 (1985); H.O.M.E.S. v. New York State Urban Dev. Corp., 69 A.D.2d 222, 232; 418 N.Y.S.2d 827 (4th Dept. 1979); Jackson, et al. v. New York State Urban Dev. Corp.et al., 67 N.Y.2d 400 (1986). Courts have applied the "hard look" standard to the judicial review of SEQR determinations and the governmental determinations concerning the environmental impact of a proposed project based upon that document. It is not the role of the court to weigh the desirability of a proposed action, chose among alternatives, resolve disagreements among experts or substitute its judgment for that of the agency. *See,* Fisher v. Giuliani, 280 A.D.2d 13, 19-20 (1st Dept. 2001); Coalition Against Lincoln W. v. City of New York, 94 A.D.2d 483, 491-492; 465 N.Y.S.2d 170; *aff'd.* 60 N.Y.2d 805 (1983); Matter of Envtl. Defense Fund v. Flacke, 96 A.D.2d 862; 465 N.Y.S.2d 759 (2nd Dept. 1983). In addition, SEQR is to be construed in light of the rule of reason. *See,* Matter of Town of Henrietta v. Dept. of Envtl. Conservation, 76 A.D.2d 215; 430 N.Y.S.2d 440 (4th Dept. 1980).

A lead agency in SEQR review does not need to investigate every conceivable environmental problem and may "within reasonable limits, use its discretion in selecting which ones are relevant." Matter of Save the Pine Bush, Inc., 13 N.Y.3d at 307. The court stated that while an agency's duty to comply with SEQR is essential, that some common sense in deciding the scope of that duty was also essential. A "rule of reason" applies, the court declared, "not only

to an agency's judgments about the environmental concerns it investigates, but also to its decisions about what issues actually require an investigation." *See,* Matter of Save the Pine Bush, Inc., 13 N.Y.3d at 307. "SEQR lead agency has the discretions of selecting environmental impacts most relevant to the determination and to overlook those of doubtful relevance". Matter of Frontier Stone, LLC v. Town of Shelby, 174 A.D.3d 1382 (4th Dept. 2019).

POINT 1(a)

THE TOWN BOARD PROPERLY ACCEPTED THE REPORTS AND CONCLUSIONS OF EXPERTS

As set forth in detail in the Verified Affidavits of Respondent, Town Supervisor Schaffer and the Affirmations of Sarah Grace Campbell, Esq. on behalf of Respondent "Applicants", the Town Board conducted an exhaustive and thorough review of the potential environmental impacts associated with this project. The Town Board provided generous, multiple opportunities for the public to comment on and participate in the review of this project. In fact, there were at least three dedicated public hearings lasting many. many hours and several additional meetings at which every member of the public was provided an opportunity to speak. The Town Board accepted documentation from anyone who chose to present it. However, in this over three-year review of this project, the only expert testimony presented on any topic whatsoever was that presented by Applicants and by the Town Engineer. Why Petitioners did not hire their own experts to review and comment in detail on the expert analysis that they criticized by way of generalized comments, is a mystery. Petitioners repeatedly suggest that the Town Board adopt their anecdotal observations as fact, even in light of competing expert analysis and study. It is well established that reliance upon generalized community objections or other uncorroborated opinions is patently improper. *See,* Matter of Chernick v. McGowan, 238 A.D.2d 586 (2nd Dept. 1997). Comments uncorroborated by empirical evidence or expert opinion are insufficient to counter the compelling

evidence submitted by experts. *See,* Matter of Mkt. Square Properties Ltd. v. Town of Guilderland Zoning Bd. of Appeals, 66 N.Y.2d 893, 895 (1985). Moreover, it is improper to disregard expert testimony in favor of generalized community objections. *See,* Framike Realty Corp. v. Hinck, 220 A.D.2d 501; 632 N.Y.S.2d 177 (1995).

Respondents acknowledge the applicability of the "hard look" standard as stated in Matter of Envtl. Defense Fund, Inc., *supra*. The Town Board clearly met that standard through its rigorous review of the project, its extensive public hearing process, its deliberation over multiple meetings of the environmental impacts of the project and its reasoned elaboration as reflected in its SEQR negative declaration determination, which was unanimously adopted by the Town Board twice. Applicants respectfully submit that the Town Board did carefully and rigorously consider the PDD designation and its ramifications and took the "hard look" that SEQR requires.

POINT 1(b)

MINOR UPDATES TO THE EAF PART 1 DO NOT REQUIRE DELIBERATION BY THE TOWN BOARD OR RE-REFERRAL TO THE COUNTY PLANNING BOARD

In this second Article 78 proceeding Petitioner's allege that updates to Part 1 of the 2022 EAF were so significant so as to require detailed deliberation by the Board, and re-referral to the County Planning Board. These updates were requested by the Town Engineer in the ordinary course of his review and were available to the Town Board for months prior to the April 27, 2022 Public Hearing. This is obviously true as Petitioners spoke to the Board regarding these updates at the Public Hearing on April 27, 2022. An agency is not required to provide multiple referrals to the planning agency unless revisions to the project are so substantially different from the original proposal that the County or Regional Board should have the opportunity to review and make recommendations on the new and revised plans. *See* Matter of Coalition for Cobbs Hill v. City of

Rochester, 194 A.D. 3d 1428, 149 NYS 3d 400, 2021 NY App Div Lexis 3061 (4th Dept. 2021). In Matter of Cobbs, the Court found that even an increase in the number of apartment units and an increase in the height of the buildings since the original County referral, when viewed in its totality, were relatively minor and did not require re-referral to the County. *See* Matter of Cobbs at 409. The fact that the Town Board did not feel that these updates, done at the request of their own Town engineer, merited discussion does not indicate a lack of consideration, but rather a conclusion that they were of such a clerical insignificance so as not to require discussion. Clearly, using their own common sense, the Board chose not to elaborate on them. *See* Matter of Save the Pine Bush above.

POINT 1(c)

THE TOWN BOARD WAS FULLY AWARE OF THE TOWN PLANNING BOARD'S ACTIONS REGARDING THIS PROJECT

At the August 20222 public hearing, Petitioners advised the Town Board about the July 2021 and August 2021 actions of the Town Planning Board. In July 2021, by a vote of 2-2 on a motion to recommend approval of the site plan, no action was taken. In August by a vote of 2-3 on a motion recommending approval of the site plan, no action was taken. No motion to recommend denial of the site plan was ever advanced. In addition, pursuant to the Affidavit of Supervisor Schaffer, the activities of the Planning Board are routinely reported to the Town Board by access to the meeting Minutes and by the town staff. To suggest, in this small town, that the Town Board was unaware of what action or in-action the Planning Board had taken on this Project is simply ridiculous. And by her own statements, Petitioner's attorney made the Town Board aware of these items herself prior to any determinations by the Town Board at the April 27th Public Hearing.

POINT II

THE PDD PROCEDURES OF THE TOWN CODE WERE PROPERLY FOLLOWED

The Town Board reserved to itself the power to review and approve all projects located in the Planned Development District ("PDD") pursuant to §§ 24-531 to §§ 24-537 of the Town Code. Petitioner's suggestion that the separate site plan sections (§24-85 et al) are required to be the followed simply is incorrect. The PDD regulations set forth the requirements for site Plan review by the Town Board and are different from those in the general site plan section. Clearly this distinction evidences the Town Board's reservation of all powers in a PDD district to themselves.

POINT III

THE DESIGNATION OF THE SUBJECT PARCEL AS A PDD DOES NOT CONSTITUTE SPOT ZONING

The Court of Appeals has defined "spot zoning" as "the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners." See Rodgers v. Tarrytown, 302 N.Y. 115, 123; 96 N.E.2d 731, 734 (1951).

There is a strong presumption in favor of the legislative body that its actions are constitutional. Asian Americans for Equality v. Koch, 72 N.Y.2d 121; 531 N.Y.S.3d 782 (1988). In order to prevail, Petitioners must meet a heavy burden. They must establish that the challenged resolution is unconstitutional beyond a reasonable doubt. *Id.* [Emphasis added]. If the validity of the legislature's actions is at least "debatable", the legislative judgment must be allowed to control, and the court may not substitute its own judgment. Matter of Preserve our Brooklyn Neighborhood v. City of New York, 2019 N.Y. Misc. Lexis 3366, *aff'd* 2020 N.Y.A.D. Lexis 6756 (NY A.D. 1st Dept. 2020).

The zoning amendment is not spot zoning simply because it is applicable to land controlled by a single owner. *See* Rodgers, *supra*; Zeitler v. Incorporated Village of Farmingdale, 190 N.Y.S.2d 486 (2nd Dept. 1959). The fact that a zoning change will have the incidental effect of benefiting a particular landowner does not invalidate the change. *See* Matter of Preserve our Brooklyn Neighborhood, 2019 N.Y. Misc. at 9.

In the case at bar, the court will note the several positive results that the Town Board identified will flow from this project. These include the extension of water over 4,000 feet up Bunn Hill Road and the elimination of septic systems which are disfavored environmentally. Also elaborated by the Town Board, was the opportunity to provide public water in this area and the opportunity to "loop" the municipal water system to benefit fire access and decrease insurance premiums. The Board also discussed the benefits in providing high-end rental housing to business people, young professionals, and adjacent university employees looking to settle in the Town of Vestal where there are very few rental opportunities. The Town Board also discussed the tax implications of this project together with the stimulation of local businesses which will service those living within the project.

Petitioners' arguments highlight their dispute as to whether the development will serve their own interests. This position is commonly known as "Not In My Backyard — NIMBY". It describes the phenomenon in which residents of a neighborhood designate a new development as inappropriate or unwanted. "It is hardly uncommon for a proposed improvement that would benefit the public generally to be opposed by those in the neighborhood in which it is to be located." Kaung v. Bd. of Mgrs., 22 Misc. 3d 854, 856 (2008). Petitioners fail to acknowledge that this small section of Bunn Hill Road is only part of the Town of Vestal; a municipality of approximately 30,000 people stretching over 33,000 acres, and that their own interest cannot be the sole

consideration regarding zoning and development. Petitioners lost their battle against the project at the legislative level twice and now have resorted to multiple court interventions. Legislative action is not required to satisfy the universe of affected persons. Mere dissatisfaction is not sufficient to warrant the relief the petitioners seek. *See,* Matter of the Application of Preserve our Brooklyn Neighborhoods, et al. v. City of New York, 2020 WL 6600151 (NY A.D.lst Dept., 11 12, 2020). Zoning laws enacted...to promote the health, safety and welfare of the community as a whole (see NYS Town Law § 261) necessarily enact hardships and difficulties for some individual owners. Id. at 118. *See,* Shepard v. Village of Skaneateles, 300 N.Y. 115, 118 (1949). No zoning plan can possibly provide for the general good and at the same time so accommodate the private interest that everyone is satisfied. While precise delineation is impossible, cardinal is the principal that what is best for the body politic in the long run must prevail over the interests of particular individuals. *Id.*

Petitioners' arguments amount to little more than resistance to change in their neighborhood and the unsubstantiated perceived perils of development. It is undisputed that the Town Board acknowledged Petitioners' concerns during the review and approval process. Certainly, the developers will naturally situate themselves so as to realize a financial gain, that is the very nature of capitalism. However, this fact does not compel the conclusion that the challenged resolution was enacted solely for their own benefit on the Record before the Court. See Id. at 9; *see* also, Rodgers, 302 N.Y. at 122.

The creation of the Vestal PDD Legislation in 1966 and its requirement that it be considered only for projects with 10 or more acres, speaks soundly to the legislative body's intention at that time to reserve Vestal PDD consideration of large projects for elected officials to evaluate at the time in the history of the town that they are submitted. Certainly, this legislative

discretion established so many years ago speaks to the legislative body's determination generally that a zone change or PDD designation for a project of 10 acres or more does not constitute spot zoning.

The newly zoned area is not an island surrounded by incompatible uses. Rather, it is a logical projection of an existing district to permit growth and to recognize changes that have already occurred. *See,* Matter of Schoonmaker Homes-John Steinberg, Inc. v. Maybrook, 178 A.D.2d 722, 728; 576 N.Y.S.2d 954 (1991).

In the case at bar, as the Town Board members themselves discussed, this project is consistent with the neighboring State University of New York, Binghamton College Campus and also is not inconsistent with the residential nature of the neighborhood. This is in fact a residential project. It is not a commercial strip mall or other commercial use. The Town Board acknowledged that the density of permitted residential units in this project is greater than that of the surrounding neighborhood, but found that it was consistent with the continuing evolution of the Town of Vestal and the need for varied housing types to attract and retain residents to the Town. As stated in Rodgers, "Changed or changing conditions call for changed plans and persons who own property in a particular zone enjoy no eternal vested right to that classification if the public interest demands otherwise and a village may amend its basic zoning ordinance in such a way as reasonably to promote the general welfare." Rodgers, 302 N.Y. at 121. Clearly, Petitioners disagree with the Town Board's determinations, however, it simply cannot be disputed that the Board's actions did not constitute spot zoning or that they failed to take a hard look at the environmental components of the Project.

POINT IV
THE TOWN BOARD'S PDD STATUTE IS LEGISLATIVE IN NATURE

The PDD regulations reserve absolute discretion to the Town Board in evaluating applications thereunder. A mere statement of purpose and explanation of the process required to obtain approval is all that is necessary. Acting purely legislatively, the determination is left to the untrammeled, but of course, not capricious discretion of the board. *See,* Bar Harbour Shopping Center v. Village of Massapequa, 196 N.Y.S.2d 856 (1959), citing Green Point Sav. Bank v. Zoning Appeals Bd., 281 N.Y. 534 (1939); Larkin Co. v. Schwab, 242 N.Y. 330 (1926); Matter of Lemir Realty Corp. v. Larkin, 11 N.Y.2d 20 (1962).

The decision as to how a community shall be zoned or rezoned, as to how various properties shall be classified or reclassified, rests with the local legislative body; its judgment and determination will be conclusive, beyond interference from the courts, unless shown to be arbitrary, and the burden of establishing such arbitrariness is imposed upon him who asserts it. Rodgers, 302 N.Y. at 121. To determine whether the Town Board's legislative action to change the zoning designation conforms to a well-considered plan or comprehensive plan, the zoning authority must show that the changes do not conflict with the community's basic scheme for land use. In rendering its determination, courts are not restricted to any particular document. Instead, they are charged with garnering the community's land use policies from any available source, most especially the master plan of the community, if any has been adopted, the zoning law itself and the zoning map. *See,* Udell v. Haas, 21 N.Y.2d 463, 469 (1968). A comprehensive plan need not be formally written out. *See,* Asian Americans for Equality, 72 N.Y.2d at 131. A reviewing court must examine all available and relevant evidence of a municipality's land use policies. *Id.* Zoning is not static. *See,* Kravetz v. Plenge, 84 A.D.2d 422 (4th Dept. 1982).

It is undisputed that the Town of Vestal does not have a written comprehensive plan. Sound planning inherently calls for the recognition of the dynamics of change. *See,* Matter of Town of Bedford v. Village of Mt. Kisko, 33 N.Y.2d 178, 186 (1973). It is also undisputed that the PDD section of the Town Code was adopted in 1966. This legislation provided for broad legislative discretion in evaluating potential projects and their advisability at any given point in time on parcels of 10 or more acres. This project represents the perfect example of the Town Board's legislative discretion in evaluating a project within the Town of Vestal at the current time and making a determination with respect to its benefit and advisability for the community generally.

The Town Board clearly found that the decision to approve this project twice, reflects an appropriate balance between growth, the provision of varied housing types to attract and retain residents to the community, increased access to public sewer and water, the diminished use of environmentally disfavored wells and septic systems and the preservation of portions of the Town's rural character.

CONCLUSION

The Town Board properly conducted their SEQR review, took a "hard look" at all potential environmental issues and made a detailed, reasoned elaboration for their SEQR negative declaration. The Board relied on expert testimony in reaching their determination as opposed to generalized community opposition and exercised their legislative discretion in adopting the PDD designation and approving the Project. Based on the foregoing, as well as the Affidavits of Town Supervisor Schaffer, the Affirmations of Sarah Grace Campbell, Esq., the affidavits of Mark Parker and Diran Kradjian and all of the public hearings, deliberations and the voluminous Record, the Board's April 2022 determinations should be upheld.

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WHEREFORE, Applicants respectfully request an Order dismissing the Petition in its entirety and for such other and further relief as the Court may deem proper.

Dated: August 4, 2022

Respectfully submitted,

Sarah Grace Campbell

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CERTIFICATION BY COUNSEL OF WORD COUNT

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