STATE OF NEW YORK
SUPREME COURT COUNTY OF CORTLAND

VICTOR LAMOUREUX, 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.: 2022-0169-M

Hon. Mark G. Masler

MEMORANDUM OF LAW IN SUPPORT AND REPLY OF ARTICLE 78 PETITION OF FRIENDS FOR RESPONSIBLE VESTAL ZONING

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INTRODUCTION

Respondent LCD Acquisitions, LLC's ("Applicant" or "LCD") submitted a rezoning application to rezone 6 parcels on Bunn Hill Road and Jensen Road in the Town of Vestal from a Rural Residence District ("RR") to a Planned Development District ("PDD") to build a multi-residential development (the "Student Housing Project"). The Town Board resolution issuing a Negative Declaration of Significance for a rezoning application and approval of Local Law A of 2022 ("2022 Rezoning Law") was made without referral to the Broome County Department of Planning and Economic Development ("County Planning Department") or the Town Planning Board. The Town Board's actions ignore and contradict the general structure and specific provisions of the Town of Vestal Town Code ("Code").

The Town Board previously sought input from the County Planning Department and recommendation and site plan approval from the Town Planning Board for the "Local Law 3 of 2021" ("2021 Rezoning Law"), which attempted to create a similar PDD for the Applicant's Student Housing Project. The County Planning Department and Town Planning Board did not recommend approval of the 2021 Rezoning Law and requested that the Applicant address certain environmental and safety concerns conditions. Shortly thereafter, this Court annulled the Town Board's approval of the 2021 Rezoning Law because the resolution did not contain a written reasoned elaboration and because subsequent documentation did not comply with the procedural requirements of SEQRA. As a reaction, and in an apparent effort to avoid fulfilling the County Planning Department's and Town Planning Board's prior conditions, the Town Board issued a Negative Declaration of Significance for the Student Housing Project and approved the 2022 Rezoning Law ("Determination") without referring it to the County Planning Department or Town Planning Board. As a result, the Town Board's Determination was procedurally and legally improper and violated the Town Code and General Municipal Law ("GML") § 239.

The 2022 Rezoning is a new law that is significantly different from the 2021 Rezoning Law. The Applicant's revised EAF raises new environmental concerns for the Town Board to address, discuss and attempt to resolve. As demonstrated below, the Town Board failed to take the requisite "hard look" required by the State Environmental Quality Review Act ("SEQRA") by relying on the record of the 2021 Rezoning Law where the revised EAF and the 2022 Rezoning Law differ significantly from the 2021 Rezoning Law.

The Student Housing Project and rezoning at issue accommodates a single developer, is inconsistent with the land use plans for the Vestal community and is incongruent with the rural character of the RR district, constituting illegal spot zoning. Therefore, the Town Board's Determinations regarding Local Law 1 of 2022 are arbitrary and capricious and in contravention of the law and should be annulled.

ARGUMENT

Point I

I. The Town Board Erroneously Removed the Planning Board from the PDD Process

The Town Board issued its Determination approving the 2022 Rezoning Law without referring the application to the Town Planning Board in violation of § 24-532(b) of the Town Zoning Law. Section 24-532(b) states:

> *Action of the town planning board.* The town planning board may approve, approve with stated conditions or disapprove an application for a zoning amendment and *shall* file a written report of its decisions with the town board. In reaching its decision the town planning board may recommend any conditions or restrictions upon the location, construction or use or operation of the district as it shall deem necessary in order to secure the general objectives of this chapter.

(Emphasis added.)

Respondents claim that § 24-532(b) merely provides the Town Planning Board with an opportunity to make a recommendation to the Town Board. (Campbell Aff., p. 19, ¶ 81), and that the Town Board was aware of the Town Planning Board's actions regarding this project. (Schaffer Aff. ¶ 8).

These arguments misconstrue § 24-532(b) and ignore the second clause of the first sentence – that the Town Planning Board "*shall* file a written report of its decisions with the town board" regarding "an application for a zoning amendment." Thus the Town Board still must refer the proposed PDD to the Town Planning Board.

The Town Planning Board did not recommend approval of the Student Housing project on three separate occasions. On August 26, 2020 the Town Planning Board advised "the Town Board to move with caution" and recommended approval of the zoning change only if conditions were met including but not limited to: the number of residential units, vegetation and landscape screening, underground utilities, screening for trash facilities, stormwater management issues and compliance with wetland mitigation measures. (Resp. Exhibit 13, pp. 2-3).

The Town Planning Board also refused to approve the site plan on the project based on too many units for the site and lack of a sidewalk plan, and reminded the Town Board "that it is the action of the Planning Board to accept/not accept the site plan …" (Petition, Exhibit J, p.5; Petition, Exhibit L, p. 3). In response, the Town Board disregarded and circumvented the Town Planning Board by not referring the updated site plan, revised EAF and 2022 Rezoning Law to the Town Planning Board before issuing its Determination, despite the significant differences in the 2022 Rezoning Law and revised EAF Part 1.

Respondents assert that the Town Code provides the Town Board with absolute, broad legislative discretion to evaluate PDD projects on parcels of 10 or more acres. (Respondents Town of Vestal and LCD Acquisitions, LLC and BHL Ventures, LLC Memorandum of Law in Opposition to Petitioner's Article 78 Proceeding[1], "Resp. Memo," p. 9). However, Town Code § 24-532(b) requires a written report on the application from the Town Planning Board before the

[1] Respondents have filed separate Answers in this matter, but a joint Memorandum of Law in Opposition. Citations to the "record" apparently cite to the exhibits in an entirely separate action, EF21-358.

Town Board can vote to establish a PDD. Section 24-531 of the Town Code provides that "[e]stablishment of a planned development district shall be by amendment to this chapter in accordance with the procedure in this division." Respondent's assertion that it can remove the Town Planning Board from the PDD process because the Town Board has absolute discretion to evaluate the PDD application is contrary to the language of the Town Zoning Code. Accordingly, the Town Board's passage of the 2022 Rezoning Law was procedurally defective, arbitrary and capricious and erroneous as a matter of law.

Point II

II. The Town Board Improperly Amended the Town Code to Remove the Planning Board from the Site Plan Review Process

A. The Town Board Erroneously Removed the Planning Board from the Site Plan Review Process

Respondents contend that the Town Board exclusively reserved to itself the power to evaluate PDD applications and to provide site plan review of all projects located in the Planned Development District pursuant to § 24-531 to § 24-537 when it passed the 2022 Rezoning Law. (Petition, Exhibit U, p. 3; Resp. Memo, pp. 5, 9). This is precisely the error that requires the Law be overturned for improperly amending the Town Code. Section 13 of the 2021 Rezoning Law originally stated that the Applicant must "complete site plan review in accordance with the Town Zoning Law." (Petition, Exhibit H, p. 3). This clause is noticeably absent from the 2022 Rezoning Law. (Resp. Exhibit I, p. 2). Section 14 of the 2022 Rezoning Law also states that "[a]ny other local law, ordinance or resolution inconsistent herewith is hereby removed." *Id.* When Sections 13 and 14 are read together, the Applicant is no longer required to complete site plan review before the Planning Board in accordance with Zoning Code §§ 24-84 to 24-88.

Section 24-84(a) states: "A site plan shall be prepared and reviewed by the *planning board* in accordance with this part prior to site development on any lot or lots or the issuance of any development permit." (emphasis added). This section does not exclude PDD applications. Section 24-84(b) states:

> No development permit shall be issued for the erection or alteration of any building on any lot or tract of land contained in a residential subdivision containing three (3) or more building lots, or for a multiple residence to accommodate six (6) or more families, or for any construction in the C-l, C-2, CD, ID and I districts, except following the submission of a site plan approval to the *planning board* and in compliance with the site plan for such lot or plot as duly approved by the town board, in accordance with this part. (emphasis added.)

The Town Code does not specify different provisions regarding site plan review regarding a PDD.[2] It would be atypical and irrational for the Town Board to exclude the Town Planning Board from site plan review where the result may be more impactful than the districts listed in section 24-84(b). Respondents' position is incongruent with the role of the Town Planning Board's in site plan approval as defined by the Town Code.

B. Removing the Planning Board from the Site Plan Review Process Improperly Amends the Town Code

The 2022 Rezoning Law improperly seeks to amend the Town Code by removing the Town Planning Board from the PDD site plan review process in contravention of the Town Code, contrary to the practices of that same Board during the 2021 Rezoning Law process. Removing the Town Planning Board's authority to review and approve a site plan after establishment of a PDD requires amending the Town Code. In amending the Town Code, Vestal Town Code § 1-6(b) requires identifying by specific reference the section of the Town Code to be amended or repealed. Section 1-6(e) of the Town Code requires specifically identifying the sections, articles,

[2] A revised site plan, dated January 21, 2022, was apparently submitted to the Town Engineer in response to comments from the Town Planning Board, the public, the Town Board and Town Engineer. (Parker Aff., p.2, ¶¶9-12). That site plan was never reviewed by the Town Planning Board.

chapters or provisions of the Town Code desired to be repealed. The 2022 Rezoning Law does not identify any sections, articles, chapters or provisions of the Town Code sought to be amended or desired to be repealed.

Identification of the provisions of law sought to be amended is critical because "[w]hen a zoning ordinance is amended, the court decides whether it accords with a well-considered plan in much the same way, by determining whether the original plan required amendment because of the community's change and growth and whether the amendment is calculated to benefit the community as a whole as opposed to benefiting individuals or a group of individuals." *Asian Americans for Equality v Koch*, 72 NY2d 121, 129 (1988). No such analysis or review by the Town Board is in the record for 2022 Rezoning Law, demonstrating the Town Board's approval of the 2022 Rezoning Law removing the Planning Board from the site plan review process was arbitrary and capricious and contrary to law.

Point III

III. Updates to EAF Part 1 Requires Referral to the County Planning Department in Accordance with GML 239

Respondents do not deny that the updated 2022 rezoning application, revised EAF Part 1 and 2022 Rezoning Law differ from the 2021 rezoning application, EAF Part 1 and 2021 Rezoning Law. Respondents merely contend that those differences are not significant. (Campbell Aff, ¶¶ 74-75; Resp. Memo, pp. 3-4 citing *Matter of Coalition for Cobbs Hill v City of Rochester*, 194 AD3d 1428 (4th Dept 2021). In *Matter of Cobbs*, the Fourth Department found that differences were not substantial where the project's footprint was essentially the same and included minor changes related to the height of the building and number of apartments. *Id.* at 1437. In arriving at this conclusion the court relied on *Matter of Ferrari v Town of Penfield Planning Bd*, 181 AD2d 149, 152 (4th Dept 1992), which held that multiple referrals to the planning agency are required

where "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". *Id*. In *Matter of Ferrari*, the revised subdivision plat was "substantially different" from the original layout such that another public hearing was convened regarding the revised plans. 181 AD2d at 153. As a result, the negative declaration of significance was annulled for failing to refer the revised plans to the county or regional board to review and make recommendations pursuant to GML §§ 239-m or 239-n. *Id.*

Similar to the facts presented in *Ferrari*, on April 20, 2022, LCD submitted a revised GeoTechnical Engineering Evaluation, dated February 28, 2022 as part of its revised EAF for the 2022 Rezoning Law. (Petition, Exhibit R). As conceded by Respondents, an additional public hearing was held after the Applicant amended the EAF and provided a more detailed site plan in response to the Town Planning Board's conditions for approving the 2021 Rezoning Law. (Petition, ¶ 99; Answer, ¶ 99). The Town Engineer observed that the updated site plan for the Student Housing Project did not include sidewalks or paths along Bunn Hill Road, which failed to comply with the County Planning Department and Town Planning Board recommendations. (Petition, Exhibit M). The Town Engineer further advised the Town Supervisor that the Applicant still needed to submit an updated site plan that *incorporates the Town Planning Board's recommendations,* among other environmental considerations. (Petition, Exhibit S). At the April 27, 2022 public hearing, the Town Attorney deemed it significant to note that there was a change in the wetland mitigation measures of the Student Housing Project. (Petition, Exhibit U, p. 3).

Respondents do not dispute the following notable changes to EAF Part 1:

(a) That the applicant needed to join water and sewer districts;
(b) That areas of disturbances would occur onsite and offsite;
(c) That approximately 33 acres of Forested land would be recategorized;
(d) That tree and brush would be removed on the eastern edge of the project;

(e) That heavy equipment (versus vehicles) would be used for construction;
(f) That construction will produce noise that exceeds present noise levels.

See Answer, ¶¶ 71, 73; Schaffer Aff. ¶¶ 2-3.

Despite this significant new information, the Town Board adopted the prior record of the 2021 Rezoning Law without referring the matter back to the County Planning Department for review. (Campbell Aff., pp. 17-18, ¶ 73). The revised EAF Part 1 is significantly different from the EAF Part 1, meeting the threshold identified in *Matter of Ferrari.* Respondents admit that the revised EAF and 2022 Rezoning Law were not discussed by the Town Board and were not submitted to the County Planning Department. (Petition, Exhibit U, p. 4; Schaffer Aff., p. 3, ¶ 8; Campbell Aff., p. 19, ¶ 86) requiring the Town's Determination be annulled for failing to comply with GML § 239.

Naturally, what results from the Town Board's unilateral decision making without input from the County is a project that fails to address the concerns expressed by the County Planning Department: concerns related to increased traffic, public transportation needs and inadequate safety measures for pedestrians. (Exhibit C, p. 4). The County Planning Department also found that visibility of utility placement and waste water facilities and stormwater management facilities were incompatible with the Broome County Comprehensive Plan and the Broome County Housing Study. *Id.* Accordingly, the Town Board's approval of the 2022 Rezoning Law without complying with GML 239 is arbitrary and capricious and contrary to law.

Point IV

IV. The Town Board Again Failed to Comply with the Procedural Requirements of SEQRA

"It is well settled that SEQRA's procedural mechanisms mandate strict compliance, and anything less will result in annulment of the lead agency's determination of significance." *Dawley*

v Whitetail 414, LLC, 130 AD3d 1570, 1571 (4th Dept 2015) citing *Matter of King v Saratoga County Bd of Supervisors*, 89 NY2d 341, 347-48 (1996). As the Third Department has explained:

> [T]he substance of SEQRA cannot be achieved without its procedure, and that any attempt to deviate from its provisions will undermine the law's express purposes. Accordingly, we hold that an agency must comply with both the letter and the spirit of SEQRA before it will be found to have discharged its responsibility thereunder.

Schenectady Chemicals, Inc. v Flacke, 83 AD2d 460, 463 (3d Dept. 1981) citing *Matter of Rye Town/King Civic Assn. v Town of Rye*, 82 AD2d 474 (1981), *app dsmd* 55 NY2d 747 (Nov 23, 1981). The Record demonstrates that Town Board failed to comply with the strict procedural requirements of SEQRA in adopting the 2022 Rezoning Law.

The Town Board was required to "identify the relevant areas of environmental concern [and] take a "hard look" at them". *See Niagara Mohawk Power Corp v Green Island Power Authority*, 265 AD2d 711, 712 (3d Dept 1999) quoting *Chinese Staff & Workers Assn v City of New York*, 68 NY2d 359, 363–64 (1986); s*ee also Spitzer v Farrell*, 100 NY2d 186, 190 (2003). Identification of some areas of environmental concern does not insulate the Town Board's failure to identify and take a "hard look" at other environmental concerns brought to its attention. *See W Branch Conservation Assn, Inc v Planning Board Town of Ramapo*, 177 AD2d 917, 919 (3d Dept 1991). As the Court of Appeals has noted "decision makers must not be given the freedom to either ignore or disregard the information that the environmental review process was designed to elicit if the process is to have any meaning." *WEOK Broadcasting Corp v Planning Bd. Of Town of Lloyd*, 79 NY2d 373, 385 (1992) quoting Gitlen, *The Substantive Impact of the SEQRA*, 46 Albany LRev 1241, 1253 (1982); s*ee also Chemical Specialties Mfrs. Assn v Jorling*, 85 NY2d 382, 411-12 (1995) (rejecting a negative declaration because the lead agency failed to perform a "through and meaningful review" by ignoring disputed evidence).

Respondents allege that the Town Board met the "hard look" standard required under SEQRA through a purportedly extensive, thorough review and deliberation of the environmental impacts of the project. (Resp. Memo, p. 3). Respondents further assert that the Town Board carefully and rigorously considered the ramifications of the PDD designation as reflected by its "reasoned elaboration" of the Negative Declaration of Significance. *Id*. However, Respondents do not cite the record for the 2022 Rezoning Law ("Record") to support these conclusory claims. Instead, Respondents contend that the Town Board satisfied the "hard look" requirement by relying on the prior record of the 2021 Rezoning Law. However, the Applicant's revised EAF Part 1 submitted with the 2022 Rezoning Law creating a PDD is significantly different from the EAF Part 1 submitted by the Applicant in connection with the 2021 Rezoning Law creating a PDD. (Campbell Aff., ¶ 73). Similarly, the Town's reliance on expert analysis from the prior record cannot satisfy the "hard look" standard, where the revised site plan and EAF Part 1 for the 2022 Rezoning Law contained additional information in response to changes requested by the Town Engineer.

Moreover, the Town Board's review of section 7a and 7b of EAF Part 2 failed to adequately address items likely to have moderate to large impacts, such as the presence of threatened or endangered species on the project site and loss of habitat for those threatened or endangered species. *Compare* Petition, Exhibit I, p. 5 with Petition, Exhibit V, p. 20. For example, while the new EAF Part 1 identifies environmental concerns such as tree removal along the eastern side of the development and the presence of endangered species inhabiting the site, EAF Part 2 no longer lists any moderate to large impact on any endangered species, or their habitat, located on or near the site. *Compare* Petition, Exhibit V, pp. 9 and 13 with p. 20.

The Town Board's purported review of the full EAF contains new environmental impacts and contradictory statements concerning impacts to the habitat of threatened or endangered species without any evidence in the Record indicating a resolution of these issues. The updates to the EAF requires deliberation by the Town Board.

According to the Town Supervisor, the Town Board did not consider any other new environmental impacts to be "significant enough to merit further discussion". (Schaffer Aff., p. 3, ¶ 8). Indeed, the minutes from the April 27th public hearing where the Town Board issued its Determination confirms that new environmental impacts were not even raised. (Petition, Exhibit U, pp. 3-4). Instead, the Town Board declared the prior record of the 2021 Rezoning Law "as still accurate and all prior proceedings and hearings should be considered as part of this record and tonight's meeting as well." *Id.* at 4. Accordingly, the Town Board failed to take the requisite "hard look" when issuing its Determination of a negative declaration under SEQRA.

Respondents unfairly discredit Petitioner's arguments and public comments by dismissing them as "generalized community objections". (Resp. Memo, p. 2). To the contrary, Petitioner's objections are based upon documents in the Record including the EAF, the County Planning Department's recommendation of denial of the project, the Applicants' Environmental Consultant's Report, and the Applicants' Traffic Impact Study. (Petition, Exhibit C, p.3; Resp. Exhibit 16, pp. 58-59; Resp. Exhibit 16, p. 16). The Traffic Impact Study identifies increased traffic delay during peak hours resulting in a degradation of the Level of Service at several intersections. (Resp. Exhibit 16, p. 16). The Town Board cannot simply disregard community objections where an expert report supports those concerns. *See Mkt Square Properties, Ltd v Town of Guilderland Zoning Bd of Appeals*, 66 NY2d 893, 895 (1985); *N Shore FCP, Inc v. Mammina*, 22 AD3d 759, 760 (2d Dept 2005).

For the reasons stated above, the Town Board failed to take the necessary "hard look" when issuing the Determination and the SEQRA review and Negative Declaration of Significance for the 2022 Rezoning Law was procedurally defective, arbitrary and capricious and erroneous as a matter of law.

Point V

V. Designation of the Subject Parcel as PDD Constitutes Spot Zoning

"Spot zoning is the singling out of 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." *Star Property Holding, LLC v Town of Islip,* 164 AD3d 799, 802 (2d Dept 2018). *See also Rotterdam Ventures, Inc. v Town of Rotterdam,* 90 AD3d 1360, 1362 (3d Dept 2011).

> Although no single factor is dispositive, in evaluating a claim of spot zoning a court may consider several factors, including whether the rezoning is consistent with a comprehensive land use plan, whether it is compatible with surrounding uses, the likelihood of harm to surrounding properties, the availability and suitability of other parcels, and the recommendations of professional planning staff. However, the ultimate test is "whether the change is other than part of a well-considered and comprehensive plan calculated to serve the general welfare of the community".

Save Our Forest Action Coal Inc v. City of Kingston, 246 AD2d 217, 221-22 (3d Dept 1998) (citations omitted). Impermissible spot zoning is created where, as here, there is evidence demonstrating negative impacts of rezoning on neighbors and the community at large, the rezoning is inconsistent with land use plans, and the entire benefit of the rezoning goes to the owner of the parcel in question. *See Cannon v Murphy,* 196 AD2d 498, 500-01 (2d Dept 1993).

Although there is a strong presumption in favor of the validity of a legislative body's actions. *Asian Americans for Equality*, 72 NY2d at 131, there is no basis for such a presumption to apply here. *See Matter of Preserve our Brooklyn Neighborhood v City of New York,* 2019 NY

Misc Lexis 3366, aff'd 202 NYAD Lexis 6756 (1st Dept 2020). In *Schoonmaker Homes-John Steinberg, Inc v Vill of Maybrook*, the Third Department upheld the lower court's decision preventing a developer from constructing 120 multiple dwelling units, 58 single-family dwellings units and 278 town houses because the project did not meet the district's zoning density requirements. 178 AD2d 722, 728 (3d Dept. 1991). The ruling relied on record evidence to find that the zoning density requirement in the zoning ordinance provided an overriding benefit to the community to meet "the increasing encroachment of urbanization and the quality of life." *Id.* Here, the Student Housing Project does not address a recognized housing need or provide a wider community benefit.

Respondents' make speculative claims that several positive outcomes will result from the Student Housing Project. (Resp. Memo p. 6). Respondents' theory that insurance premiums will decrease lacks support. *Id.* The hope that this project will attract business people and young professionals is fanciful given the obvious student housing audience and no demonstrated increase of professional jobs in the community. *Id.* Respondents readily acknowledge this project is an expansion of a nearby college into the rural community. (Resp. Exhibit 6, p. 130; Resp. Exhibit 27, p. 33; Resp. Memo, p. 8; Petition, Exhibit V, pp. 31-32**)**.

This project will irreparably alter demographics and dramatically increase population density with no apparent benefit to the rural character of the Vestal community. The rezoning at issue accommodates a single developer, is inconsistent with the land use plans for the Vestal community and is not in harmony with the rural character of the neighborhood. (Lamoureux Aff., pp. 5-6, ¶¶ 17-25). The Record does not indicate that alternative sites for the proposed project were even considered to alleviate these negative impacts on the rural community. Accordingly,

the Student Housing Project is inconsistent with the existing RR district in which it is located and constitutes illegal spot zoning for the benefit of a single landowner.

Dated: Albany, New York
August 10, 2022

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CERTIFICATE OF WORD COUNT LIMIT

The undersigned attorney hereby certifies:

This Memorandum of Law filed herein complies with the word count limitations pursuant to rule 202.8-b(c) of the Uniform Civil Rules for the Supreme Court and County Court as amended by the Administrative Order 141-22 effective July 1, 2022. According to the word processing system used in this office this document, exclusive of the sections excluded by Rule 202.8-b(b) contains 4,168 words.

Dated: Albany, New York
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