At a Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Cortland County Courthouse, in the City of Cortland, New York, on the 11th day of August, 2022.

PRESENT: HON. MARK G. MASLER
Justice Presiding.

STATE OF NEW YORK
SUPREME COURT: COUNTY OF CORTLAND

In the Matter of **VICTOR LAMOUREUX**, on behalf of **FRIENDS FOR RESPONSIBLE VESTAL ZONING**, an unincorporated association,

Petitioner,

DECISION, ORDER, AND JUDGMENT

-against-

Index No. EF22-260
RJI No. 2022-0160-M

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

Respondents.

APPEARANCES:

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MARK G. MASLER, J.S.C.

Victor Lamoureux commenced this CPLR article 78 proceeding on behalf of Friends for Responsible Vestal Zoning (RVZ), against the Vestal Town Board (the Town Board), LCD Acquisitions, LLC (LCD), and BHL Ventures, LLC (BHL), seeking to set aside the Town Board's negative declaration of significance pursuant to the New York State Environmental Quality Review Act (SEQRA), the Town Board's resolution approving Local Law A of 2022, and the correspondingly filed Local Law 1 of 2022 (the rezoning law), which created a Planned Development District (PDD) for six contiguous parcels, containing a total of 42 acres, to permit construction of a housing complex by LCD on land presently owned by BHL (the project). The proposed housing complex is intended to have up to 700 residents living in 64 cottage-style dwelling units, each containing 2-5 bedrooms. The project also includes a clubhouse, recreational amenities, and more than 550 parking spaces. Petitioner is President of RVZ, an unincorporated association of more than 150 Town of Vestal residents formed "for the purpose of insuring that the Town of Vestal follows its approved zoning code and the proposed but un-adopted comprehensive plan" and to protect the interests of town residents by opposing development projects in residential districts which require a change in the Town of Vestal's zoning laws (NY St Cts Elec Filing [NYSCEF] Doc No. 26, Lamoureux aff, ¶¶ 1-4).

LCD first applied for the establishment of a PDD for the project in March 2019. The Town Board referred the application to the Town of Vestal Planning Board (the Planning Board) and the Broome County Department of Planning and Public Development (the County Planning Department) for review and recommendation. LCD thereafter withdrew its first application and submitted a revised application in January 2020. The revised application was also referred to the Planning Board and the County Planning Department, as well as the Town Engineer. The County Planning Department considered the revised PDD application and, by letter dated March

13, 2020, recommended denial of the project as submitted (see NYSCEF Doc No. 37 in Lamoureux v Town of Vestal, Sup Ct, Cortland County, index No. EF21-358 [the prior proceeding]). The Planning Board considered the PDD application at public meetings held in March and August 2020, and, by letter dated August 26, 2020, recommended that the Town Board approve it with stated conditions, which included a requirement that the developer complete site plan review in accordance with the Town of Vestal's Zoning Laws (chapter 24 of the Town of Vestal Municipal Code, hereinafter the Zoning Code) (see NYSCEF Doc No. 41 in the prior proceeding).

LCD submitted part 1 of a full environmental assessment form (EAF) in December 2020. The Town Board held a public hearing to consider Local Law A of 2021, a prior version of the rezoning law, in January 2021. LCD submitted an amended EAF in February 2021. At the reopened public hearing held in March 2021, having assumed lead agency status for SEQRA purposes, the Town Board classified the project as a Type I action and reviewed part 2 of the EAF, noting several potential moderate to large impacts, including degradation of habitat used by rare, threatened, or endangered species; land use which may differ from or sharply contrast with current surrounding land use patterns and which is inconsistent with local land use plans and zoning regulations; a projected increase in traffic which may exceed the capacity of the existing road network; and inconsistencies with the existing character of the community. The Town Board held two further meetings in April 2021: at the first, it continued its review of part 2 of the EAF, and at the second it unanimously adopted resolutions (1) making a negative declaration of significance under SEQRA for the project; and (2) passing Local Law A of 2021. The Town Attorney thereafter prepared EAF parts 2 and 3, which were signed by the Town Attorney and the Town Supervisor and filed with the Town Clerk of the Town of Vestal and the New York State Department of Environmental Conservation in May 2021.

These actions were challenged in the prior proceeding commenced by petitioner, where, by decision, order, and judgment dated February 23, 2022, this court determined that the Town Board had failed to fulfill the procedural mandates of SEQRA because it had not provided a written reasoned elaboration prior to its issuance of a negative declaration, annulled the negative declaration, and vacated the Town Board's resolution approving Local Law A of 2021 and the correspondingly filed Local Law 3 of 2021. Thereafter, the Town Board again reviewed the project at a public hearing held on April 27, 2022. After incorporating the administrative record from the prior proceeding into the subsequent review, and noting that the developer had elected to purchase one wetland mitigation credit in lieu of conducting onsite wetland mitigation, the Town Board reviewed part 2 of the EAF, adopted the written findings in part 3 regarding the potentially moderate to large impacts it had identified, issued a negative declaration of significance under SEQRA, and enacted the proposed rezoning law (see NYSCEF Doc No. 62, April 27, 2022 transcript at 5-9, 49-66).

The petition asserts seven claims. The first and second claims allege that the Town Board failed to comply with the procedural and substantive requirements of SEQRA because the EAF part 1 considered at the April 27, 2022 meeting was a revised EAF containing significant changes that the Town Board failed to address. As alleged by petitioner, these changes included: the expansion of the existing water district and establishment of a new water supply district; the establishment of a new wastewater sewage treatment district; noise levels during construction exceeding the existing noise levels; removal of trees along the eastern side of the development adjacent to Bunn Hill Road; recategorization of approximately 22 acres of forested land to "Other: Woods"; and prohibition of hunting on the property. It initially bears noting that these alleged changes in the project were reflected in the amended EAF that was submitted by

LCD in February 2021 and, therefore, were considered by the Town Board at its March and April 2021 meetings.[1]

> "A lead agency must strictly comply with SEQRA's mandates. SEQRA requires an environmental impact statement (hereinafter EIS) when an agency action may have a significant effect on the environment, and such an impact is presumed to be likely where, as here, a type I action is involved; however, a type I action does not, per se, necessitate the filing of an EIS. A negative declaration may be issued, obviating the need for an EIS, if the lead agency determines that no adverse environmental impacts will result or that the identified adverse environmental impacts will not be significant. The lead agency's determination of significance must be in writing, contain a reasoned elaboration and provide reference to any supporting documentation" (Matter of Village of Ballston Spa v City of Saratoga Springs, 163 AD3d 1220, 1222-1223 [2018] [internal quotation marks, brackets, ellipsis, and citations omitted]).

Petitioner's claim that the Town Board failed to comply with the procedural requirements of SEQRA lacks merit because the record shows that the Town Board conducted the steps required in the SEQRA review process by considering areas of potential environmental concern based upon the information provided in the revised EAF; found that the project may cause several potential moderate to large impacts to the environment; and ultimately concluded that only no or small impacts would result, as set forth in the written rationale provided for its decision (see NYSCEF Doc No. 25, full environmental assessment form).[2]

> "In assessing compliance with the substantive mandates of SEQRA, [the court must review] the record to determine whether the lead 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. . . . An agency's substantive obligations under SEQRA must be viewed in light of a rule of reason

[1] The petition purports to incorporate the revised EAF part 1 submitted by LCD in February 2021 as Exhibit E (see NYSCEF Doc No. 1, petition, ¶ 37). However, as filed, Exhibit E is the verified answer filed by LCD and BHL in the prior proceeding (see NYSCEF Doc No. 8, Exhibit E).

[2] Petitioner also alleges that the Town Board improperly recharacterized the project as an unlisted action under SEQRA; however, the Town Supervisor avers that he had inadvertently checked "unlisted" instead of "Type I" on the EAF without intending to recharacterize the project (see NYSCEF Doc No. 45, Schaffer aff ¶ 8). In any event, it is clear from the record that the Town Board considered the project as a Type I action by completing the full EAF.

> as not every conceivable environmental impact, mitigating measure or alternative must be identified and addressed before . . . the substantive requirements of SEQRA [are satisfied.] The degree of detail with which each environmental impact or mitigation measure must be discussed obviously will vary with the circumstances and nature of the proposal. It is not the province of the courts to second-guess thoughtful agency decision making and, accordingly, an agency decision should be annulled only if it is arbitrary, capricious or unsupported by the evidence" (Matter of Hart v Town of Guilderland, 196 AD3d 900, 903-904 [2021] [internal quotation marks, ellipses, brackets, and citations omitted]).

The record establishes that the Town Board took the requisite hard look and provided a reasoned elaboration for the basis of its determination regarding the potential impacts of the project. In taking this hard look, the Town Board relied on, among other things, the record of the prior proceeding. At Town Board meetings held in March and April 2021, the Town Board members assessed and discussed each of the areas of potential environmental concern (see NYSCEF Doc No. 36, March 24, 2021 transcript; NYSCEF Doc No. 37, April 14, 2021 transcript; NYSCEF Doc No. 66, Grace Campbell aff ¶¶ 47-60). Based upon this prior review, as well as its review of the revised EAF, the Town Board found that the project might cause several moderate to large impacts to the environment, which included a projected increase in traffic which may exceed the capacity of the existing road network; land use which may differ from or sharply contrast with current surrounding land use patterns and which is inconsistent with local land use plans and zoning regulations; and inconsistencies with the existing character of the community (see NYSCEF Doc No. 25, full environmental assessment form, at part 2, [13] [a], [17] [a], 18 [e]).[3] As evidenced by the detailed written findings set forth in Part 3 of the EAF, the Town Board considered each of these potential impacts and, relying on evidence in the record which included professional studies, rationally concluded that there would be no

[3] In contrast to the prior proceeding, the Town Board did not note degradation of habitat used by rare, threatened, or endangered species as a potential moderate to large impact in its review of part 2 of the EAF; however, this potential impact was nevertheless considered, and addressed at length, in its written findings (see NYSCEF Doc No. 25, revised EAF at 29-30).

significant environmental impact (see Matter of Heights of Lansing, LLC v Village of Lansing, 160 AD3d 1165, 1167-1168 [2018], citing Matter of Village of Chestnut Ridge v Town of Ramapo, 99 AD3d 918, 925-926 [2012], lv dismissed and denied 20 NY3d 1034 [2013]; Matter of Ellsworth v Town of Malta, 16 AD3d 948, 950 [2005]).

Petitioner's argument that the Town Board improperly overlooked additional areas of environmental concern (see NYSCEF Doc No. 1, petition, ¶ 87) is unavailing because he failed to provide any evidence, such as expert opinions, demonstrating that the Town Board's determination of no significant environmental impact in these areas was improper. "An agency complying with SEQRA need not investigate every conceivable environmental problem; it may, within reasonable limits, use its discretion in selecting which ones are relevant" (Matter of Save the Pine Bush, Inc. v Common Council of City of Albany, 13 NY3d 297, 307 [2009] [citation omitted]).

The third and fifth claims are based on the allegation that the rezoning law improperly amended Zoning Code § 24-532 by removing a requirement that the Planning Board approve a site plan before a PDD can be authorized by the Town Board. The fourth claim is based on the related allegation that the Town Board failed to refer the rezoning law to the Planning Board in violation of Zoning Code § 24-532. These claims are largely made in response to respondents' contention that separate site plan review by the Planning Board is not required for approval of a PDD because the Town Board reserved to itself the power to review and approve all projects located in a PDD (see NYSCEF Doc No. 66, Grace Campbell aff, ¶¶ 82-86; NYSCEF Doc No. 69, respondents' memorandum of law at 5). Resolution of these competing claims turns on the role the Town Board assigned to the Planning Board when it enacted the PDD ordinance. There are two alternatives: (1) that the Town Board delegated to the Planning Board the authority to make mandatory findings, thereby making Planning Board approval a condition precedent to the

Town Board's authority to approve a PDD; or (2) that the Town Board assigned the Planning Board only an advisory role, thereby effectively reserving to itself the sole authority to act on PDD applications.

The Zoning Code provides that a PDD may be established for the purpose of promoting integrated site planning of tracts of land comprised of 10 or more acres (see Zoning Code § 24-531) in accordance with a three-step procedure which requires: (1) filing of a written application with the administrative officer that includes, among other things, a site plan for the proposed district; (2) review of the application by the Planning Board, which "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 which it] 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" the Zoning Code; and (3) action by the Town Board, which may amend the Zoning Code to approve the PDD (Zoning Code § 24-532). The first step in determining the role assigned to the Planning Board is to consider the language of the ordinance, which is not a model of clarity and includes language that is facially ambiguous. On one hand, it provides that the Planning Board may "approve, approve with stated conditions or disapprove an application," terms which suggest that decision-making authority was delegated to the Planning Board. On the other hand, the ordinance provides that the Planning Board "may recommend" conditions or restrictions, which suggests that the Planning Board's role is merely advisory.

In light of this ambiguity, it is necessary to consider the legislative intent by reference to the principles under which a Town Board may delegate its legislative authority. It is well-settled that "legislative delegations of power to administrative bodies are legitimate so long as adequate standards exist to channel the exercise of that power. The standards need only be

prescribed in so much detail as is reasonably practicable in light of the complexities of the area to be regulated" (Matter of Troy Sand & Gravel Co., Inc. v Town of Sand Lake, 185 AD3d 1306, 1316 [2020], lv denied 36 NY3d 913 [2021] [internal quotation marks, brackets, and citations omitted]; see Matter of Schimmel v Biscone, 107 AD2d 915, 916 [1985]). The Zoning Code provides no standards whatsoever to guide the Planning Board in determining whether to "approve, approve with stated conditions or disapprove an application" (Zoning Code § 24-532 [b]), and the observation that the Planning Board may consider the general objectives of the Zoning Code in deciding whether to recommend any conditions similarly fails to provide the Planning Board with intelligible standards (see e.g. Dur-Bar Realty Co. v City of Utica, 57 AD2d 51, 55-56 [1977] affd 44 NY2d 1002 [1978]; Marshall v Village of Wappingers Falls, 28 AD2d 542, 542-543 [1967]). Accordingly, by failing to provide standards to guide the actions of the Planning Board when it enacted the PDD ordinance, the Town Board reserved to itself the sole authority to approve or deny a PDD application.[4] This determination – that the PDD ordinance, as originally enacted, provides the Planning Board with only an advisory role – defeats petitioner's third and fifth claims which assert that the rezoning law improperly amended the PDD ordinance. Further, the fourth claim likewise fails because the procedure established by the PDD ordinance was satisfied by the Planning Board's review of the PDD application and its August 26, 2020 letter to the Town Board recommending approval of the PDD application with stated conditions.

[4] Compare Webster Assoc. v Town of Webster, 59 NY2d 220 (1983) (legislative authority was delegated by an ordinance that set forth a detailed procedure which clearly established that planning board approval was a condition precedent to town board action on a planned development district application and, further, required that upon any approval by the town board, the final plans must be approved by the planning board) with Matter of Troy Sand & Gravel Co., Inc. v Town of Sand Lake, 185 AD3d 1306 (there was no legislative delegation of authority where the ordinance mandated that the planning board make required findings and "recommend" approval, approval with modifications, or disapproval of any planned development district application).

The sixth claim alleges that the Town Board's approval of the rezoning law without referral to the County Planning Department in accordance with Town Law § 264 (3) and General Municipal Law §§ 239-l and 239-m was arbitrary and capricious. As set forth above, after the revised PDD application was submitted in January 2020, it was referred by the Town Board to the County Planning Department. By letter dated March 13, 2020, the County Planning Department recommended denial of the project as submitted (see NYSCEF Doc No. 37 in the prior proceeding). "[A]n 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 . . . board should have the opportunity to review and make recommendations on the new and revised plans" (Matter of Coalition for Cobbs Hill v City of Rochester, 194 AD3d 1428, 1436 [2021] [internal quotation marks, brackets, ellipsis, and citation omitted], lv denied, 198 AD3d 1338 [2021]). Petitioner failed to demonstrate that the changes in the revised EAF part 1, discussed above, constituted a modification of the project of such magnitude as would warrant a further referral to the County Planning Department (see Matter of Friends of Woodstock v Town of Woodstock Planning Bd., 152 AD2d 876, 881 [1989]; cf. Matter of Calverton Manor, LLC v Town of Riverhead, 160 AD3d 842, 845 [2018] [new referral required where referred version of proposed local law reserved details regarding mapping of districts and final version mapped those districts]; Matter of Ferrari v Town of Penfield Planning Bd., 181 AD2d 149, 153 [1992] [new referral required where planning board deemed revised subdivision plat so substantially different from initial submission that it convened third public hearing regarding the revised plans]).

The seventh and final claim alleges that the rezoning law constitutes illegal spot zoning.

> "Spot zoning is 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 said property to the detriment of other owners. In evaluating a claim of spot zoning, courts 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 inquiry is whether the challenged zoning is other than part of a well-considered and comprehensive plan calculated to serve the general welfare of the community" (61 Crown St., LLC v City of Kingston Common Council, 206 AD3d 1316, 1320 [2022] [internal quotation marks and citations omitted]).

As a legislative act, the rezoning law enjoys a strong presumption of constitutionality which the petitioner has the burden of overcoming beyond a reasonable doubt (see Matter of Heights of Lansing, LLC v Village of Lansing, 160 AD3d at 1168).

Petitioner failed to meet his heavy burden. The Town of Vestal has not adopted a comprehensive plan. The ordinance enabling the establishment of PDDs was enacted in 1966 "for the purpose of promoting integrated site planning of tracts of land ten (10) acres or more in area" (Zoning Code § 24-531; see Town Law § 261-c). In reaching its determination that rezoning the 42 acres at issue herein from rural residential to PDD was appropriate, the Town Board considered the consistency of the project with community plans and the existing community character, and noted that the project's residential character was consistent with the predominantly residential use of the surrounding area and that the project would benefit the general welfare of the community by providing high-quality, multi-family housing and by extending public water and sewer service in the Town, thereby leading to an elimination of individual septic systems (see NYSCEF Doc No. 37, April 14, 2021 transcript at 31-35; NYSECF Doc No. 62, April 27, 2022 transcript at 59-62). Notably, the Zoning Code specifies that limitation on development in the rural residential district is based on the legislative determination that "[r]esidential development in approved subdivisions with public sewer and water is more desirable than rural residential development" (Zoning Code § 24-183 [b] [1]). The Town Board also found that the project was consistent with the Broome County comprehensive plan because it will provide multi-family housing and amenities that appeal to

university students and recent graduates, which are in high demand in the community. Based on the foregoing, the Town Board rationally concluded that the rezoning law was consistent with the Town's plans and calculated to benefit the community as a whole (see e.g. Matter of Baumgarten v Town Bd. of Town of Northampton, 35 AD3d 1081, 1083-1084 [2006]).

Petitioner's remaining contentions have been considered and found to lack merit. Based upon the foregoing, the petition is hereby dismissed.

This decision constitutes the order and judgment of the court. The filing of this decision, order, and judgment, or transmittal of copies hereof, by the court shall not constitute notice of entry (see CPLR 5513).

Dated: November 9, 2022
Cortland, New York

ENTER

MGML

Digitally signed by Hon. Mark G. Masler
DN: C=US, OU=Cortland County Supreme Court, O=Sixth Judicial District, CN=Hon. Mark G. Masler, E=crtmasler_chambers@nycourts.gov
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HON. MARK G. MASLER
Supreme Court Justice

The following documents filed with the Clerk of the County of Cortland via New York State Courts Electronic Filing System were considered in this proceeding (see CPLR 2219 [a]):

Document Numbers 1-5; 7-39; 44-45; 46, including the record of the prior proceeding incorporated therein; 47-68; 70.