SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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In the Matter of the Application of
1216 HENRY AVE, LLC

For a Judgment Pursuant to Article 78 of the C.P.L.R.,

DECISION & ORDER
INDEX NO. 59508-2016
(Final Dispo. Seq. 1 & 2)

Petitioner,

-against-

THE VILLAGE OF MAMARONECK PLANNING BOARD COMPRISED OF STEWART STERK, CHAIRMAN, LEE WEXLER, LOUIS MENDES, INGEMAR SJUNNEMARK, JOHN VERNI,

Respondents.

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MINIHAN, J.

New York State Courts Electronic Filing ("NYSCEF") Doc. Nos. 1 through 29 were read on this petition pursuant to Article 78 (NYSCEF Doc. No. 1) brought by petitioner, 1216 Henry Ave, LLC, for an order vacating the June 8, 2016 conditional negative declaration in connection with petitioner's subdivision application made by respondents, The Village of Mamaroneck Planning Board Comprised of Stewart Sterk, Chairman Lee Wexler, Louis Mendes, Ingemar Sjunnemark, John Verni.

Upon the foregoing papers, for the reasons articulated hereinafter, the petition is dismissed insofar as the petitioner has failed to demonstrate that the determination is ripe for adjudication.

Factual and Procedural Background

Petitioner brings this verified petition pursuant to CPLR 78 and Village Law 7-740 seeking to annul the Conditioned Negative Declaration (hereinafter "CND") dated June 8, 2016 issued by the Village of Mamaroneck Planning Board and filed with the Village of Mamaroneck Clerk on June 9, 2016.

Petitioner is a New York Limited Liability Company and the fee owner of 17,500 acres of property located at 1216 Henry Avenue Mamaroneck, New York also designated as section 4, block 49 and lot 9 on the Village of Mamaroneck tax map (hereinafter "the premises"). On February 9, 2015, petitioner submitted a subdivision application to the Planning Board to create

three residential lots which would be inclusive of the existing single-family dwelling. The square footage of each proposed lot is 5,776 (lot 1); 5,973 (lot 2) and 5,752 (lot 3). Petitioner alleges that based on the schedule of minimum requirements for residential districts in the Village Code, it has the right to erect a 3,177 square foot house on lot 1; a 3,285 square foot house on lot 2 and a 3,164 square foot house on lot 3. Petitioner alleges that each of the proposed dwellings has a lot coverage of 27.5% which is less than the maximum permissible coverage of 35% under the code. According to the petitioner, the subdivision application provided to the Planning Board included a zoning analysis demonstrating that the proposed site improvements and plat were zoning compliant.

On February 18, 2016, the Village of Mamaroneck issued a certificate of occupancy for the existing single-family dwelling. On April 12, 2016, the Planning Board in connection with petitioner's subdivision application made its determination of significance pursuant to the State Environmental Quality Review Act ("SEQRA") by adopting a CND. A CND is a negative declaration issued by a lead agency[1] for an unlisted action[2] in which the action as initially proposed may result in one or more significant adverse environmental impacts; however, mitigation measures identified and required by the lead agency, pursuant to the procedures in Part 617 of SEQRA, will modify the proposed action so that no significant adverse environmental impacts will result[3].

On June 8, 2016, after more than a year of public hearings, the Planning Board adopted the CND imposing conditions[4] including the following: (1) a limitation on the floor to area ratio

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[1] A lead agency is an involved agency principally responsible for undertaking, funding or approving an action, and therefore responsible for determining whether an environmental impact statement is required in connection with the action, and for the preparation and filing of the statement if one is required (6 NYCRR 617.7 [u]).

[2]Unlisted action "means all actions not identified as a Type I or Type II action in [Part Part 617], or, in the case of a particular agency action, not identified as a Type I or Type II action in the agency's own SEQR procedures" (6 NYCRR 617.2 [ak]). Type II actions are not subject to SEQRA where Type I actions may require preparation of an environmental Impact Statement. Upon receipt of the application, the Lead Agency designates the type and determines the significance of any Type I or Unlisted action (6 NYCRR 617.7).

[3] So long as the lead agency identifies the relevant areas of environmental concern, takes a "hard look" at them to determine whether there may be a significant effect on the environment and sets forth in writing the basis for its determination of significance, it has met its SEQRA obligation (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417 [1986]; 6 NYCRR 617.6 [g][2]).

[4]Petitioner is not challenging other conditions imposed by the CND such as the rock removal restrictions and the storm water management conditions.

(FAR) on lots 1 and 2 to 2,500 square feet including the garage; and (2) a requirement that there must be a distance of 22 feet between the existing residence on lot 2 and the proposed new residences on lots 1 and 3.

In this proceeding, petitioner challenges the CND contending that it is non-compliant as it imposes unauthorized conditions. Petitioner contends that the CND limits the allowable FAR for the residences on lots 1 and 3 which is beyond the scope of its powers under either Village Law 7-730 or the Mamaroneck Village Code Chapter 348. Petitioner further claims that the CND imposes an improper condition that there be a distance of 22 feet between the existing residence on lot 2 and the proposed new residences on lots 1 and 3 which is also beyond the scope of the powers granted to the Board. As such, petitioner claims that the Board has issued a "de facto" illegal CND whereby it re-wrote zoning regulations and exceeded its powers. Petitioner states that the Planning Board found no potential adverse environmental impacts of the project after submission of the EAF, yet still summarily decided to impose the CND on grounds which included "community character[5]." By doing so, the petitioner claims that the Board misinterpreted SEQRA utilizing it to limit the size of the proposed residences.

Petitioner contends that the Planning Board's issuance of the CND was unauthorized as Planning Boards are without power to interpret or implement the local zoning law as that power is vested solely with local building officials and the Zoning Board of Appeals pursuant to Village Law.

By notice of motion, respondents move to dismiss the petition pursuant to CPLR Section 3211(a)(2) and 7804(f) on the grounds that the CND is not a final determination and is otherwise not ripe for judicial review. By affidavit, respondent Stewart Sterk, a member of the Planning Board, contends that on February 25th, 2015, the Planning Board, as the lead agency determined the proposed subdivision to be an unlisted action in accordance with SEQRA. Respondent Stewart Sterk avers that the Planning Board reviewed the EAF and the revised plans during the public review process. Respondent Sterk also states that the Board considered advice and commentary from Board staff, counsel, consultants and other governmental agencies. The Board as the lead agency (with no objection by petitioner) completed Part II of the EAF identifying potential adverse impacts of the proposed subdivision. An area of environmental concern was the proposed subdivision's consistency with the "community character" of the neighborhood which respondent alleges is specifically protected by SEQRA. To that end, the Board determined that the proposed subdivision had the potential to be out of scale with many surrounding homes and

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[5]With respect to "community character," SEQRA defines "environment" as "the physical conditions which will be affected by a proposed action, including ... existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character" (Environmental Conservation Law 8–0105[6]), and "require[s] a lead agency to consider more than impacts upon the physical environment," including "the potential displacement of local residents" (*Chinese Staff & Workers Assn. v City of New York,* 68 NY2d 359, 366 [1986]).

that coupled with the storm water system and other environmental concerns caused the Board to implement conditions to mitigate the impacts to the environment. The Planning Board adopted the CND concluding that if the conditions set forth in the CND were satisfied, then the revised subdivision application by petitioner would not result in significant environmental impacts.

Respondents argue that this proceeding is not ripe for judicial review because there is no final determination by the Planning Board to either approve or disapprove the petitioner's subdivision application. Respondents contend that absent a determination on the merits of the land use application, the CND is only an interim step in the land use approval.

Petitioner argues that the CND is a final determination ripe for judicial review pursuant to CPLR 7801(1) since it represents a definitive position that impacts petitioner. Specifically, the imposition of the limit of 2,500 square feet of FAR including the garage per residential dwelling lot is in contravention of the Mamaroneck Village Law 7-740 which allows for a maximum FAR of 3,150 square feet, with an additional 400 square feet of exempted garage space, on all lots over 5,000 feet. Petitioner argues that the proposed lots are over 5,000 feet each and the deprivation of permission to build 2 new single-family residences according to existing zoning codes represents a definitive position on an issue resulting in an actual concrete injury.

Petitioner argues that the CND is not subject to further review or administrative action. Petitioner further states that the indefinite delay in the subdivision approval from Harbor Coastal Zone Management, the agency charged to review land development applications in the Village to confirm they do not adversely impact Long Island Sound, is based solely on the issuance of the CND which declares petitioner's plans inconsistent with current Village building code. Petitioner submits the actions of the Harbor Coastal Zone Management are not amenable to further administrative review which further necessitates the instant Article 78 proceeding.

Standard of Review

A CPLR article 78 proceeding to review a determination of a public body or officer must be brought within four months of the date which the determination is "final and binding upon the petitioner" (CPLR 217[1]; CPLR 7801[1]; *see Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of NY*, 5 NY3d 30, 34 [2005]). A determination becomes final when "the decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury" (*Matter of Essex County v Zagata*, 91 NY2d 447, 453 [1998], which is "not amenable to further administrative review and corrective action" (*Matter of City of New York [Grand Lafayette Props. LLC]*, 6 NY3d 540, 548 [2006]).

Specifically, a challenge to a decision made pursuant to SEQRA must be commenced within the four-month statute of limitations (*Matter of Save the Pine Bush v City of Albany*, 70 NY2d 193, 202-203 [1987]; CPLR 217) and is triggered when the Board committed itself to "a definite course of future decisions" (*see Young v Board of Trustees of Vil. of Blaisdell*, 89 NY2d 846 [1996]). A SEQRA determination of significance, such as a positive declaration, negative

declaration or a conditioned negative declaration[6], or the adoption findings statement under the SEQRA, is an interim step in the land use approval process and, as such, is not a final agency action which may be challenged under Article 78 of the CPLR and is otherwise not ripe for judicial review (*Eadie v Town Bd. of Town of North Greenbush*, 7 NY3d 306 [2006]; *Matter of Long Island Pine Barrens Society v Planning Board of the Town of Brookhaven*, 78 NY2d 608 [1991](the Court of Appeals held that the preliminary subdivision approval triggered the statute of limitations to challenge the Board's SEQRA determination); *Patel v Board of Trustees of Incorporated Village of Mamaroneck*, 115 AD3d 862 [2d Dept 2014]); *Gach v City of Long Beach*, 218 AD2d 801 [2d Dept 1995] (The court held that the issuance of SEQRA findings statement, although the final step in the SEQRA process, does not trigger the accrual of the statute of limitations period for a SEQRA challenge, rather it is the date the agency resolves to undertake the action); *Group for the South Fork Inc. v Wines*, 190 AD2d 794 [2d Dept 1993] (The court held that the preliminary subdivision approval, *not the conditioned negative declaration*, triggered the statute of limitations to challenge the Board's SEQRA review of the application).

Most recently the Court of Appeals in *Ranco*, ruled that a challenge to a positive declaration under SEQRA, prior to any decision being made on the underlying re-zoning application, was not ripe for judicial review (*Ranco Sand and Stone Corp. v Vecchio*, 27 NY3d 92, 98 [2016]). The Court of Appeals held that in the context of a challenge to an action pursuant

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[6]In connection with unlisted actions, a lead agency may prepare a conditioned negative declaration provided that it:

> (I) has completed a full environmental assessment form; (ii) has completed a coordinated review in accordance with section 617.6(b)(3); (iii) has imposed SEQR conditions pursuant to section 617.3(b) that have mitigated all significant environmental impacts and are supported by the full EAF and any other documentation; (iv) has published a notice of a CND and a minimum 30-day public comment period has been provided. The notice must state what conditions have been imposed. An agency may also use its own public notice and review procedures, provided the notice states that a CND has been issued, states what conditions have been imposed and allows for a minimum 30-day public comment period; and (v) has complied with the requisite sections of part 617 (6 NYCRR 617.7 [d][1]).

A lead agency must rescind the CND and issue a positive declaration requiring the preparation of a draft EIS if it receives substantive comments that identify: (I) potentially significant adverse environmental impacts that were not previously identified and assessed or were inadequately assessed in the review; or (ii) a substantial deficiency in the proposed mitigation measures (6 NYCRR 617.7 [d][2]). A CND is properly issued when the agencies have made a thorough investigation of the problems involved and reasonably exercised their discretion (*Matter of Cohalan v Carey*, 88 AD2d 77 [2d Dept 1982]).

to SEQRA, a positive declaration is ripe for judicial review when two requirements are satisfied:

> First, the action must impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process. This threshold inquiry entails a pragmatic evaluation . . . of whether the decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury. Second, there must be a finding that the apparent harm inflicted by the action may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party (*Ranco Sand and Stone Corp. v Vecchio*, 27 NY3d 92, 98 [2016] *citing Gordon v Rush*, 100 NY2d 236 [2003]).

Here, the CND is not a final agency determination ripe for judicial review. Respondents have not arrived at a definitive position as they have not issued a final determination as to the underlying subdivision application that could inflict an actual, concrete injury. Petitioner has failed to demonstrate how the CND has a concrete injury particularly since respondents have not made a determination on the underlying subdivision application. Petitioner has failed to demonstrate that the CND has impacted the transfer of the lots in the subdivision since subdivision approval has neither been denied or granted by respondents. Petitioner has not established that the alleged harm inflicted by the CND may not be significantly ameliorated by further administrative action or by other steps available to it. Petitioner's contention that the determination of the Harbor Coastal Zone Management created concrete harm since as it is inconsistent with the LWRP and is not amenable to further administrative review is without merit since petitioner has neither named the Harbor Coastal Zone Management in this proceeding nor has demonstrated that it filed a separate proceeding challenging its determination or that it pursued all administrative remedies.

Based on the foregoing, the article 78 petition is dismissed as premature and is not ripe for adjudication. Since the matter is not ripe, petitioner's other claims are not being considered on the merits.

The foregoing constitutes the opinion, decision and order of this court.

Dated: White Plains, New York
~~January~~ FEB. 7, 2017

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Acting Supreme Court Justice

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