STATE OF NEW YORK
SUPREME COURT

COUNTY OF ULSTER

WILMORITE, INC., PARK POINT NEW PALTZ, LLC, GOSHAWK, LLC, J.A.M. OF NEW WALTZ, INC., FALL LINE LIMIT, LLC, MICHAEL A. MORIELLO AND JEAN MORIELLO,

Petitioners,

DECISION AND ORDER

-against-

PLANNING BOARD OF THE TOWN OF NEW PALTZ,

Respondent.

(Supreme Court, Ulster County, Motion Term, January 9, 2015)
Index No. 14-1896
(RJI No. 55-14-01158)

(Acting Justice Michael H. Melkonian, Presiding)

APPEARANCES: Harris Beach PLLC
Attorneys for Petitioners Wilmorite, Inc. and Park Point New Paltz, LLC
(Joseph D. Picciotti, Esq., of Counsel)
99 Garnsey Road
Pittsford, New York 14534

Bond, Schoeneck and King, PLLC
Attorneys for Petitioner Goshawk, LLC
(Kevin Recchia, Esq., of Counsel)
350 Linden Oaks, Suite 310
Rochester, New York 14625

Riseley & Moriello, PLLC
Attorneys for Petitioners J.A.M. of New Paltz, Inc., Fall Line Limit, LLC, Michael A. Moriello and Jean Moriello
(Michael A. Moriello, Esq., of Counsel)

111 Green Street
Kingston, New York 12402

Jacobowitz and Gubits, LLP
Attorneys for Respondent the Planning Board of the
Town of New Paltz
(George Litheo, Esq., of Counsel)
158 Orange Avenue
P.O. Box 367
Walden, New York 12586

MELKONIAN, J.:

Petitioners commenced this CPLR Article 78 proceeding alleging the determination of respondent the Planning Board of the Town of New Paltz's ("respondent" or the "Planning Board") was arbitrary, capricious, irrational, illegal and an abuse of discretion.

The State University of New York at New Paltz ("SUNY New Paltz") operates a public university campus within the Town of New Paltz. Wilmorite, Inc. ("Wilmorite") is a private real estate company that proposes to develop, finance, construct and operate, through its subsidiary, respondent Park Point New Paltz, LLC ("Park Point"), an off-campus residential development for SUNY New Waltz students, faculty and staff (the "Park Point project"). Respondents Goshawk, LLC, J.A.M. of New Paltz, Inc., Fall Line Limit, LLC, Michael A. Moriello and Jean Moriello are owners or leaseholders of the real property where the Park Point project is proposed to be constructed. Wilmorite has contractual rights to purchase the real property from the fee owners and leaseholders. The project is estimated to cost approximately $67,000.000.00 and contain 226 dwelling units with a total of 696 student beds with an additional 30 dwelling units for faculty and staff.

The formal project process began in 2010, when Park Point, the project sponsor, applied to the Planning Board for site plan and subdivision approval. Housing for students and SUNY New Paltz faculty members has been under discussion for several years. The record contains information concerning SUNY New Paltz's inability to fund the construction of student housing within its budget, which resulted in the Park Point project proposal.

Consistent with its responsibilities under the State Environmental Quality Review Act ("SEQRA"), the Planning Board undertook an initial review of the environmental impacts of the project. The Planning Board named itself lead agency to coordinate the SEQRA review process. In January 2011, the Planning Board as lead agency issued a positive declaration for the project requiring the preparation of an Environmental Impact Statement ("EIS"). Toward that end, a scoping outline was adopted. The Draft Environmental Impact Statement ("DEIS") was submitted in June 2012. After review, the DEIS was accepted as complete. Several public hearings were held and written comments were received. Thereafter, in May 2013, a draft Final Environmental Impact Statement ("FEIS") was submitted by the project sponsor. Upon review and revision by the Planning Board in October 2013, the FEIS was accepted as complete. The Planning Board conducted pubic hearings and solicited written comments on the FEIS. During the review process, several issues such as the project's impact on public water, pubic sewers, traffic patterns and wetlands were raised. Amendments to the plan and other changes addressed substantially all of the issues raised and mitigated most of the impacts of the project. The fiscal impact

of the project upon the Town of New Paltz is the prime focus of this lawsuit.

In February 2013, Park Point applied to the Ulster County Industrial Development Agency ("IDA") for an exemption from certain sales, use, property transfer and mortgage taxes associated with the project pursuant to a Payment in Lieu of Tax Agreement ("PILOT"). This PILOT would remove the project from the normal tax assessment upon private real property. When the project was first proposed, it was intended to remain on the tax rolls as fully taxable. The proposed IDA tax exemption would result in substantially less revenue to the Town of New Paltz than had the Park Point project remained on the tax rolls. The IDA adopted rules which based a PILOT on a schedule of payments due upon the number of beds times an amount between $450.00 and $750.00 per bed. The IDA approved the request for a PILOT determining that the project would contain 696 units or beds and each bed would be subject to an annual PILOT charge of $750.00. The Pilot agreement would run for 25 years. The faculty and staff dwelling units would be subject to full tax assessment and not part of the PILOT agreement.

In April 2014, the Planning Board issued a draft Findings Statement. The Findings Statement approved the project on the condition that it not be subject to a Category 5 PILOT from the IDA. The Planning Board determined that if granted, the PILOT agreement would cause significant adverse fiscal impacts upon community services. In May 2014, the Planning Board adopted Amended Findings. The Amended Findings eliminated the condition that the project not be subject to the IDA PILOT agreement. However, by the date

of the adoption of Amended Findings, the IDA had approved the PILOT agreement rendering the condition contained in the April Findings Statement academic. The Planning Board also adopted a resolution denying approval of the Park Point project. This Article 78 proceeding challenging the denial of the project was thereafter commenced.

The Legislature's stated purpose in enacting SEQRA was to "declare a state policy which will encourage productive and enjoyable harmony between [people and their] environment; to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of the ecological systems, natural, human and community resources important to the people of the state" (Environmental Conservation Law ["ECL"] § 8-0101). Thus, the primary purpose of SEQRA "is to inject environmental considerations directly into governmental decision making" (Matter of Coca-Cola Bottling Co. v Board of Estimate, 72 NY2d 674, 679 [1988]; see, also, Akpan v Koch, 75 NY2d 561, 569 [1990]). In furtherance of that purpose, the information obtained by lead agencies through the SEQRA process enables State and local officials to intelligently "assess and weigh the environmental factors, along with social, economic and other relevant considerations in determining whether or not a project or activity should be approved or undertaken in the best over-all interest of the people of the State" (Matter of Town of Henrietta v Department of Envtl. Conservation, 76 AD2d 215, 222 [1980]). SEQRA seeks to "strike a balance between social and economic goals and concerns about the environment" (Matter of Jackson v New York State Urban Dev. Corp., 67 NY2d

400, 414 [1986]), by requiring an agency to engage in a systematic balancing analysis in every instance Matter of Town of Henrietta v Department of Envtl. Conservation, 76 AD2d 215, 223 [1980]).

If an agency proposes to approve a project, it must consider the FEIS and prepare written findings that the requirements of SEQRA have been met (ECL § 8- 0109 [8]). It must also prepare a written statement of the facts and conclusions in the FEIS and comments relied upon and the social, economic and other factors and standards which form the basis of its decision (6 NYCRR § 617.9 [c]). Stated differently, the agency must take a sufficiently "hard look" at the proposal before making its final determination and must set forth a reasoned elaboration for its determination (see, Akpan v Koch, 75 NY2d 561 [1990]; Matter of Jackson v New York State Urban Dev. Corp., 67 NY2d 400 [1986]). Where an agency determines to rejects a proposed project, it must likewise take a sufficiently "hard look" at the proposal and set forth a reasoned elaboration for its determination (see, Matter of Jackson v New York State Urban Dev. Corp., 67 NY2d 400, 416 [1986])

The often stated rule regarding the Court's role in reviewing SEQRA determinations needs no extended discussion; it is not to weigh the desirability of any proposed action or to choose among alternatives and procedural requirements of SEQRA and the regulations implementing it (Matter of Village of Westbury v Department of Transp., 75 NY2d 62, 66 [1989]), but to determine whether the agency took a "hard look" at the proposed project and made a "reasoned elaboration" of the basis for its determination (Matter of Jackson v New

York State Urban Dev. Corp., 67 NY2d 400 [1986]). Where an agency fails to take the requisite hard look and make a reasoned elaboration, or its determination is affected by an error of law, or its decision was not rational, or is arbitrary and capricious or not supported by substantial evidence, the agency's determination may be annulled (see, CPLR § 7803 [3]; Chinese Staff & Workers Assn. v City of New York, 68 NY2d 359, 363 [1986]).

The "hard look" requirement is a judicially imposed requirement deriving from early Federal Court decisions relating to the Federal National Environmental Policy Act of 1969, 42 USCA 4332, the statute on which SEQRA was based (see, Natural Resources Defense Council, Inc. v Morton, 458 F.2d 827 [DC Cir. 1972]). This "hard look" standard has thereafter been regularly expressed, although not expressly explained. The rule is easier stated than applied. Natural Resources Defense Council's language was imported into New York jurisprudence relating to SEQRA by Lincoln West, Inc., v City of New York, 94 AD2d 483 [1st Dept. 1983], aff'd, 60 NY2d 805 [1983]) which, in turn, was followed by the Court of Appeals in Matter of Jackson v New York State Urban Dev. Corp, 67 NY2d 400 (1986). In none of these cases is the term "hard look" defined, except that the standard means that the agency must not treat the matter in a trivial or superficial way. In Natural Resources Defense Council, Inc. v Morton, expert studies were commissioned to provide the agency with information to consider in making its determination. Requiring expert reports on potential environmental impacts was considered by the Court to be a "hard look." Other than requiring expert studies or reports, there is no easy standard to apply to the "hard look"

requirement.

The instant petition blends SEQRA claims and administrative law claims. In their first cause of action, petitioners contend that the Planning Board's determination that the PILOT will result in significant adverse impacts upon community services that can not be mitigated is illegal, arbitrary and capricious, an abuse of discretion, and/or made in violation of law and lawful procedure. In their second cause of action, petitioners contend that the denial of site plan approval is erroneously based upon the May 2014 Findings Statement. In this regard, petitioners argue that the Planning Board has no authority to negotiate or approve PILOT agreements. Petitioners argue that the IDA has exclusive jurisdiction over PILOT agreements and in this regard, argue that the Planning Board has overstepped its bounds. Petitioners further argue that the Planning Board's condition that there be no PILOT for the Park Point is unlawful. In this regard, petitioners argue that to allow a planning board the authority to deny a project because an IDA has allowed a tax abatement would undermine the authority of an IDA. Petitioners argue that the granting of the PILOT involves purely competitive economic factors, which are not subject to SEQRA. Petitioners further contend that there is no factual support in the record for a finding by the Planning Board of any adverse fiscal impacts. In opposition, respondent denies that it acted unlawfully or that it's determination was arbitrary or capricious.

The Planning Board, as lead agency, has a broad role in evaluating the impacts of the project. The IDA, as an involved agency, has a limited role in approving tax abatements as

an inducement to the construction and financing of the project. Each entity has separate authority over approvals for the project. It is not unusual for a project to require approvals by more than one agency. Denial by one involved agency may doom a project despite approvals by other involved agencies. Here, the Planning Board is obligated under SEQRA to determine the fiscal impact of the PILOT granted by the IDA upon the town, the village and the school district. The Planning Board has no ability to dictate to the IDA whether or not to grant a tax exemption or to dictate the terms of a PILOT granted by the IDA. It may, however, disagree with the IDA over the fiscal impact of the PILOT upon the municipalities involved. Assuming that the Planning Board's determination is based upon evidence in the record, it can come to conclusions differing from another involved agency. Here, the Planning Board concluded that the revenues coming to the town and school district under the PILOT were insufficient to maintain local services. The Planning Board further concluded that local services may actually be decreased because of the state imposed 2% tax cap. The PILOT payments are counted as tax revenue, but the assessed value of the project does not increase the real property tax base upon which the 2% tax cap is calculated. These findings are based upon an expert report, information provided by the Town Supervisor, the Police Chief and other public officials. The conclusion also is based upon the fixed amount of the PILOT for twenty-five (25) years. The report sets forth in detail the increase in the cost of various services in past years and concludes that the costs are likely to increase over the twenty-five (25) year life of the PILOT. Also considered is the division of the PILOT

between the various taxing entities involved. This conclusion is made by Planning Board members as public officials upon public services. The record clearly shows that the Planning Board took the required "hard look" at the fiscal impact of Park Point upon the town and the school district. There is nothing in the record to support respondents' claim that the Planning Board unlawfully usurped the authority of the IDA. The IDA set the PILOT. The Planning Board simply determined that the amount and terms set by the IDA were insufficient to mitigate the adverse fiscal impacts. Both of these determinations were within the discretionary authority of each agency. Nothing requires that one defer to the other.

The decision does not involve economic competition between private entities and the cases cited by petitioners arguing the respondent lacks authority to consider economic issues have no application to this situation. Likewise, the claim that respondent improperly amended its Findings is without merit (see, 6 NYCRR § 617.11(a); see, also, Matter of Town of Woodbury v County of Orange, 114 AD3d 951 [2nd Dept. 2014]).

Agencies and local boards have broad discretion in considering applications and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary or an abuse of discretion (Ifrah v Utschig, 98 NY2d 304 [2002]); Matter of Sasso v Osgood, 86 NY2d 374 [1995]). A board's determination may not be set aside in absence of illegality, arbitrariness or abuse of discretion, and such determination will be sustained if it has a rational basis and is supported by substantial evidence (SoHo Alliance v New York City Board of Standard and Appeals, 95 NY2d 437 [2000]). The reviewing Court in a

proceeding pursuant to CPLR Article 78 will not substitute its judgment for that of the local Board unless it clearly appears to be arbitrary, capricious, or contrary to the law (Massa v City of Kingston, 235 AD2d 947 [3rd Dept. 1997]). Also, the Court must give deference to factual evaluations within an agency's area of expertise (Matter of City of Rensselaer v Duncan, 266 AD2d 657 [3rd Dept. 1999]).

Here, the record supports the Planning Board's assertions that it properly followed SEQRA. Petitioners' claims that the Planning Board acted illegally or abused its discretion in denying site plan approval for the Park Point project are wholly refuted by the record.

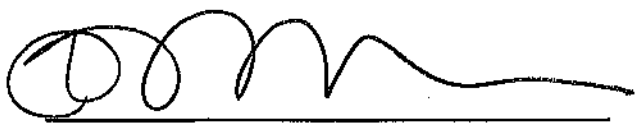
The Court considered all other issues raised in the petition not specifically addressed herein and finds them to be without merit. Petitioners disagree with the factual findings made by the Planning Board, but raise no valid legal basis for vacating its determination.

Accordingly, it is **ORDERED** that the petition is dismissed without costs.

This constitutes the Decision and Order of the Court. This Decision and Order is returned to respondent's counsel. All other papers are delivered to the Supreme Court Clerk for transmission to the County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry. This Memorandum constitutes the Decision and Order of the Court.

SO ORDERED.
ENTER.

Dated: Troy, New York
March 17, 2015



MICHAEL H. MELKONIAN
Acting Supreme Court Justice

Papers Considered:

(1) Order to Show Cause dated June 19, 2014;
(2) Verified Petition dated June 18, 2014, with exhibits annexed;
(3) Verified Answer dated August 11, 2014;
(4) Affirmation of Joseph D. Picciotti, Esq., dated June 19, 2014;
(5) Affirmation of Michael A. Moriello, Esq., dated June 12, 2014, with exhibits annexed;
(6) Affirmation of Thomas W. Daniels, Esq., dated June 18, 2014;
(7) Affidavit of L. David Rooney dated June 17, 2014;
(8) Petitioners' Memorandum of Law dated June 18, 2014;
(9) Affidavit of Michael Calimano dated August 11, 2014, with exhibits annexed;
(10) Affidavit of Susan Zimet dated August 11, 2014, with exhibits annexed;
(11) Affidavit of David Clouser dated August 4, 2014;
(12) Affidavit of Kent Gardner dated August 1, 2014, with exhibits annexed;
(13) Affirmation of George Lithco, Esq., dated August 11, 2014, with exhibit annexed;
(14) Respondent's Memorandum of Law dated August 27, 2014;
(15) Affirmation of Michael A. Moriello, Esq., dated September 10, 2014;
(16) Affidavit of Erica L. Marks dated September 11, 2014;
(17) Affidavit of Jean Moriello dated September 10, 2014;
(18) Affirmation of Michael A. Moriello, Esq., dated September 10, 2014;
(19) Affidavit of Thomas W. Daniels dated September 12, 2014, with exhibits annexed;
(20) Affidavit of Douglas B. Eldred dated September 12, 2014, with exhibits annexed;
(21) Affirmation of Michael A. Moriello, Esq., dated September 10, 2014;
(22) Memorandum of Law dated September 12, 2014;
(23) Binders 1, 2, 3, 4;
(24) Appendices; and
(23) Certification of administrative record and record.