Matter of Oyster Bay Associates Limited Partnership v Town Board of Town of Oyster Bay
2002 NY Slip Op 30017(U)
July 8, 2002
Supreme Court, Suffolk County
Docket Number: 0016830/6830
Judge: James M. Catterson
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SHORT FORM ORDER

INDEX NO. 16830/01

SUPREME COURT - STATE OF NEW YORK
IAS PART XXXVIII SUFFOLK COUNTY

COPY

PRESENT:
Honorable JAMES M. CATTERSON

R/D 08-03-01
MOTION NO. 001 MG

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In the Matter of the Application **of** OYSTER BAY ASSOCIATES LIMITED PARTNERSHIP and WPIX INC.,

Petitioners,

For a Judgment to Article 78 of the Civil Practice Law and Rules

-against-

THE TOWN BOARD OF THE TOWN OF OYSTER BAY and THE TOWN ENVIRONMENTAL QUALITY REVIEW COMMISSION,

Respondents.

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Upon reading and filing the following papers in this matter: (1) Notice of Petition dated July 11,2001 and supporting papers (including Petitioners' Memorandum of Law in Support of Article 78 Petition to Annul Town Board Denial of Special Use Permit) by petitioners; (2) Verified Answer dated September 7,2002 by Town of Oyster Bay; (3) Affirmation Relating to Objections in Point of Law dated September 11,2001 by Town of Oyster Bay; (4) Respondent Town Board of the 'Townof Oyster Bay Memorandum of Law; (5) Petitioners' Reply Memorandum of Law in Further Support of Article 78 Petition to Annul Town Board Denial of Special Use Permit; (6) Memorandum of Law of Intervenors-RespondentsIn Opposition to Petition; (7) Petitioners' Memorandum of Law in Response to Intervenors-Respondents' Memorandum of Law; (8) Letter from petitioners dated March 21,2002; and now,

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing, the motion is decided as follows:

ORDERED that the determination by the Town Board of the Town of Oyster Bay is hereby vacated and the matter is remitted to the Town Board for further proceedings not inconsistent with this decision. It is further

ORDERED that the petitioners are directed to serve a copy of this decision and order upon all parties with 'Notice of Entry.

The petitioners seek to annul the June 12,2001 decision by the Town Board of the Town of Oyster Bay (hereinafter referred to as "the Town Board") in which the Town Board denied the petitioners' application for a special use permit to construct a retail fashion mall on a moribund industrial site. The site is located along the North Service Road of the Long Island Expressway in Syosset, New York. The boundaries to the property in issue are Robbins lane (a two-way four-lane road) to the west, the Long Island Railroad right-of-way to the north, the North Service Road of the Long Island Expressway to the south, and the Syosset Landfill and the Town of Oyster Bay Department of Public Works maintenance facility to the east. The area immediately surrounding the site consists of industrial and commercial uses. The site had been owned by the Cerro Wire and Cable Company which manufactured steel electrical conduits, hot rolled copper rods, and steel strips for use by the construction industry. The manufacturing operation terminated in 1986, and over the next seven years the property went through decommissioning, listing as an inactive hazardous waste site by the new York State Department of Environmental Conservation (hereinafter referred to as "the DEC"), clean-up of the site, and delisting by the DEC making the site suitable for development without restriction.

As originally proposed, the project consisted of 960,000 square feet in a single two-level building, anchored by three nationally recognized upscale fashion department stores (which would occupy approximately 540,000 square feet, with the remaining 420,000 square feet consisting of smaller shops, restaurants, and service functions). "As-of-right" permitted uses in this industrial district include light industry (warehousing and light manufacturing), a 1.4 million square foot office building, and a 1.6 million square foot hospital operating twenty-four hours a day, seven days a week. While a special use permit is required, no variances are needed.

The Town Board as the lead agency determined that because the project may have a significant impact on the environment, the State Environmental Quality Review Act (hereinafter referred to as "SEQRA") was implicated, and that the petitioners were required to prepare a Draft Environmental Impact Statement (hereinafter referred to as "the DEIS"). The Town Environmental Quality Review Commission (hereinafter referred to as "the TEQR Commission"), acting at the direction of the Town Board and pursuant to SEQRA, held a public scoping session to delineate the issues to be addressed in the DEIS, and issued a Final Scoping Memorandum in March of 1998.

The petitioners prepared an exhaustive DEIS (complete with voluminous supporting appendices containing the studies identified in the DEIS) dealing with the issues identified in the Final Scoping Memorandum. The DEIS examined twenty-five road intersections, road

movements, groundwater, soil, air, noise, socioeconomic issues and development alternatives. On December 14, 1999, the Town Board accepted the DEIS with respect to its scope, content and adequacy for the purpose of SEQRA and local TEQR Laws.

Pursuant to the regulations under SEQRA, a public hearing was held before the TEQR Commission on January 27,2000 to solicit comments on the DEIS. The petitioners prepared a Final Environmental Impact Statement (hereinafter referred to as "the FEIS") addressing the comments received following the DEIS, in which the petitioners, inter alia, reduced the size of the project to 860,000 square feet by eliminating one of the anchor stores. The TEQR Commission also prepared its own FEIS to address issues raised by the DEIS during the public review. Involved in this process were other interested agencies such as the New York State Department of Transportation (hereinafter referred to as "the NYSDOT") and the Nassau County Department of Public Works. The complete FEIS (comprised of the petitioners' FEIS, the TEQR Commission's FEIS, written comments received regarding the DEIS, and the transcript of the public hearing) was accepted by the Town Board on June 13,2000. A twenty-five day review period ensued pursuant to SEQRA regulations, for the review of the complete FEIS by involved agencies and interested parties.

At the end of the review period, the TEQR Commission issued a recommended Statement of Environmental Findings pursuant to SEQRA and TEQR regulations on July 25,2000 (hereinafter referred to as "the Findings Statement"), in which the Commission supported the project on virtually every consideration raised pursuant to the SEQRA process as identified in the DEIS and complete FEIS.

On September 7,2000 a public hearing was held[1] and strong opposition to the project was presented by civic groups, legal counsel, and many others. The record was held open for thirty days to solicit any further comments and rebuttal. At some point afterwards, the Town Board requested that the TEQR Commission review the information received subsequent to its Findings Statement of July 25,2000. In compliance with the Town Board's direction, the TEQR Commission rescinded and annulled its Findings Statement "in light of additional information and analyses relevant to important environmental issues that subsequently have emerged, either in response to comments and questions regarding the Commission's earlier report, or as part of the record of statements and documents compiled during the Town Board's zoning hearing process." The new /Statement of Environmental Findings (hereinafter referred to as "the revised Findings Statement") issued January 16,2001, found that a number of potential traffic and transportation impacts were not adequately addressed in the earlier Findings Statement, and that, despite the earlier conclusions, there would be a significant adverse impact in several areas. The revised Findings Statement also reached different conclusions from the earlier Findings Statement in regards to land use and zoning. In the earlier Findings Statement the TEQR Commission did not *take* issue with the density of the proposed mall (and, indeed, noted that there were numerous malls, including one in Nassau County, that are developed at higher

[1]The hearing continued until 4:00 a.m. on the morning of September 8th.

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density). However, in the revised Findings Statement the Commission found that the density (pursuant to a floor area ratio chart) suggests that the proposed mall is too large in relation to the Cerro property. Furthermore, in the revised Findings Statement, the Commission set forth "Community Character" as a separate impact topic not previously considered in the earlier Findings Statement. The Commission found that there could be an adverse impact on local crime rates and in the overall "quality of life" in regards to "traffic-related concerns." Finally, in the revised Findings Statement, the Commission found that, despite its earlier conclusions, there could be adverse impacts upon existing retail facilities and residential real estate values.

In response to the revised Findings Statement dated January 16,2001, the petitioners requested that the TEQR Commission consider a mitigation proposal that reduced the square footage of the proposed mall by 110,000 square feet to 750,000 square feet of retail space, which, according to the petitioners, further reduced any adverse effects of the project. On May 8,2001, the Town Board issued its own findings (hereinafter referred to as "the Town Board Findings") in which it adopted, with modifications, the TEQR Commission's revised Findings Statement and declined to consider the mitigation proposal as "insufficient and untimely." Thereafter, the petitioners submitted another letter to the Town Board dated May 21,2001 with an Expanded Environmental Assessment Form and supplemental analyses in support of the mitigation proposal of 750,000 square feet. On June 12,2001, the Town Board issued its decision (hereinafter referred to as "the Decision") denying the petitioners' application and refusing to consider the mitigation proposal. This Article 78 petition to vacate the Town Board's Decision followed.

The petitioners argue that the Decision is arbitrary, capricious and not supported by substantial evidence. The respondents and intervenors* argue that the information revealed subsequent to the TEQR Commission's Findings Statement of July 25,2000, supports the revised Findings Statement, the Town Board's Findings of May 8,2001, and, most importantly, the Town Board's Decision to deny the application.

It is the obligation of this Court to review and analyze the Town Board's Decision in conjunction with the record in this case to determine whether its determination is arbitrary and/or capricious, or based upon substantial evidence. This review necessarily involves deciding whether the Town Board took a sufficiently "hard look" at the project and set forth a reasoned elaboration for its determination. See In the Matter of Weok Broadcasting Corporation v.

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[2] The Intervenors are the Birchwood Civic Association at Jericho, Inc., Birchwood Park at Syosset Homeowners Association, and the Syosset Groves Civic Association. The petitioners have maintained throughout these proceedings that the civic associations are merely a "front" for Simon Properties, the owner of two competing regional shopping malls, which has been funding the opposition. The members of these Associations are homeowners, not immediately adjacent to or abutting the project site, but in areas to the north, south and west of the proposed mall. These Associations were granted intervenor status pursuant to a Decision and Order of this Court dated December 10, 2001.

Planning Board of thie Town of Llovd, 79 N.Y.2d 373,382-383,583 N.Y.S.2d 170, 174-175 (1992). Suchjudicia! review must consider the record as incorporated by the Town Board into its Decision in order to determine whether the Board actually relied upon substantial evidence of record. To do otherwise would render the Court's obligations under C.P.L.R. Article 78 toothless, as the Town Board would enjoy a blanket immunity from judicial review.[3] In other words, it would be innpossible for the Court to determine whether the Town Board's Decision rests upon substantial evidence of record unless the Town Board actually cited to what evidence it actually relied on for each finding.[4] Based upon the submitted papers, the record, as well as the oral argument had in this Court on March 8,2002, the Court finds for the petitioners.

It is undisputed that, "[a] special use permit confers authority to use property in a manner that is permitted by a zoning ordinance under stated conditions, and such permit is required to be granted unless reasonable grounds exist for its denial." In the Matter of 7 Eleven. Inc. v. Board of Trustees of the Incorporated Village of Mineola, 289 A.D.2d 250, __, 733 N.Y.S.2d 729 (2d Dept. 2001). In detarmining whether such grounds exist, the only limitation upon the exercise of the Town Board's discretion is that its determination must not be arbitrary or capricious, and must be supported by substantial evidence. See In the Matter of Weok Broadcasting Corporation

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[3]This Court is cognizant of the recent holdings by the Court of Appeals in Matter of Ifrah v. Utschig, Matter of Retail Property Trust v. Zoning Board of Appeals of the Town of Hempstead, and Matter of P.M.S. Assets Ltd. v. Zoning Board of Appeals of the Village of Pleasantville. In thase cases, and in Retail Property Trust in particular, the Court could not have meant by its holdings that the mere inclusion of evidence in the record is sufficient to support a Board of Zoning Appeals' determination in an Article 78 proceeding when such evidence is not explicitly used as a basis for a particular finding. Such an interpretation of the above cases would render moot any meaningful judicial review. If mere inclusion of evidence in the record were enough to sustain a determination, a Board of Zoning Appeals could speak in broad generalities or merely one word affirmative or negative answers. This would hardly satisfy the requirements of providing a reasoned elaboration for a finding or determination and supporting that finding or determination with substantial evidence. Indeed, such an interpretation would effectively result in a grant of unbridled power to the Town Board to make decisions on political grounds rather than evidence of record. Almost a century ago, Ambrose Bierce in The Devil's Dictionary (1911) defined politics as: "a strife of interests masquerading as a contests of principles. The conduct of public affairs for private advantage." Judicial review in the context of C.P.L.R. Article '78is the surest method of preventing the encroachment of such politics into the municipal decision making process.

[4]Indeed, as the respondents make clear, a soil analysis submitted to the Town Board concluding that this mall would have a significant adverse impact on the environment was a part of this record. The Town Board, however, declined to accept it as a basis for a positive adverse impact finding, thus; demonstrating that its Decision does not necessarily utilize the record submissions as a basis for its findings. Therefore, without an explicit statement in the findings by the Town Board,,this Court is unable to exercise its review powers.

v. Planning Board of the Town of Lloyd, 79 N.Y.2d at 382-383, 583 N.Y.S.2d at 174-175. It is impermissible for a town to base a denial of a special use permit upon generalized objections and concerns by community members that are uncorroborated by empirical data. Id. at 385, 583 N.Y.S.2d at 176.

The primary purpose behind SEQRA "'is to inject environmental considerations directly into governmental decision making.'" In the Matter of Weok Broadcasting Corporation v. Planning Board of the Town of Lloyd, 79 N.Y.2d at 380, 583 N.Y.S.2d at 173 quoting Matter of Coca-Cola Bottling Co. v. Board of Estimate, 72 N.Y.2d 674, 679, 536 N.Y.S.2d 33, 35, (1988).[5] SEQRA imposes procedural and substantive requirements upon the lead agency whenever it is determined, as in this case, that a proposed action or project may have a significant effect on the environment. See In the Matter of Weok Broadcasting Corporation v. Planning Board of the Town of Lloyd, 79 N.Y.2d at 380, 583 N.Y.S.2d at 173. The information obtained by lead agencies through tha SEQRA process allows that agency to intelligently assess and consider environmental factors in determining whether to approve an activity or project. Id. The lead agency must take a sufficiently "hard look" at the proposal before making its determination and must render a reasoned elaboration for its determination once made. Id. at 381, 583 N.Y.S.2d at 174. The Court's role in reviewing SEQRA determinations is not to "weigh the desirability of any proposed action . . . 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." Id. at 382, 583 N.Y.S.2d at 175. If the agency's determination is arbitrary and capricious or not supported by substantial evidence, the agency's decision may be annulled as the agency is not free to ignore or disregard the information that the environmental review process was designed to illicit. Id. at 383-384, 583 N.Y.S.2d at 175-176.

In this case, the Town Board's determination is insufficient for the following reasons:

Finding Number Two

Starting with finding number two of the Decision, regarding the "Traffic Volume Comparison" this Court holds that it is arbitrary and capricious, and not supported by substantial evidence. The Town Board failed to identify the data upon which it based its conclusions, specifically as it regards "Industrial Use." The Town Board indicated in its Decision that all of the negative environmental findings identified through the SEQRA process were summarized in

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[5]The stated legislative purpose was "to declare a state policy which will encourage productive and enjoyable harmony between man and his 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." E.C.L. §8-0101 (McKinney 1997).

the SEQRA Resolution in the section entitled "Unavoidable Adverse Environmental Impacts."[6] In an attempt to discern the bases of the findings in this Decision, the Court turns to the Town Board's May 8,2001 Findings and the revised Findings Statement, under the sections labeled "Alternatives" (which follows the section in each document labeled "Unavoidable Adverse Environmental Impacts"). In those sections there is a similar chart comparing an office facility comprised of 720,0013 square feet taken from the DEIS (rather than the FEIS [7]), and an office facility comprised of 425,000 square feet, to the proposed project of 860,000 square feet. The chart notes that the comparison of the 425,000 square foot office space is not based upon the DEIS nor any empirical study, but rather it is based upon "formulas in the Sixth Edition of Trip Generation (Institute of Transportation Engineers)." Thus, that portion of the chart considering an office space of 425,000 square feet is not based upon substantial evidence in the record and is, therefore, rejected. See In the Matter of Weok Broadcasting Corporation v. Planning Board of the Town of Llovd, 79 N.Y.2d at 384, 583 N.Y.S.2d at 175; see also In the Matter of Sci Funeral Services of New York, Inc., v. Planning Board of the Town of Babvlon, 277 A.D.2d 319, __, 715 N.Y.S.2d 744,745 (2d Dept. 2000).

Furthermore, in the "Alternatives" section (of either document), there is a subsection regarding "As-of-Right Industrial Use" which does state that this type of industrial development in comparison to the project would generate increased traffic in the a.m. peak hour, but less traffic during the p.m. peak hour and on Saturday peak hours. However, there is no numerical data offered in terms of the size of the as-of-right space used for comparison purposes, trip generation numbers, or the basis for these statements (i.e. empirical data as found in the EIS or an expert traffic submission proffered at the public hearing stage) in these two documents which seem to form the basis for the Decision. Indeed, in this "Alternatives" section, it states that the DEIS presents a only "conceptual sketch plan" leading the Court to conclude that no concrete comparison was made. In addition, traffic volume was not considered an adverse impact in the original Findings Statement, and there is no basis that the Court can decipher from this Decision for this chart in finding number two regarding an as-of-right industrial use traffic volume comparison, or for the Town Board's deviation from the TEQR Commission's original recommendation. Without knowing what size as-of-right industrial space is utilized for the comparison, the derivation of the numbers utilized in the chart, or any basis for this comparison, the chart, as it pertains to the as-of-right industrial comparison is without a substantial basis in

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[6] The Court must presume from the submissions that the Decision is referring to either the Town Board's May 8,2001 Findings or the revised Findings Statement which contain identical discussions in this respect.

[7] In the original Findings Statement, the TEQR Commission stated under "Traffic and Transportation" that "the DEIS performed a computerized capacity analysis for numerous locations . . ." and that "[a] completely new traffic analysis was performed as part of the FEIS" for the amended project which was only 860,000 square feet in comparison to the original project of 960,000 square fleet. Therefore, to the extent that this comparison takes data regarding traffic from the DEIS, it is inapplicable to the amended project in the FEIS.

the record and is rejected. See In the Matter of Weok Broadcasting; Corporation v. Planning Board of the Town of Lloyd, 79 N.Y.2d at 384, 583 N.Y.S.2d at175. Because the remaining chart provides only a comparison to office use (which the Court assumes corresponds to the 720,000 square foot space), this finding must be vacated. See In The Matter of 7 Eleven, Inc., v. Board of Trustees of the Incorporated Village of Mineola, 289 A.D.2d at __, 733 N.Y.S.2d at 730.

Moreover, this finding is an attempt to support a conclusion of an adverse impact based upon raw number of trips generated, in a vacuum. Raw traffic generation numbers alone are not proof of an adverse impact if not considered in light of the mitigation offered by the petitioners in the form of road improvements. See, e.g., In the Matter of Lerner v. Town Board of the Town of Oyster Bay, 244 A.D.2d 336, 337, 663 N.Y.S.2d 661, 662 (2d Dept. 1997). Accordingly, this finding is annulled as arbitrary and capricious as well.

Finding Number Three

The Town Board's Decision under finding number three must fail as well. In that portion of the Decision, the Town Board discussed "Specific Roadway Impacts" consisting of five areas/intersections of concern. In none of these specific areas does the Town Board include an as-of-right development comparison as required by law. Rather, the Town Board addressed only the no-build scenario to show the deterioration that would result in "level of service" (hereinafter referred to as "LOS") and "vehicle capacity ratio" (hereinafter referred to as "V/C") in these areas/intersections. This analysis is, therefore, fatally flawed. See In The Matter of 7 Eleven, Inc., v. Board of Trustees of the Incorporated Village of Mineola, 289 A.D.2d at __, 733 N.Y.S.2d at 730; In the Matter of Lerner v. Town Board of the Town of Oyster Bay, 244 A.D.2d at 337, 663 N.Y.S.2d at 662. In the TEQR Commission's Findings Statement of July 25, 2000, the Commission found that the only appreciable degrade under the project as compared to an as-of-right development is in the LOS at Robbins Lane and the North Service Road. The Commission further found that LOS C at this intersection is acceptable. The Commission therefore held that there would be no significant adverse impact due to this LOS rating. Its first conclusion notwithstanding, the TEQR Commission changed its position in the revised Findings Statement. While it conceded that LOS C is acceptable at this intersection, it stated that the LOS change would causa noticeable congestion and delay (as compared to the no-build scenario) according to the data in the DEIS and FEIS. This is repeated in the Town Board's Findings of May 8, 2001 and in the Decision. There is no basis stated for the shift in conclusion nor any explanation as to why an acceptable LOS C rating which originally supported a finding of no significant adverse impact based upon the EIS record in the Findings Statement of July 25, 2000, is now invalid. For the above reasons, this Court finds conclusion number three to be arbitrary and capricious, and not based upon substantial evidence.

Finding Number Four

The Town Board's finding number four ("Trip Distribution") is unclear. The Town board

found that the petitioners have submitted traffic analyses that exhibit inconsistencies or discrepancies, and that these discrepancies coupled with what the Town Board perceived as a "failure to better define [the] market area cast[] doubt of [sic] applicant's traffic study and the true volume of traffic that will impact the Jericho Turnpike intersections."[8] The Town Board does not find that there will be a significant adverse impact due to "Trip Distribution" patterns as compared to an as-of-right development as required under precedent. See In The Matter of 7 Eleven, Inc., v. Board of Trustees of the Incorporated Village of Mineola, 289 A.D.2d at __, 733 N.Y.S.2d at 730; In the Matter of Lerner v. Town Board of the Town of Oyster Bay, 244 A.D.2d at 337,663 N.Y.S.2d at 662. Indeed, the Town Board has not rendered any finding as to "Trip Distribution" in finding number four. If the Town Board had found a legitimate concern raised by the petitioners' analyses or by comments received at the public hearing: such concerns should have been addressed pursuant to the procedural review process provided in the SEQRA regulations. See 6 N.Y.C.R.R. § 617.9(a)7; In the Matter of Ernalex Construction Realty Corn. v. Bellissimo, 256 A.D.2d 338,340,681 N.Y.S.2d 298,300 (2d Dept. 1998). To the extent the Decision reached a finding, it was not based upon substantial evidence, and was arbitrary and capricious.

Finding Number Five

Similarly, the Town Board's finding number five must fail. In number five, the Town Board addressed "Traffic Impacts During Holiday Season" and found that traffic generated on holidays would be "substantially worse than is portrayed in the applicant's traffic analysis report" and "would exceed other unconditionally permitted uses." There is no basis for this conclusion in the Decision, nor in the Town Board's Findings. In the revised Findings Statement the TEQR Commission admitted that there was no analysis done of the local roadway system under holiday conditions, yet the TEQR Commission (and the Town Board) found that traffic congestion would be worse than that considered in nonholiday traffic studies. However, without an analysis based upon empirical evidence there is no basis to conclude that the roadways would not operate at acceptable levels. Furthermore, as there was no analysis done on holiday traffic congestion and its effects on the roadway and, therefore, no comparison to any as-of-right usage, the Town Board's finding that the holiday traffic congestion will exceed other unconditionally permitted

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[8]While this same discussion is found in the Town Board's Findings of May 8,2001 and in the revised Findings Statement of January 16,2001, it apparently was not an issue worthy of discussion in the original Findings Statement.

'While the Town Board's Decision, its Findings of May 8,2001, and the revised Findings Statement lead the reader to conclude that the "discrepancies" cited derive from the petitioners' analyses, the original Findings Statement makes clear that any questions regarding Trip Distribution arise solely from comments elicited during the public hearing.

uses is without any factual basis." See In The Matter of 7 Eleven. Inc.,v. Board of Trustees of the Incorporated Village of Mineola, 289 A.D.2d at __, 733 N.Y.S.2d at 730; In the Matter of Lerner v. Town Board of the Town of Oyster Bay, 244 A.D.2d at 337,663 N.Y.S.2d at 662. As such, it is arbitrary, oapricious and without substantial evidence of record.

Finding Number Six

The Town Board, in finding number six, once again draws a speculative conclusion regarding another traffic issue ("Neighborhood Cut-Through Traffic") without any comparison to an as-of-right development, and without any empirical data as a basis. Therefore, it is insufficient. See In The Matter of 7 Eleven, Inc.,v. Board of Trustees of the Incorporated Village of Mineola, 289 A.D.2d at __, 733 N.Y.S.2d at 730; In the Matter of Lerner v. Town Board of the Town of Oyster Bay, 244 A.D.2d at 337,663 N.Y.S.2d at 662. Furthermore, the Town Board admitted that the anailyses conducted by the applicant concluded that the proposed project would not cause a significant increase in volume of cut-through traffic in residential neighborhoods. Yet the Town Board found this conclusion to be speculative and that certain neighborhoods could be impacted to greater degree than that indicated in the only analysis presented. Such wholesale speculation is unsupported by any factual data and at best is mere conjecture. See In the Matter of Sci Funeral Services of New York, Inc., v. Planning; Board of the Town of Babylon, 277 A.D.2d at __, 715 N.Y.S.2d at 745; In the Matter of Ernalex Construction Realtv Corp. v. Bellissimo, 256 A.D.2d at 340, 681 N.Y.S.2d at 300. Thus, the Town Board's finding is without substantial evidence and is arbitrary and capricious.

Finding; Number Seven

The Town Board's finding number seven is similarly flawed in that the Town Board failed to consider a comparison to an as-of-right development and, once again, completely contradicts the findings in the DEIS and FEIS. Contrary to the original TEQR Findings Statement of no significant impact to the Robbins Lane School and Syosset Library, the revised Findings Statement, the Town Board's Findings and the Town Board's Decision conclude that, although there would be no degrade in the LOS at the intersections close to these facilities, the proposed mall would increase the volume of traffic traveling past these areas which would increase the potential for accidents as compared to a no build scenario. No data is presented to justify this finding nor is there a basis proffered for the following conclusion that the unconditionally permitted uses would experience a reduced level of activity. Therefore, this Court finds the Town Board's decision under finding number seven to be unsupported by any factual basis and arbitrary and capricious. See In The Matter of 7 Eleven. Inc.,v. Board of Trustees of the Incorporated Village of Mineola, 289 A.D.2d at __, 733 N.Y.S.2d at 730; In the

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[10] If the Town Board found this to be a compelling factor, as it was not addressed in the EIS, it should have been the subject of a supplemental EIS. See 6 N.Y.C.R.R. § 617.9(a)7; In the Matter of Ernalex Construction Realty Corp. v. Bellissimo, 256 A.D.2d 338,340,681 N.Y.S.2d 298,300

Matter of Sci Funeral Services of New York, Inc., v. Planning Board of the Town of Babvlon, 277 A.D.2d at—, 715 N.Y.S.2d at 745.

Finding Number Eight

In the eighth finding concerning the "Railroad Grade Crossing at Robbins Lane," the Town Board concluded that the proposed mall creates an unusually hazardous situation with little or no possibility of mitigation. The original TEQR Findings Statement, however, found that the measures suggested by the petitioners would alleviate the danger of trapping cars on the tracks when the railroad gates are lowered. Indeed, the TEQR Commission did not change its conclusion in its revised Findings Statement. Nevertheless, without giving a foundation for its rejection of both of the TEQR Findings Statements, the Town Board in its Findings and Decision reached a contrary conclusion. Moreover, no as-of-right comparison was conducted. Thus, the Town Board acted arbitrarily and capriciously when it ignored its own findings and failed to compare the project to an as-of-right development, and its finding are not supported by substantial evidence. See In The Matter of 7 Eleven. Inc.,v. Board of Trustees of the Incorporated Village of Mineola, 289 A.D.2d at __, 733 N.Y.S.2d at 730; In the Matter of Sci Funeral Services of New York, Inc.. v. Planning: Board of the Town of Babvlon, 277 A.D.2d at—, 715 N.Y.S.2d at 745; In the Matter of Ernalex Construction Realtv Corp. v. Bellissimo, 256 A.D.2d at 340,681 N.Y.S.2d at 300.

Finding Number Nine

In its ninth finding (Proposed Project Density [Floor Area Ratio]), the Town Board concluded that because the proposed mall would have a higher floor area ratio as compared to other Long Island malls, the proposed mall could be considered too large in relation to the subject property. The Town also found that the proposed mall would substantially increase "land use intensity" in comparison to unconditionally permitted uses, and would not be consistent with land use intensity of the surrounding area. In the Town Board's May 8,2001 Findings, however, the Town Board stated that the property is surrounded by industrial uses, that there are no floor area ratio standards for this area and that the property conforms with the Town Zoning Code (subject to the issuance of a special permit). It also admitted in its May 8,2001 Findings that in the original TEQR Findings Statement, the TEQR Commission found that the amendments to the project as presented in the FEIS enhanced its compatibility with the surrounding area. In addition, in the original TEQR Findings Statement, the TEQR Commission stated that, while there was much concern expressed by residents of the communities that lie directly outside of the industrial-zoned area (in which this property is situated) this site is "buffered from those communities by the industrial-type development (and some commercial uses), and given that the proposed project conforms to Town of Oyster Bay zoning requirements, it is not expected that the development of a mall at this location will represent a significant impact with respect to land use and zoning considerations." It went on to state that "it is important to reiterate that the proposed project has been amended in direct response to comments received during the DEIS review period regarding the density and scale of the original mall . . . ." Finally, the original

TEQR Findings Statement noted that the petitioners' FEIS submission listed other malls, including Roosevelt Field in Nassau County, that are developed at a higher density. Thus, the TEQR Commission, in fulfilling its SEQRA requirements, did not find a significant adverse impact with respect to land use intensity, and this is not a Town Code concern.

Moreover, according to the Town Board Findings and Decision, the Town Board reexamined this issue. because of concern expressed in the public hearing process. There is nothing in the Decision, however, to suggest that new evidence or empirical data was presented to the Town Board to justify a retreat from the original TEQR Findings Statement. Only further community concerns were cited and they apparently were addressed by the petitioners after the first review process. In addition, while the Town Board claimed that this project has a substantially increased land use intensity as compared to unconditionally permitted uses, there appears no basis in this Decision, the May 8,2001 Findings, or the revised TEQR Findings Statement, to support such a conclusion. Thus, there is no reason for the Town Board's current position on land use and density as it ignores its own SEQRA results in favor of unsubstantiated community concerns. See In the Matter of Weok Broadcasting Corporation v. Planning Board of the Town of Llovd, '79 N.Y.2d at 385, 583 N.Y.S.2d at176; In the Matter of Sci Funeral Services of New York, Inc., v. Planning: Board of the Town of Babvlon, 277 A.D.2d at—, 715 N.Y.S.2d at 745; In the Matter of Ernalex Construction Realtv Corn. v. Bellissimo, 256 A.D.2d at 340, 681 N.Y.S.2d at 300. Accordingly, this finding is arbitrary, capricious, and not based upon substantial evidence.

Finding Number Ten

In the tenth finding, the Town Board concluded that the mall will have an adverse impact on "Traffic-Related Quality-of-Life Considerations and Community Character" due to the increased traffic volume as compared to as-of-right uses and regardless of the success of the roadway mitigation features. But (as previously discussed) there is no comparison to as-of-right uses in the Decision, the Town Board's Findings, the original TEQR Findings Statement, nor in the revised Findings Statement. Indeed, there is no mention of any studies or analyses in any of these documents to suggest a basis for this broad conclusion regarding as-of-right considerations. Furthermore, in the Town Board's May 8,2001 Findings, the Town Board stated that the opposition by the local residents to the traffic volume increase demonstrated that they perceive that this mall will negatively impact upon their quality of life. The Town Board, however, admitted that it is not possible to quantify this level of impact and that the petitioners' analyses do not fully examine the potential quality of life implications of the proposed mall. This finding, therefore, is wholly speculative in nature and is predicated upon general community comments, and not based upon empirical data. As such it is arbitrary, capricious and not based upon substantial evidence. See In the Matter of Weok Broadcasting Corporation v. Planning Board of the Town of Llovd, 79 N.Y.2d at 384, 583 N.Y.S.2d at 175; In The Matter of 7 Eleven. Inc.,v. Board of Trustees of the Incorporated Village of Mineola, 289 A.D.2d at __, 733 N.Y.S.2d at

730.[11]

Finding Number Eleven

The Town Board, in its eleventh finding ("Impact on Existing Retail Facilities"), drew speculative conclusions regarding the impact of the proposed mall upon the existing retail facilities. It found that it is likely some stores that carry the same type of merchandise as that of the proposed mall would experience a loss of sales and possibly closure, which could harm commercial real property values. The Town Board admits, however, that the magnitude of this "possible" or "likely" impact is not known. The original TEQR Findings Statement found that there would be no significant adverse impact to retail areas nearby. Upon reexamination of the issue, the revised Findings Statement and the Town Board's Findings concluded from the petitioners' analysis that 85 stores out of 612 stores in the three surrounding towns' commercial centers could be affected as they sold "shoppers goods." There is no basis to draw such a conclusion as there is no showing in the record before the Town Board that they would sell the same or similar merchandise. Furthermore, there is no additional information supplied to justify the Town Board's deviation from its original TEQR Findings Statement, nor any data to support its conclusions regarding the failure of the stores were there such an impact. Therefore, the Court holds this finding to be arbitrary, capricious and not based upon substantial evidence. See In the Matter of Sci Funeral Services of New York, Inc., v. Planning Board of the Town of Babylon, 277 A.D.2d at __, 715 N.Y.S.2d at 745; In the Matter of Markowitz v. Town Board of Oyster Bay, 200 A.D.2d 673, __, 606 N.Y.S.2d 705,707 (2d Dept. 1994).

Finding Number Twelve

The Town Board in finding number twelve speculated that based upon expert analyses presented by both sides, it appears likely that there would be some diminution in real estate values for properties; near the proposed mall. Nevertheless, the Town Board went on to state that "[t]herefore, it is reasonable to conclude, based upon the relevant record, that development of the proposed mall could entail a significant, though currently uncertain, potential for inducing adverse impacts with respect to the market value of neighboring residential properties." Besides being inconclusive, the Town Board's "finding" is flawed as it relied upon the expert analysis as submitted by the opponent's consultant who did no empirical studies of his own, but merely critiqued the study done in the EIS. Furthermore, even if there are empirical studies or data to support his opinion, the expert did not compare the impact of the proposed mall on property values with the impact from the development of an as-of-right usage, such as, inter alia, an industrial manufacturing facility, on the same property values. This expert critique is therefore insufficient to counter the extensive analysis in the EIS as accepted in the original TEQR Findings Statement. See In the Matter of Sci Funeral Services of New York, Inc., v. Planning,

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[11] Moreover, in regards to the Town Board's conclusion that this project's road improvements are "negatives in terms of community character," this Court notes that the property is presently a delisted superfund site that is not enhancing community character.

Board of the Town of Babylon, 277 A.D.2d at—, 715 N.Y.S.2d at 745-746. This finding is therefore arbitrary, capricious, and not based upon substantial evidence.

Finding Number Thirteen

The Town Board, in its thirteenth finding, expressed its concerns that another regional mall could "cripple" nearby business districts, and that the petitioners' conclusion that there will be no adverse impact was unpersuasive. Although the Town Board also stated that whether the mall will or will not conflict with downtown business is "sheer speculation," it went on to state that the welfare of the Oyster Bay community "would be best served without another regional mall." This statement seems to be a summary of the concerns expressed by the Town Board in its earlier findings in regards to the possible impact on residential and retail values, and quality of life considerations. 'While a laudable sentiment, we reiterate that this special use exception is a permitted use and as such it is tantamount to a legislative finding that it will not adversely affect the surrounding areas. See In the Matter of Holbrook Associates Development Co. v. McGowen, 261 A.D.2d__, 690 N.Y.S.2d 686,687 (2d Dept. 1999). The Town Board is required to grant it, whether desirable or not, unless reasonable grounds exist for its denial. See In The Matter of 7 Eleven, Inc., v. Board of Trustees of the Incorporated Village of Mineola, 289 A.D.2d at __, 733 N.Y.S.2d at 729; In the Matter of Holbrook Associates Development Co. v. McGowen, 261 A.D.2d at—, 690 N.Y.S.2d at 687. Moreover, "zoning laws do not exist to insure limited business competition." In the Matter of Sun-Brite Car Wash. Inc. v. Board of Zoning Appeals of the Town of Hempstead, et al., 69 N.Y.2d 406,415,515 N.Y.S.2d 418,423 (1987). This finding appears to be nothing more than the Town's policy driven condemnation of regional malls. It is not grounds based upon substantial evidence necessary to deny the special use permit. Indeed, this was not a factor defined in scoping process, nor considered in the SEQRA review.[12] Moreover, all of the SEQRA findings in the original Findings Statement lead to the conclusion that another mall would not adversely impact upon the surrounding area. Notwithstanding the revised Findings Statement, the Town Board's Findings and its Decision, no grounds have been proffered to support reaching a contrary conclusion. This generalized statement based upon conjecture cannot form a basis to defeat an application for a special exception use that is permitted. Therefore, this "finding" is rejected as it is not based upon substantial evidence.

Finding Number Fourteen

The Town Board's fourteenth finding in regards to zoning standards is again, a mere conclusory statement made without any further elaboration or support. Indeed, as noted above in the discussion of the ninth finding, the Town Board stated in its May 8,2001 Findings that the project conformed to the Town zoning code. The Town Board's failure to identify and support its finding regarding; the alleged shortcomings of this project in relation to these code sections underscores the weakness of this finding and cannot be deemed a reasoned elaboration of its

[12]It was not in issue that was considered in the TEQR Commission's Findings Statements or in the Town Board's Findings.

determination. See In the Matter of Weok Broadcasting Corporation v. Planning Board of the Town of Lloyd, 79 N.Y.2d at 381, 583 N.Y.S.2d at 174. Therefore, this conclusion is arbitrary, capricious and is not based upon substantial evidence.

Finding Number Fifteen

The fifteenth finding ("Credibility of Expert Opinions and Conclusion") is merely the Town Board's recognition of the various submissions placed before it on the record in this application, its pronouncement that it fulfilled its obligation to review the record and that it made its findings accordingly. As such it is not a finding subject to judicial review.

The First Finding

The Court now turns to the Town Board's first finding, that being a rejection of the petitioners' proposal to further amend the application to reduce the square footage of the proposed mall to 750,000 square feet. By failing to take the mandated "hard look" at this new proposal to mitigate, the Town Board cannot certify that the adverse environmental effects realized in the EIS process will be minimized or avoided to the maximum extent possible, as required by the law. See E.C.L. § 8-0109(1) & (8); 6 N.Y.C.R.R.. $617.9; Glen Head-Glenwood Landing Civic Council, Inc v. The Town Of Oyster Bay, 88 A.D.2d 484, __, 453 N.Y.S.2d 732, 734 (2d Dept. 1982). Literal compliance with SEQRA is required because the "because the Legislature has directed that the policies of the State and its political subdivisions shall be administered 'to the fullest extent possible' in accordance with SEQRA." Id. at __, 453 N.Y.S.2d 737, quoting E.C.L. § 8-0103(6). Thus, the Town Board was not just free to consider the environmental impact, but also was obligated to consider attempts to minimize or avoid adverse environmental effects. See Weinberg, Practice Commentaries, McKinney's Cons Laws of N.Y., Book 171/2, ECL C8-0109:2. To the extent that the Town Board failed to consider the mitigation proposal to reduce the mall by a not inconsiderable amount, the Town Board failed to comply with SEQRA, and this case, therefore, must be remitted to the Town Board .

The Town aid the intervenors argue that there exists support in the record for the Town Board's actions in the form of a soil analysis,[13] expert submission by a land planner regarding the adverse effect of a regional mall from a planning perspective as well as the adverse effects on retail business, submissions by a retired traffic engineer and a traffic consultant, and submission by a real estate expert. However, not one of these submissions was specifically referred to in the Decision, except for finding number twelve in which the Town Board mentioned data produced by the "experts for the proponents and opponents." But such an anonymous reference simply cannot constitute a substantial basis for a finding. It is equivalent to no basis as it does not supply the Court with any content to review. The Court is left to speculate as to what expert

[13] Contrary to the argument by the respondents, the soil analysis was not a substantial basis of support for the Decision as it was explicitly rejected by the Town Board in its Findings and was not an adverse impact finding in the Decision.

originally favorable SEQRA findings supported by the FEIS. Simply giving boilerplate responses will not satisfy the Court that the Town Board has fulfilled its function to rely upon substantial evidence to make a decision that is neither arbitrary nor capricious. Moreover, if these subsequent submissions are good cause for the Board to deviate from its Commission's original recommendations, then such evidence requires that the Town Board continue with the SEQRA process in the form of a supplemental EIS. See Glen Head-Glenwood Landing Civic Council. Inc v. The 'Town Of Oyster Bay, 88 A.D.2d at __, 453 N.Y.S.2d 739; 6 N.Y.C.R.R. §

The above constitutes the decision and order of this Court.

Dated: July 8,2002

ENTER

James M. Catterson, J.S.C.

M. Catterson, J.S.C.

__FINAL DISPOSITION

✓ NON-FINAL DISPOSITION