

Coppola v Good Samaritan Hosp. Med. Ctr.
2002 NY Slip Op 30150(U)
October 22, 2002
Sup Ct, Suffolk County
Docket Number: 01-10881
Judge: Thomas F. Whelan
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART33 - SUFFOLKCOUNTY

P R E S E N T :

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

ART 78 ADJ. DATE 6/20/02
ADJ. DATES _____
Amd. Petition Decided; CDISP

-----X
MICHAEL C. COPPOLA, JOHN S. POPOVITCH, :
JOHN CARUSO, WILLIAM MARLETTA, :
WILLIAM LANE, TERESA DIOGUARDI, :
DONNA DELANOY, BEVERLY FONSECA, :
LOIS BAISLEY, GARY SEIB, JOSEPH SURACE, :
KEVIN WOOD, DANIEL GRIPPA and WAYNE :
S. SMITH, :

Petitioners, :

-against- :
:
GOOD SAMARITAN HOSPITAL MEDICAL :
CENTER, TOWN OF ISLIP and TOWN OF ISLIP :
PLANNING BOARD, :

Respondents. :
-----X

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Upon the following papers numbered 1 to 21 read on this amended Article 78 proceeding
_____; Notice of Petition and supporting papers 1-6; Notice of
Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 7-8: 14: 15: 18-19
_____; Replying Affidavits and supporting papers 20-21; Other 9-11 (Return); 12-13 (Memo); 16-17 (Memo)
_____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the amended petition seeking, among other relief, an order directing the respondents, Good Samaritan Hospital Medical Center ("the Hospital") and the Town of Islip Planning Board ("Planning Board"), to comply with the procedural and substantive requirements of Article 8 of the Environmental Conservation Law, commonly known as the State Environmental Quality Review Act ("SEQRA"), concerning the relocation of the Emergency Room to near the intersection of Beach Drive and Gate Lane in the Town of Islip, is granted to the extent that the Planning Board site plan approval decision of December 9, 1999, and the Building Permit issued on June 9, 2000 and the Certificate of Occupancy, dated November 20, 2001, which were both issued in reliance upon the site plan approval, are declared to be null and void and are annulled, and it is further

ORDERED that the matter is remanded to the Planning Board and the Town for further *de novo* consideration and rehearing in accordance with this Order, and it is further

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ORDERED that the branch of the amended petition seeking an injunction, pursuant to CPLR Article 63, restraining and enjoining the Hospital from conducting business affairs and services at the relocated Emergency Room, is granted, and it is further

ORDERED that enforcement of the order is stayed until March 21, 2003, to afford respondents an opportunity to expeditiously comply with SEQRA, without prejudice to an application for a further extension, if necessary; if no extension is requested or if an application for an extension is denied, upon application by petitioners, the Court shall vacate the stay.

The failure to abide by the procedural and substantive rigors of New York State's environmental laws and concomitant regulations, coupled with an agency's declaration of no significant environmental impact has, over the years, stymied the completion of a massive state highway improvement project (see *Village of Westbury v Department of Transp. of the State of New York*, 146 AD2d 578, 536 NYS2d 502 [2d Dept 1989]; *aff'd* 75 NY2d 62, 550 NYS2d 604 [1989]), the enactment of a zoning amendment that created a "Destination Commercial Planned Development Overlay District" (see *Riverhead Bus. Improvement Dist. Mgt. Assn., Inc. v Stark*, 253 AD2d 752, 677 NYS2d 383 [2d Dept 1998]), and the construction of a large supermarket (see *Matter of Syrop v City Council of City of Yonkers*, 282 AD2d 466, 722 NYS2d 741 [2d Dept 2001]). Here, the relocation of a hospital's busy emergency room into a newly constructed structure, that was originally designed and intended to house an outpatient rehabilitation center, was accomplished without appropriate regard to the controlling environmental regulations. While the improper governmental action must be annulled, under the circumstances of this case, the Town is afforded an opportunity to comply with the State Environmental Quality Review Act ("SEQRA").

The controversy before the Court has, to date, resulted in eight separate short form orders (June 18, 2001, July 16, 2001, September 19, 2001, October 26, 2001, two [2] dated January 17, 2002, April 30, 2002, and January 17, 2002 [a. related proceeding under Index No. 01-20903]) and two dismissed appeals (see Decision & Order on Motion, March 1, 2002, 2002-0088 1, and 296 AD2d 460, 744 NYS2d 718 [2d Dept 2002]). Familiarity with all of the Court's prior short form orders related to this proceeding is presumed.

Originally, the Good Samaritan Hospital emergency room was located in the north-westerly portion of the large parcel that constitutes the hospital complex, facing Montauk Highway, a County road and a major thoroughfare. Abutting that location, are various residences along Bay Drive East, in the hamlet of West Islip, which the petitioners claim are currently owned by the Hospital and utilized by its personnel. Now, the emergency room has been relocated to the south-easterly portion of the parcel, facing Beach Drive, a roadway with varied uses, but in close proximity to certain residences and, in particular, Gate Lane, which apparently constitutes the single means of ingress and egress into a residential community, known as Cedar Point. Aside from access to the Cedar Point homes, Beach Drive is utilized for access to West Islip Little League Fields, Consolation Nursing Home, St. John the Baptist High School, West Islip Marina, and the Hospital, including its delivery dock.

The Hospital is located in a General Service C Zoning District and its use is an **as** of right use pursuant to the provisions of the Code of the Town of Islip. A review of the Town's Return and the various affidavits submitted on the final submission, as well as in past submissions, reveals that by applications sworn to on April 30, 1997 (see Return, p. 117), the Hospital applied for a building permit to build a two story building addition, totaling over 34,500 square feet, to house, among other things, an outpatient rehabilitation center. The building permit called the structure an addition (see Return, p. 116). The building permit was issued on March 19, 1998. Apparently, the Hospital was considering a second capital improvement or expansion, that is, for **an** outpatient surgical unit. A decision was then made to house the outpatient surgical unit in the second floor of the two story addition, instead of building a separate new wing for it. By application sworn to on August 25, 1998, a second building application was submitted by the Hospital to

accomplish same (see Return, p. 108). The permit was issued on January 8, 1999 (see Return, p. 115). In fact, the second floor interior was completed before work was begun on the bottom floor, which was intended to house the outpatient rehabilitation center.

During this time, a neighbor who lived adjacent to the then existing emergency room, complained about the lack of adequate buffering and planting between his property and the Hospital property and noted that 40 - 50 ambulances a day travel down the existing roadway (see Return, pp. 111 -113).

Thereafter, and apparently in consultation with the New York State Health Department, the decision to house the outpatient rehabilitation center in the first floor was abandoned in favor of a new expanded and relocated emergency room facility. The first indication of this intention is found in a "Letter of Proposed Use," dated October 15, 1999 (see Return, p. 102). Since the space required was more than that as constructed on the first floor, by applications sworn to on October 18, 1999, the Hospital filed a third building permit application for a one story addition to the new two story pavilion to house a relocated emergency room (see Return, pp. 97, 21). This application called for the construction of an additional 11,000 square feet of floor space and was expressly conditioned upon "approved site plan" (see Return, p. 78). A Short Environmental Assessment Form for Unlisted Actions ("SEAF") was submitted, as part of the SEQRA review process (see Return, p. 99) and an assistant site plan reviewer for the Town of Islip found no significant environmental effects, on January 28, 2000 (see Return, p. 100). By letter dated November 9, 1999 the relocation site plans were disapproved (see Return, p. 92), and due to lack of the appropriate landscaping buffer of eight feet along Beach Drive, and the inclusion of one way aisles and angular parking, it was noted that Planning Board approval was required (see Return, pp. 93 - 4). By letter dated December 1, 1999 the relocation site plans were, once again, disapproved (see Return, p. 88).

By transmittal letter, dated December 2, 1999, the Application for Modification of Land Usage, site plans, and a new SEAF were submitted to the Planning Board (see Return, p. 84), along with a request for a hearing date. The modification request noted that the property was within 500 feet of a county or state road (see Return, pp. 87, 11), making same subject to referral to the Suffolk County Planning Commission pursuant to General Municipal Law §239-m(3) (iv).¹

The Planning Board entertained the application just seven days thereafter, on December 9, 1999. The minutes of that meeting (see Return, pp. 81-2, 13 - 12) show that the Town's then Acting Commissioner of Planning and Development "represented the application." He discussed the Town's reluctance to approve the one-way access system, but noted that the relocation of the emergency room away from the west side of the property "will make these residents very happy." Concern was expressed for the "few residents" on the east side of Beach Drive and "we just want to make sure that if this is considered to be approved by the Board that we would have the ability to mitigate any potential noise concerns that might occur after the property is up and functioning. So we feel it could work from a Traffic Safety standpoint." He recommended that approval be "subject to the ability to exhaust any potential noise impacts that may result from the relocation of the Emergency Service Area." A Planning Board member agreed with the restrictions and stated "just be very careful, because there are residents as you mentioned over there." The minutes reflect that no one else spoke at the meeting, and that the approval was unanimously passed by the Planning Board. No party has claimed that these minutes have ever been filed with the Town Clerk prior to the commencement of this proceeding.

¹ The Return is devoid of any indication that this matter was ever submitted to the Suffolk County Planning Commission.

By letter, dated December 10, 1999 (see Return, p. 1A, 1B, 80), the Acting Commissioner (not the Planning Board), notified Good Samaritan of the approval, subject to the following important conditions:

3. The Planning Board reserves the right to hold a public hearing to address any future noise and/or loitering complaints and to consider any mitigation necessary to alleviate any problems resulting from the relocation of the Emergency Room facility. The Planning Board shall be solely responsible for the determination regarding noise and loitering impacts.

5. The above reference conditions shall be placed on the Building Certificate of Occupancy (emphasis added).

The letter did not reflect who was present or the actual vote of the Planning Board. Additionally, by notation dated May 24, 2000, a special condition was added to the building permit to change the Certificate of Occupancy to reflect the new building use (see Return, p. 72). A review of the latest Certificate of Occupancy, dated November 20, 2001, finally reflects the required conditions.* By letter, dated January 31, 2000, the relocation site plans were, once again, disapproved (see Return, p. 76). Finally, by letter dated February 18, 2000 the relocation site plans were approved (see Return, p. 73).

Thereafter, on March 7, 2000, the assistant site plan reviewer for the Town of Islip, upon reviewing the SEAF submitted to the Planning Board, found no significant environmental effects resulting from the relocation (see Return, p. 86). However, before doing so, she noted that the project would not be subject to coordinated SEQRA review, that she was relying upon "site plan review to mitigate any impacts regarding change to existing traffic patterns," and as to the potential for change in use or intensity of use of land, it was noted, rather contradictory, that "intensity & use remain the same or increase. Relocation of Emergency room away from residences on w/s/o site is an improvement." Moreover, the Return is devoid of any approval of the negative declaration by the Planning Board.

The Return does contain additional correspondence from a neighbor on the west side of the property, complaining about constant noise from the ambulances at the then existing emergency room (see Return, p. 65-6, 63, 62, 61, 24, 23, 22). After **approvals** were forthcoming from the Suffolk County Health Department in March 2000 (see Return, p. 70), the building permit was ready for issuance in June 2000 (see Return, p. 69).

From the above recital, the Court surmises that since the building permit was expressly conditioned upon approval of site plan modification by the Planning Board, if the site plan approval is defective, so must fall the building permit. Here, site plan approval was issued on December 9, 1999. However, the SEAF not completed by the Town's reviewer, until some three months thereafter, on March 7, 2000. Nor does it appear that the EAF was ever considered by or a negative declaration ever approved by the Planning Board. Such constitutes the challenged negative declaration.

On April 25, 2001, petitioners commenced this proceeding by Order to Show Cause seeking a preliminary injunction restraining and enjoining the Hospital from operating the new emergency room. At

² In keeping with this Court's suggestion set forth in the July 16, 2001 Order, numerous written requests have been made by petitioners for a hearing before the Planning Board. These requests have been ignored.

that time, this Court refused to grant a temporary restraining order since the petition and supporting papers failed to delineate how the challenged action constituted a “Type I” action under SEQRA and failed to particularize the procedural and substantive violations of that Act. The emergency room opened for business the next day, April 26, 2001.

The original petition mistakenly claimed that the Town issued a special use permit to the Hospital for the construction of a building for pain management. The petition **further** alleged that the switch to an emergency room use was accomplished without notice and without an environmental study. At oral argument, petitioners’ counsel conceded the fact that the relocation of the emergency room fails to qualify as a “Type I” action under the SEQRA regulations, but pointed to the confusion of the Hospital’s claim that such constitutes a “Type: II” action and the Town’s utilization of an Environmental Assessment Form that is reserved for “Unlisted” actions.

By Order dated July 16, 2001, the Court disposed of various motions to dismiss and permitted the filing of an amended petition. The amended petition before the Court seeks judicial review of certain determinations of the Planning Board and other officers of the Town concerning the relocation of an emergency room entrance of an existing hospital. It alleges that the relocation of the emergency room constitutes a “Unlisted” action as defined in the regulations promulgated under SEQRA and that the Town failed to undertake a full environmental review, or, as alleged by petitioners, any appropriate environmental review. Petitioners allege, among other things, the lack of proper public notice and public hearing of the application, the issuance of a negative declaration of environmental significance without conducting a proper review, a review which did not identify significant adverse traffic impacts and avoided consideration of some significant impacts by postponing review of them until after construction was begun, and a review which failed to comply with the procedural and substantive requirements of SEQRA.

It is well-settled that “SEQRA’s goal [is] to incorporate environmental considerations into the decision-making process at the earliest possible opportunity” (*Matter of Neville v Koch*, 79 NY2d 416, 426, 583 NYS2d 802 [1992]; **see**, ECL § 8-0109[4]). “The basic purpose of SEQR[A] is to incorporate the consideration of environmental factors into the existing planning, review and decision making processes of state, regional and local government agencies at the earliest possible time. To accomplish this goal, SEQR[A] requires that all agencies determine whether the actions they directly undertake, fund or approve may have a significant impact on the environment, and, if it is determined that the action may have a significant impact on the environment, and, if it is determined that the action may have a significant adverse impact, prepare or request an environmental impact statement” (6 NYCRR 617.1[c]). **An** EIS is required if the proposed project “may include the potential for at least one significant adverse environmental impact” (6 NYCRR 617.7[a][1]). “Because the operative word triggering the requirement of an EIS is ‘may’, there is a relatively low threshold for the preparation of an EIS” (*Matter of Omni Partners v County of Nassau*, 237 AD2d 440, 442, 654 NYS2d 824 [2d Dept 1997]). Pursuant to regulation (6 NYCRR part 617), an Environmental Assessment Form is the form to be used by an agency to assist it in determining the environmental significance or non-significance of its actions. “A properly completed Environmental Assessment Form must contain enough information to describe the proposed action, its location, its purpose and its potential impacts on the environment” (6 NYCRR 617.2[m]).

Pursuant to SEQRA, an agency may issue a negative declaration, obviating the need for an EIS, only after it has identified the relevant areas of environmental concern, taken a “hard look” at them, and made a “reasoned elaboration of the basis for its determination” (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417, 503 NYS2d 298 [1986]; *Matter of Munash v Town Bd. of Town of East Hampton*, __ AD2d __, __ NYS2d __, 2001 WL 1940855 [2d Dept 2002]). “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 maybe annulled" (*Matter of WEOK Broadcasting Corp. v Planning Bd.*, 79 NY2d 373, 383, 583 NYS2d 170 [1992]). Accordingly, this Court must determine whether the Planning Board (or the Town) complied with the procedural mandates of SEQRA, identified the relevant areas of environmental concern, whether they took a "hard look" at them, and whether they reasonably elaborated on the finding of no significance.

Upon this Court's review of the record, it concludes that the Town failed to satisfy the above standard. The analysis undertaken on March 7, 2000 by the assistant site plan reviewer for the Town of Islip, which deferred consideration of the one obvious environmental impact, that is, traffic, to "site plan review to mitigate any impacts regarding change to existing traffic patterns," and which analysis occurred three months *after* the Planning Board had already approved the site plan application at an unnoticed meeting, without public comment, underscores the superficiality of the challenged SEQRA process. In addition, the Planning Board's approval, which deferred consideration of the one obvious environmental impact, that is, **traffic**, to some future public hearing to "consider any mitigation necessary to alleviate any problems resulting from the relocation of the Emergency Room facility," despite the fact that the Planning Board acknowledged that it had to "be very careful, because there are residents as you mentioned over there," reveals a complete misunderstanding of the SEQRA process. Instead of the mandatory "hard look," the Planning Board and the Town, at best, offered a "confused gaze" at the potential traffic implications of the relocation of the Emergency Room. While acknowledging a traffic and noise concern at the prior location and that the relocation of the emergency room away from the west side of the property "will make these residents very happy," the Planning Board and the Town failed to adequately address the impact to the residents on the east side of the property. The concern is not sufficiently detailed in the EAF, particularly in light of the unexplored comment that the potential for change in use or intensity of use of land will "remain the same or increase."

It is not for this Court to weigh the desirability of having the Emergency Room relocated to the east side of the Hospital property, but only to insure that the Town and the Planning Board satisfied the procedural and substantive requirements of SEQRA and the rules and regulations implementing it (*see Chemical Specialties Manufactures Assoc. v Jorling*, 85 NY2d 382, 397, 626 NYS2d 1 [1995]; *Matter of Jackson*, 67 NY2d at 416, *supra*).

Since this was an Unlisted Action where there was no coordinated review, the procedures set forth in 6 NYCRR 617.6(b)(4) were to be followed (*see* §617.6[b][2]). The Planning Board was permitted to proceed as if it were the only involved agency. As explained at 6 NYCRR 617.4(a)(1), "[f]or all individual actions which are Type I or Unlisted, the determination of significance must be made by comparing the impacts which may be reasonably expected to result from the proposed action with the criteria listed in subdivision 617.7(c) of this Part." A review of that subdivision's Criteria for Determining Significance reveals two possible potential impacts, which may possibly trigger a third impact. The first is "a substantial adverse change in ... traffic or noise levels..." (§617.7[c][1][i]). The second is "the encouraging or attracting of a large number of people to a place or places for more than a few days, compared to the number of people who would come to such absent the action" (§617.7[c][1][ix]). Additionally, §617.7(c)(1)(xi) may be relevant ("changes in two or more elements of the environment, no one of which has a significant impact on the environment, but when considered together result in a substantial adverse impact on the environment") (*see also* §617.7[c][3]).

Here, procedurally, the Planning Board violated 6 NYCRR 617.3(a), that is, "[n]o agency involved in an action may undertake, fund or approve the action until it has complied with the provisions of SEQR[A]." As detailed above, the Planning Board approved the site plan submitted to it just seven days earlier, without first considering and approving a resolution concerning SEQRA compliance. If the Planning Board seeks to rely upon the SEAF completed by the Town's reviewer, such was not accomplished until

March 7, 2000, three months after approval of the site plan. Furthermore, no explanation is offered as to the authority of the Town's reviewer to undertake SEQRA review on behalf of the Planning Board. It may be that said individual undertakes such review for the Building Department, but under the applicable SEQRA regulations the Planning Board has to approve its separated review. Such is indicated by the submission of the SEAF to the Planning Board by the Hospital by letter dated December 2, 1999.

Having found that the Planning Board failed to comply with the procedural rigors of SEQRA, the Court need not address the substantive requirements, that is, the Town reviewer's determination of non-significance. However, in light of the fact that the courts have failed to set forth the precise limits of the "hard look" test beyond that found in *Matter of Jackson*, 67 NY2d 400, *supra*, the Court makes the following observations. Based upon the current record, the Court cannot find that the Town adequately considered the probable environmental impact of the emergency room relocation and reasonably addressed all prevailing concerns. The SEAF is internally inconsistent and fails to contain sufficient evidence to provide a rational basis to support a determination that the requisite "hard look" was undertaken.

That is not to say that a determination of non-significance is not possible. While the record does contain evidence of the traffic and noise concerns of the original neighbors on the west side of the Hospital and generalized objections to the relocation from a traffic consultant submitted with the original petition and from a safety expert (see Return, p. 30), Beach Drive is, apparently, a widely utilized roadway. The record fails to disclose how the addition of ambulances, hospital workers, walk-in patients, and visitors to that site will affect conditions, if at all. The record is also devoid of objective reports of a significant impact (compare *Matter of Munash*, ___ AD2d ___, *supra*). Once the Town corrects the procedural errors, it may still be able to articulate a rational basis to support a determination of non-significance. As previously noted by the Court, the fact that petitioners would require further mitigation measures is not a basis for invalidating findings that satisfy SEQRA criteria (see, *City of Rye v Korff*, 249 ADS2d 470, 671 NYS2d 526 [2d Dept 1998]). A court should not second-guess the environmental review conducted by an agency if the substantive requirements of SEQRA are met (see, *Matter of Finger v DelFino*, 275 AD2d 745, 713 NYS2d 490 [2d Dept 2000]).

The Court does reject the Town's claim that the relocation constitutes a "Type II" action, since it fails to satisfy any one of the 37 categories found at §617.5(c). The claim from the then Commissioner of Planning and Development that "ambulances turn off their sirens at Montauk Highway, well before they ever begin to travel along Beach Drive" (Gulizio *aff.*, par. 14), is offered without support, is contradicted by the complaints of the original neighbors to the west, and fails to address the traffic concerns.

Another issue looming over the remanded proceedings is whether or not the building permit for the relocated emergency room required a front yard variance. All parties concede that the Hospital property constitutes a corner lot and pursuant to Town of Islip Zoning Code §68-189.B., "[a]ll main buildings hereafter erected on a corner lot in a General Service C District shall also have a front yard facing the side street. This front yard shall be a minimum of 30 feet, unless arterial highway setback is greater (see Article XXXII)." Here, the setback is 45 feet. However, the issue is whether this new construction for the relocated emergency room (the building permit at issue called for an approximately 11,036 sq. ft. addition to the existing first floor area) is a main building or an accessory building, for pursuant to §68-189.D.(2), "[a]ccessory buildings on corner lots shall have a minimum front yard setback from the side street of 50 feet." The Town argues that the new structure is not an accessory building, but instead, attached to the main building.

It appears that the structure was built separately and subsequently connected to the main building of the Hospital by virtue of a connecting and enclosed hallway. The record is incomplete as to whether this connecting hallway was part of the original design when the structure was intended as an outpatient

rehabilitation center or added when the decision was made to relocate the emergency room. The certificate of occupancy does not explain this addition. Moreover, the question arises as to whether one can simply build satellite structures that are connected like spokes to a main structure and claim the benefit of a main building for front yard setback purposes. However, with the annulment of the building permit, petitioners can advance their claim that the relocation of the emergency room constitutes an accessory building with the Building Inspector and if they disapprove of his decision, they can appeal it to the Zoning Board of Appeals (*see* Town Law § 267-a).

By prior Orders of this Court, dated July 16, 2001 and October 26, 2001, it has been determined that petitioners possess the requisite standing to bring this proceeding (*see Town of Southold v Cross Sound Ferry Serus, Inc.*, 256 AD2d 403, 404, 68 1 NYS2d 571 [2d Dept 1998] wherein neighboring homeowners “some of whom suffered from an increase in noise, traffic, and air emissions on the streets upon which they reside, possessed a real and substantial interest in the outcome of this action”).

Additionally, both of those Orders examined the statute of limitations issue in detail, reserving final judgment until the submission of the entire record. In summary, a person aggrieved by a decision of any board of a town must seek judicial review by filing a proceeding under CPLR article 78 within 30 days of the filing of the board’s decision in the office of the Town Clerk (*see* Town Law § 274-a[11]; § 267-c[1]). If the challenged action relates to SEQRA review, the statute of limitations is triggered by the filing of the decision which embodies the final determination for SEQRA issues (*see Matter of City of Saratoga Springs v Zoning Bd. of Appeals of the Town of Wilton*, 279 AD2d 756, 719 NYS2d 178 [3d Dept 2001]). Here, the basis of petitioners’ challenge is the Planning Board’s noncompliance with SEQRA in approving the relocation of the emergency room, before the issuance of a negative declaration, without the benefit of an environmental impact statement, and apparently, without that Board ever taking part in the SEQRA process.

Petitioners’ primary challenge is to the site plan modification by the Planning Board issued on December 9, 1999, however, the Town Attorney conceded at oral argument that neither the site plan modification or the negative declaration prepared by Elizabeth K. Anderson were ever filed with the Town Clerk. The records of the Town Clerk were the subject of various Freedom of Information Requests by petitioners, none of which disclosed the required filing with the Town Clerk. Long thereafter, the Town came forward with a copy of the Acting Commissioner’s December 10, 1999 letter concerning the Planning Board’s site plan modification, with a date stamp showing receipt by the Town Clerk on December 15, 1999. However, although such was requested in this Court’s Order of October 26, 2001, no explanation is offered from the Town Attorney, from an individual responsible for filing the determination with the Town Clerk, or from an individual responsible for record-keeping and safe-keeping within the Town Clerk’s office.

Moreover, the then Acting Commissioner’s December 10, 1999 letter is nothing more than a hearsay account of what transpired at the Planning Board. A Planning Director is without authority to approve or disapprove a site plan (*see Figgie Intl., Inc. v Town of Huntington*, 203 AD2d 416, 610 NYS2d 563 [2d Dept 1994]; *Matter of Nemeroff Realty Corp. v Kerr*, 38 AD2d 437, 330 NYS2d 632 [2d Dept 1972], *aff’d* 32 NY2d 873, 346 NYS2d 532 [1973]). The Planning Board is expressly authorized by statute (Town Law § 271) and its powers are statutory (Town Law §§ 274-a, 274-b, 276, 277, 278, 282). Since only a Planning Board can approve a site plan, and since it is acknowledged that the minutes of the December 9, 1999 meeting were never filed until, at best, long after the filing of this proceeding, the statute of limitations claim (Town and Planning Board’s first affirmative defense) must be dismissed.

The Court also agrees with petitioners’ contention that the letter does not enumerate the vote of the Planning Board and does not constitute a “decision” for statute of limitation purposes in keeping with *Matter of Allens Creek/Corbett’s Glen Preserv. Group v Town of Penfield Planning Bd.*, 249 AD2d 921, 673 NYS2d 222 (4th Dept 1998).

Additionally, the Court rejects the Hospital's claim that the issuance of the building permit was a ministerial act not subject to SEQRA review (see 6 NYCRR §617.5[c][19]; see also *Incorporated Vil. of Atl. Beach v Gavalas*, 81 NY2d 322, 599 NYS2d 218 [1993]; *Matter of Lighthouse Hill Civic Assoc. v City of New York*, 275 AD2d 322, 712 NYS2d 558 [2d Dept 2000]). Where permits are issued as a matter of right, that is, as "official acts of a ministerial nature, involving no exercise of discretion" (ECL §8-0105[5][ii]), SEQRA review is not required (see, *Matter of Dujmich v New York State Freshwater Wetlands Appeals Bd.*, 240 AD2d 743, 659 NYS2d 310 [2d Dept 1997]). However, a building permit may constitute agency "action" subject to SEQRA depending upon the regulatory scheme underlying the action (see *Matter of Pius v Blutsch*, 70 NY2d 920, 524 NYS2d 395 [1987]). Here, the role of the Planning Board added a large element of discretionary action into the decision-making process. As noted, the building permit was subject to Planning Board review of the site plan. Therefore, it was not simply ministerial in nature.

As for that branch of petitioners' amended petition seeking an injunction restraining and enjoining the Hospital from conducting business affairs and services at the relocated emergency room, the request is granted but stayed until March 21, 2003, to afford the Town an opportunity to comply with SEQRA (see *Matter of Uprose v Power Auth. of State of New York*, 285 AD2d 603, 729 NYS2d 42 [2d Dept 2001]; *Matter of Silvercup Studios, Inc. v Power Auth. of State of New York*, 284 AD2d 598, 729 NYS2d 47 [2d Dept 2001]). Under the circumstances, that being the denial of the initial temporary restraining order request, and since the emergency room is currently open and operating, the cited Second Department holdings dictate the issuance of a stay order.

Finally, the Court, by short form order dated July 16, 2001, determined that this proceeding was not rendered moot or academic by virtue of the completion of the construction. It was noted that the petitioners sought immediate injunctive relief as soon as they became aware that the opening was imminent. Under the circumstances, petitioners did all they could do to timely safeguard their interests, and the Hospital was put on notice that if it proceeded, it would do so at its own risk (see *Vitiello v City of Yonkers*, 255 AD2d 506, 680 NYS2d 607 [2d Dept 1998]; *Matter of Save Our Forest Action Coalition Inc. v City of Kingston*, 246 AD2d 217, 675 NYS2d 451 [3d Dept 1998]; *Matter of Watch Hill Homeowners Assoc. Inc. v Town Bd. of Town of Greenburgh*, 226 AD2d 1031, 641 NYS2d 443 [3d Dept 1996]; cf. *Matter of Gorman v Town Bd. of Town of East Hampton*, 273 AD2d 235, 709 NYS2d 433 [2d Dept 2000]; *Matter of Save the Pine Bush Inc. v City of Albany*, 281 AD2d 832, 722 NYS2d 310 [3d Dept 2001]).

The recent decision from the Court of Appeals in *Matter of Dreikausen v Zoning Bd. of Appeals of the City of Long Beach*, 98 NY2d 165, 746 NYS2d 429 (2002) does not alter that result. Therein, the Court emphasized that the petitioners failed to seek a temporary restraining order at any time during which the matter was pending before the Supreme Court. In fact, the Court recognized that notwithstanding substantial completion, "public interests such as environmental concerns warrant continuing review (citations omitted)" (*Matter of Dreikausen*, 98 NY2d at 173).

Since it is clear that any interlocutory appeal from this remand Order will require permission (see CPLR 5701[b][1]; see also *Matter of Russo v Black*, ___ AD2d ___, ___ NYS2d ___ [2d Dept 2002]; *Matter of Luebbe v Town of Brookhaven Zoning Bd. of Appeals*, 120 AD2d 731, 502 NYS2d 516 [2d Dept 1986]; *Coor Dev. Corp. v Weber*, 41 AD2d 689, 342 NYS2d 635 [4th Dept 1973]; *People ex rel. Afrika v Russi*, 204 AD12d 1062, 613 NYS2d 99 [4th Dept 1994]; *Cirasole v Simins*, 48 AD2d 795, 369 NYS2d 423 [1st Dept 1975]), this Court declines to entertain such an application (see CPLR 5701[c]). However, as noted, the Court has partially stayed enforcement of this Order.

It is this Court's firm belief that if the challenged governmental review process had been open to the public for comment and input, the relocation of the emergency room still could have been accomplished, and genuine concerns of nearby residents could have been addressed. While the Planning Board's review

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may have been slowed, early answers to potential traffic, noise, and safety concerns could have dispelled any unfounded fears and eliminated the need for endlessjudicial intervention.

According, **the** amended petition is granted to the extent indicated and the matter **is** remanded to **the Planning Board**. **This** shall constitute **the** decision and order **of** the **Court**.

DATED: 10/22/02



THOMAS F. WHELAN, J.S.C.