Coalition to Save Cedar Hill v Planning Bd. of Inc. Vil. of Port Jefferson
2008 NY Slip Op 31186(U)
April 2, 2008
Supreme Court, Suffolk County
Docket Number: 0001811/2007
Judge: Emily Pines
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Short Form Order

Index Number: 1811-2007

Supreme Court - State of New York
I.A.S. Term, Part 23, Suffolk County

Present:

HON. EMILY PINES
J. S. C.

Original Motion Date: 02-26-2007
Motion Submit Date: 01-30-2008
Motion Sequence No.: 001 MOTD

COALITION TO SAVE CEDAR HILL, LINDA M. WICKS, KATHLEEN MATTHEWS, JACK RICHMOND, TIMOTHY MORAN, JESSICA GIOVACHINO, CATHERINE BALL, THOMAS SIMKO, LOUISE W. HARRISON, and HENRY MARTYN RANDALL, as Members and in their Individual Capacities,

Petitioners,

-against-

PLANNING BOARD OF THE INCORPORATED VILLAGE OF PORT JEFFERSON, LIBERTY MEADOWS, LLC, HOWARD O. WUNDERLICH, INDIVIDUALLY AND AS TRUSTEE OF THE HOWARD O. WUNDERLICH REVOCABLE LIVING TRUST, ADELINE E. WUNDERLICH, INDIVIDUALLY AND AS TRUSTEE OF THE ADELINE E. WUNDERLICH REVOCABLE LIVING TRUST, SEAN CASH AND KATHLEEN CASH,

Respondents .

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CORRECTED DECISION

In this Article 78 Proceeding, the Petitioners seek a Judgment annulling a resolution of the Planning Board of the Incorporated Village of Port Jefferson ("Planning Board"), dated December 14, 2006, which approved the final clustered 43 unit residential subdivision of Respondent Liberty Meadows, LLC ("Liberty Meadows" or "applicant"). The Petition also requests that the Court take the following further actions concerning the land use application: 1) Order that the negative declaration issued by the Planning Board under the State Environmental Quality Review Act ("SEQRA") and adopted prior to the preliminary subdivision approval on March 29, 2006, be rescinded; 2) Direct that the Planning Board, as lead agency, prepare a Draft Environmental Impact Statement ("DEIS") before any further action is taken on the application; 3) Order that a drainage system be

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designed in conformity with the provisions of the Village Code based upon representative borings taken at a proper depth; 4) Order the Planning Board after SEQRA review is complete, to recalculate the allowable yield of the project proposed by Liberty Meadows, LLC; and 5) Order that the Planning Board comply with the Open Meetings Law in all future deliberations.

As set forth in the Petition, the Petitioners consist of an organization and several individuals, each of whom are members of the organization and several of whom are stated to have residences in close proximity to the proposed subdivision or who have family and loved ones buried at the Cedar Hill Cemetery, which abuts the site in question. The organizational Petitioner, the Coalition to Save Cedar Hill ("Coalition") sets forth as its purpose to preserve the forest surrounding the cemetery, where much of the building and clearing would occur; to safeguard the quiet repose of the Cemetery; to protect native ecological communities; and to guard the safety and health as well as to enhance the quality of life of the community. All Petitioners seek to prevent the development of an 18 acre site in the Village for the purpose of developing a 43 unit clustered subdivision.

Petitioners make numerous arguments in support of their application to set aside the final subdivision approval, based on alleged violations of SEQRA, the Village's own Code provisions, and the Open Meetings Law. The Petition contains the following arguments: 1) the Planning Board made substantive changes to the project between the time of preliminary and final approval; and as the project is classified as a Type I action under SEQRA, this requires a rescission of the negative declaration previously made pursuant to **6 NYCRR § 617.7(f) (i).**These changes included, inter alia, a significant new retaining wall, the location of the drainage easement in a sloped area of high elevation, installation of a new sidewalk involving tree clearing and grading not depicted on the preliminary plan; the configuration of the buildings; and a new walking path in the previously undisturbed portion of the development. 2) Substantive new information was discovered in the time in between the preliminary and the final subdivision approvals, which requires the Planning Board to rescind its original negative declaration under **6 NYCRR § 617.7 (f)(ii)**. According to Petitioner, the applicant's engineers recalculated the tributary drainage area, in this period, thus bringing the subdivision within the Village Code requirement for a drainage basin, which in and of itself, would significantly affect the yield for the project. 3) Changes in circumstances not previously considered require the Planning Board to rescind the negative declaration under **6 NYCRR § 616.7 (f)(iii).** In support of this claim, Petitioners assert that

the Planning Board ignored the Code requirement that it provide a drainage system capable of handling rain from a 10 year storm, despite a 5" rain storm in the period between the preliminary and final approvals. Petitioners assert, in addition, as a basis for an alleged violation of **6 NYCRR § 617.7 (f)(iii)**, that in the period between preliminary and final approval, the applicant submitted an additional 5 boring samples, which Petitioners opine are not properly located for the purpose of determining the suitability of the soil for the construction of storm water or sanitary leaching structures. 4) The Planning Board as part of its final subdivision approval, made such action contingent upon 44 conditions thereby effectuating an attempted back door conditioned negative declaration, improperly segmenting environmental review in violation **of 6 NYCRR §617.2 (h)**. In this vein, Petitioners assert that the Village has also impermissibly delegated its responsibility to perform SEQRA review as the lead agency to other entities. 5) As brought to Respondents' attention prior to the preliminary subdivision approval, the Village violated **§ 220-41** of the **Village Code** which requires that yield be calculated based not only on lot size and density under the Zoning Code but also dependent upon all other applicable requirements. Thus, according to Petitioners, the Village's failure to take into account land used for recreation and swimming pool, land for retaining walls, land for road profiles, land for sewer collection facilities, land for a booster and distribution main as required by the Suffolk County Water authority, land for a secondary entrance shown on the map, and land for a storm water drainage basin, violated SEQRA and the Village Code. 6) The Village Code violations that give rise to SEQRA violations also constitute a separate basis, under **CPLR Article 78,** to set aside the final approval as arbitrary , capricious and affected by errors of law. In support of this claim, Petitioners set forth **Village Code § 220-27 (F)(1)** which states that a tributary area of eight acres or more shall be deemed to necessitate a storm water recharge basin; **§220-27 (B)** which requires that the Planning Board engineer approve the design and size of a drainage facility based on anticipated runoff from a ten-year storm; **§220-12** which requires the Planning Board where waiving a requirement to "enter upon its records the reason or reasons why the particular improvement is not necessary, and (to) attach appropriate conditions or require such guaranties as may be necessary to protect the public interest". According to Petitioners, the Record of the Planning Board is devoid of any basis for ignoring these significant requirements. 7) The Planning Board's acts violated **Public Officer's Law § 95** (Open Meetings Law) in several respects. As examples, according to Petitioners, the Planning Board voted on the final subdivision approval without having received its comments form the State DOT, due to its own recalcitrance in forwarding a letter from the State DOT to the applicant's engineers; the applicant's engineers submitted documents to the

Planning Board from the Department of Health Services and the Suffolk County Water Authority more than five weeks after the close of the public hearing, thereby effectively closing off any opportunity for reasonable public input; the Village conducted its December 14, 2006 meeting inaudibly so as to close off the ability of the public to hear the proceeding; and e-mails were apparently sent concerning the project to members of the Planning Board, none of which were made part of the record. 8) Certain of the conditions placed upon the final subdivision approval are arbitrary and capricious, such as one delegating to the Village Engineer to approve modifications of the plans, one requiring "title Certification" where petitioners have potential evidence that one parcel and part of another were neither owned by the applicant nor anyone in contract with the applicant at the time of the subdivision application to the Planning Board, and one subjecting the project to DOT requirements rather than awaiting final approval until receiving the same, as they may affect the project. 9) Finally, Petitioners assert that the final subdivision plat was never properly and fully submitted allowing the time to begin to run for the final approval by the Planning Board. The Planning Board declared the final subdivision officially submitted only one day after it was submitted by the applicant without many of the requirements set forth as conditions to the preliminary plan and without addressing, according to Petitioners, the many violations set forth therein.

In addition to their legal arguments, Petitioners submit the Affidavits of Professional Engineer Michael Simon and Steven Engelbright (Curator of Geology at SUNY Stony Brook). Mr. Simon opines in some detail his support for Petitioners' claims that the Planning Board failed to comply with the Village Code requirements concerning the type and capacity of drainage facilities for this size project. In addition, he argues that the supplemental 5 borings taken between the time of preliminary and final approvals are inadequate to allow a determination as to whether the drainage facilities designed will be able to perform as required.

Respondents, Planning Board and Liberty Meadows both oppose the Article 78 Petition. Respondents assert as follows: 1) a prior determination of this Court, dated September 20, 2006, dismissing a prior Article 78 Petition by the same Petitioners , then seeking to annul the preliminary subdivision approval of the Village Planning Board, acts under the doctrines of res judicata, collateral estoppel and/or issue preclusion to bar the Court's consideration of all the claims raised herein to the extent that they were raised

previously. In this vein, Respondents allege that this Court's prior determination, dismissing the prior proceeding based on lack of personal service under **CPLR § 308** on necessary parties within the applicable statute of limitations, constitutes a determination on the merits of that proceeding. Respondents then make the claim that the bulk of Petitioners' arguments, concerning SEQRA violations, inadequate borings, and segmentation, as well as the adequacy of the drainage system were all raised in the first proceeding and are, therefore, barred from reconsideration, once that proceeding was dismissed. 2) Petitioners' Second, Third and Fourth Causes of Action are all barred by the applicable statutes of limitations because the issues were all raised in advance of the March 2006 preliminary approval. To support this claim, Respondents set forth that the Second Cause of Action is a challenge to the yield map as set forth in the original proceeding and is barred by the thirty day statute of limitations which began to run at the time of Preliminary approval on March 28, 2006. With regard to the Third cause of action, Respondents assert that it is a claim that the Village improperly segmented its environmental review; therefore, this challenge had to have been commenced no later than thirty days following the Village's SEQRA determination on March 9, 2006. The attacks on the drainage plan as well, according to Respondents, were to be commenced no later than thirty days following preliminary approval because the drainage plan was submitted and became part of the preliminary approval. 3) The alleged SEQRA violations under **6 NYCRR § 617.7 (f)** never occurred because, based on the affidavit of the applicant's engineer, the site plan did not undergo any significant changes between the time of preliminary and final approval. In addition, the Planning Board's engineer submitted an affidavit setting forth that changes made to the project in the interim were specifically intended for the public benefit including improvement of storm water retention and pedestrian access. In further support of this argument, Respondents submit a June 9, 2006 letter from the Suffolk County Planning Commission comparing the two maps and finding no substantial differences. 4) The **Village Code § 220-12** specifically grants the Planning Board authority to waive any improvements not necessary in the interests of public health, safety and general welfare. To the extent that this provision excepts those requirements that are "otherwise required by law", such exception refers to requirements of other laws such as those imposed by the Town, County, State and Federal government. To interpret the Code otherwise, as Petitioners would do, is, according to Respondents, to give the waiver provision no meaning. Thus, Respondents were not required to provide for a recharge basin and properly provided a drainage system to reflect the topography of the site as set forth in the record. 5) The drainage system contained within the final plan is properly designed to be

capable of collecting rain from a 10-year storm. Respondents assert both that this issue was raised before the preliminary approval and that Respondent Planning Board complied with the applicable Village Code requirement because the applicant's engineer opines that the Code should be interpreted to require capability of collecting the rainfall from a 10 year storm (5") and storing 3". 6) The Village complied with the Public Officers Law, since Petitioners were given correspondence prior to the December 2006 meeting which allowed them to raise and discuss the issues of conditioning the final approval on necessary approvals from the Department of Health Services, and the Department of Public Works. In addition, they assert that the record reflects the issue of DOT approval has now been mooted as a result of a March 2007 response from that agency. Respondents deny any pre meeting discussions and set forth that the only e-mail sent to the Board members by their engineer was a draft resolution for their review. Ultimately, Respondents contend that although the Village's engineer attended all meetings related to this project, the Petitioners did not and that their lack of awareness of what was discussed is not the fault of the Village and certainly not a violation of the Open Meetings Law. 7) Respondent Liberty Meadows argues that neither the organizational Petitioner nor the individuals have the requisite standing to challenge the Planning Board's determination. 8) There are no improper delegations of authority according to Respondent applicant because the condition that the Village engineer approve modifications to the plan is only specifically made before such modifications are returned to the Planning Board for review; the referral to the Village's Architectural Review Committee is not required to state that their recommendations go back to the Planning Board since such a requirement is built into the **Village Code§ 250.52(1)(c)**. 9) Finally, with regard to the issue of title, the issue is properly referred to the Village's legal counsel in the conditions to final approval.

Respondents submit the Affidavits of Licensed Engineer, Victor Bert and Charles J. Voorhis, (Masters in Environmental Planning) from the firm of Nelson & Pope, William Rau (Village Planner) and Lee E. Koppelman (former Executive Director of the Long Island Regional Planning Board).

PROCEDURAL HISTORY

Pursuant to **Village Code § 220-39**, Liberty Meadows applied to the Village Planning

Board in 2005 for approval to build a clustered residential subdivision in the Village of Port Jefferson. A yield map was approved by the Planning Board on December 13, 2005, establishing a yield of 43 units for the project, assertedly based on setting aside twenty percent of the land for roads and other infrastructure. On March 9, 2006, the Planning Board as the lead agency under SEQRA, made a finding of non significance and issued a negative declaration for this Type I action. Preliminary Approval of the subdivision was granted by the Planning Board on March 28, 2006. Thereafter, the Petitioners herein brought an Article 78 Proceeding attacking the Planning Board's action on numerous grounds , including violations of SEQRA and failure to comply with provisions of the Village Code. This Court issued a Decision and Judgment dismissing that Petition on September 29, 2006, on the ground that Petitioners had failed to serve properly and therefore obtain jurisdiction over certain property owners of the proposed project within the applicable statute of limitations. The Planning Board granted the applicant final subdivision approval by resolution dated December 14, 2006 and the Petitioners filed the current Article 78 Petition on January 12, 2007.

STANDING

Where an organization seeks to achieve standing to challenge the determination of a governmental agency, it must set forth 1) that one or more of its members would have standing to sue; 2) that the interests of such organization are related to its purpose so that it is the appropriate representative of such interests; and 3) that neither the asserted claims nor the appropriate relief requires participation of the individual members. **Society of Plastics Industry Inc v County of Suffolk**, 77 NY 2d 761, 570 NYS 2d 778, 573 NE 2d 1034 (1991). Thus, an association organized to seek preservation of historical structures had standing to sue to enjoin demolition of historic buildings pending review under SEQRA. **See, Ziemba v City of Troy**, 37 AD 3d 68, 827 NYS 2d 322 (3d Dep't 2006), lv to app den, 8 NY 3d 806, 832 NYS 2d 488, 864 NE 2d 618 (2007).

With regard to individual standing to sue concerning land use determinations, petitioners are generally required to demonstrate that they will suffer injury that is somehow different from that of the public at large, and in those cases involving SEQRA, that the alleged injury falls within the zone of interest sought to be promoted by the statute. **Society**

of Plastics Indus, supra. In this vein, the mere proximity of a homeowner's residence to a proposed construction, without more, is insufficient to confer standing to commence an Article 78 proceeding, whereas, a homeowner who resides directly across from or abuts the site has been held to possess standing to bring an Article 78 proceeding to review a government determination that an environmental impact statement was unnecessary. **Barrett v Dutchess County Legislature**, 38 AD 3d 651, 831 NYS 2d 540 (2d Dep't 2007).

In this case, the Coalition consists of individuals, some of whom own property directly across from and adjacent to the subject project, and who have asserted concerns with the potential noise and traffic resulting from the proposal as well as interference with views of wooded areas from their properties. Another individual Petitioner/member has asserted concerns with the economic impact on several commercial properties within close proximity to the proposed project. The Coalition has a stated goal to maintain the historic character of the community, to preserve the forest surrounding the historic Cedar Hill Cemetery, to guard the safety and health of the people and enhance their quality of life . Based on the above, this Court finds that the organizational Petitioner's goals are directly germane to their stated purpose and that it has sustained its required showing and has standing to maintain this proceeding. The Court concomitantly finds the same for many of the individual Petitioners, including those whose properties abut or are directly across from the 18 acre site. These include petitioners Timothy Moran, Jessica Giovahino, and Jack Richmond. Petitioner Linda Wicks has also submitted an affidavit stating that she has views of the wooded property on the proposed site from her own residence. Petitioner Catherine Ball owns several plots in the Cedar Hill Cemetery adjacent to and allegedly affected by the proposal. Thomas Simko resides north of and downhill from the project and has cited concerns regarding runoff onto his property as a result of the extent of construction and the steep hills. In addition, both Petitioner Simko and Petitioner Randall visit loved ones in the Cedar Hill Cemetery. Based on the recent discussion of this issue in the **Barrett** case, **supra**, this Court is applying the rule that standing should be liberally construed in order that this land use dispute is decided on its merits rather than by "(p)reclusive, restrictive standing rules". **Id**. Therefore, the Court finds that all of the above Petitioners have standing to bring this Article 78 Petition. Although Petitioner Louise W. Harrison has submitted an affidavit concerning other issues germane to the proceeding, she has not set forth a basis why she has standing to sue as individual and this Court rules, therefore, that she lacks standing to sue as an individual.

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RES ADJUDICATA-COLLATERAL ESTOPPEL- ISSUE PRECLUSION

A dismissal of an action on the grounds of statute of limitations is considered a dismissal on the merits for claim preclusion purposes and has been held by the Court of Appeals to bar a subsequent action. **See, Smith v Russell Sage College**, 54 NY 2d 185, 445 NYS 2d 68, 429 NE 2d 746 (1981). Applying this principle more recently in the context of a land use application, the Appellate Division Second Department barred an application challenging a zoning variance in a declaratory judgment action, where a prior Article 78 had been dismissed for failure to join necessary parties within the statute of limitations. **Cold Spring Harbor Area Civic Assoc v Board of Zoning Appeals of Town of Huntington**, 305 AD 2d 444, 762 NYS 2d 392 (2d Dep't 2003).

In the context of the case at Bar, the Court finds that some of Petitioners' claims are indeed identical to those raised in the dismissed proceeding and are, therefore, barred. These include the Petitioners' Second Cause of Action, based on the Village's alleged failure to calculate density or allowable yield as required by law; the Petitioners' Third Cause of Action that the Planning Board's issuance of a conditioned subdivision approval constituted a conditioned negative declaration under SEQRA; and the Petitioners' Seventh cause of Action, raised in its prior proceeding that the Planning Board violated proper procedure in adopting a May 11, 2006 resolution finding the final application to be complete and ready for a public hearing. However, the Court does not find that any of the other causes of action are precluded, since, at least in part, they contain arguments regarding issues that allegedly occurred between the preliminary and final approvals. Thus, the First Cause of Action asserts that substantial changes between the two approvals necessitated revocation of the negative declaration; the Fourth Cause of Action may refer to drainage issues and Code violations raised before; however, they are argued in the context of specific events that occurred between the two approvals, specifically the finding in a post preliminary submission by the applicant's engineer of a tributary area of greater than eight feet and a rainfall event that may have impacted the need for application of specific provisions of the Village Code. Petitioners had the right to raise these issues in the context of the specific evidence presented.

While Respondents also argue that many of the same causes of action are barred by the thirty statute of limitations applicable to SEQRA challenges, the Court agrees only with

regard to the Second and Third Causes of Action. Read carefully, Petitioners are rearguing that the final approval did not calculate the allowable yield and that the approval, by containing numerous conditions constituted an improper segmentation of a Type I action. Both of these issues were ripe and had indeed accrued at the time of preliminary approval in May 2006. Accordingly, whether subject to the thirty day SEQRA statute of limitations or the four month Article 78 statute of limitations, both claims are barred. **See, Long Island Pine Barrens Society v Planning Board of the Town of Brook haven,** 78 NY 2d 608, 578 NYS 2d 466, 585 NE 2d 778 (1991). The Village Law, like the Town Law discussed in that case, provides that a preliminary plat must show the layout of the proposed subdivision, including the road and lot layout with approximate dimensions, key plan, topography, drainage, and all proposed facilities with detailed preliminary plans and profiles. **Village Law § 7-728.** Thus, the preliminary approval fixes the basic components of the proposed development and that is when the Planning Board's action triggers a potential Article 78 action under SEQRA concerning such issues as yield and segmentation. On the other hand, allegations that a SEQRA determination should be rescinded based on new information or facts only accrues when an action based on such new facts is made. Accordingly, the Court rules that only the Second and Third causes of action are barred.

ARTICLE 78/ SEQRA REVIEW

Upon review of a municipal land use determination, the Court must inquire "(w)hether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion". **CPLR § 7803(3).** Whether an action is "arbitrary and capricious" requires the Court to determine whether the action reviewed had a rational basis. **Matter of Cowan v Kern,** 41 NY 2d 591, 394 NYS 2d 579, 363 NE 2d 305 (1977); **Halperin v City of New Rochelle,** 24 AD 3d 768, 809 NYS 2d 98 (2d Dep't 2005). Such determination will be found rational where it has some objective factual basis. **Halperin, supra.**

As set forth above, Petitioners assert that the Planning Board violated specific SEQRA regulations, provisions of the Village Code and the State Public Officers Law in their conduct leading to the determination of December 14, 2006.

RECISION OF NEGATIVE DECLARATION

SEQRA regulations concerning recision of Negative Declarations provide, in relevant part, as follows: "(a)t any time prior to its decision to undertake, fund, or approve an action, a lead agency must rescind a negative declaration when substantive (i) changes are proposed for the project; (ii) new information is discovered; or (iii)changes in circumstances related to the project arise that were not previously considered and the lead agency determines that a significant impact may result". **6 NYCRR § 617.7 (f).**

In response to the Petition , the applicant's engineer, Victor Bert, provided the Court with a drawing demonstrating the differences between the preliminary and final subdivision plans. He opines that the changes were few and of a minor nature. The accompanying Affidavit of Charles Voorhis states that items such as retaining walls were part of the earlier submissions and that the changes made actually reduced the amount of tree clearing and re-grading. To the extent that the addition of a sidewalk required a new retaining wall, he avers that this would increase clearing by 0.11 acres. As set forth, he states that the final site plan still preserves approximately 50% of the site as undisturbed open space. He argues in some detail that there simply were no changes made that would make the project fall within the ambit of those actions necessitating a recision of the March 2006 SEQRA negative declaration. With regard to the alleged newly discovered information, he states that Part II of the Environmental Assessment Form addressed stormwater containment well before the preliminary subdivision approval. Both Victor Bert and Charles Voorhis argue that Petitioners are misreading the provision of the Village Code which requires the Planning Board engineer to design drainage based on "(a)nticipated runoff from a ten-year storm..." . As stated in the Bert Affidavit, "(t)he storm water leaching pools not only collect and store the rain but also leach-i.e., drain-it, so that the water that has already been collected is draining out while other water is collected". Mr. Bert also disputes the allegation that the final site plan fails to take into account potential runoff from upstream areas, stating that the preliminary subdivision approval demonstrates that drainage from the upstream area around the cemetery was taken into account and handled through the drainage system included in the subdivision plan. In a Supplemental Affidavit, Mr. Bert annexes copies demonstrating a similar development of an adjacent condominium project where 2 test borings were taken and found sufficient to design a stormwater and drainage system. He also demonstrates that the

drainage system in the adjacent residential project drains a tributary area in excess of 8 acres utilizing a system of multiple storm water leaching pools to collect and discharge stormwater rather than a recharge basin or sump. The Village Planner, William Rau, asserts in his Affidavit that the Planning Board was entitled to waive any Code requirements as set forth under **Village Code § 220-12.** He alleges further that there had been a history of blowouts of recharge basins on sloped sites, in Port Jefferson, resulting in significant damage to property making the determination not to utilize them not only rational but preferable.

This Court will not substitute its own judgment, where, as here, the rational explanations of a licensed engineer and environmental planner demonstrate that there exists an objective basis in fact for the Planning Board not to consider any of the changes and/or new information as necessitating a recision of the March 2006 negative declaration. In reaching this conclusion, the Court is not ignoring the equally extensive submissions on behalf of the Petitioners (especially that submitted by Mr. Simon); however, the Court's role in such disputes is limited. Respondents' experts set forth rational, objective bases for their determination that no changes to the project, no changed circumstances and no new information required the Planning Board to rescind the negative declaration that preceded the preliminary subdivision approval. **Matter of Cowan v Kern, supra**. Thus, the Court declines to annul the Planning Board determination based on failure to rescind the negative declaration.

CONDITIONS CLAIMED TO BE ARBITRARY

As set forth above, in addition to the broader claim of segmentation, Petitioners assert that some of the specific conditions of the final subdivision approval constituted an improper delegation of the Planning Board's powers to other entities. Applying the rational basis standard, the Court finds nothing arbitrary in the Planning Board's delegation of powers to the Village Engineer or the Architectural Review Committee, since both entities will be required to submit their proposed modifications and or comments to the Planning Board as set forth in Respondents' papers. Petitioners' objection to the wording of a condition that delegates the wording of the age restriction for the community to the Village attorney is rational, especially in view of William Rau's statement in his Affidavit that the wording will ultimately be presented to the Planning Board for approval. Nor does the Court find irrational

the reference to the Village Attorney to assure title certification of all property subject to the approval. In this vein, as stated by applicant's counsel, a conditional approval requires the signing of the plat by an officer of the Planning Board before the plat qualifies for recording and certainly prior to authorization for the issuance of any building permits. **Village Law § 7-728.** A municipal entity may impose conditions on a subdivision application as long as a relationship exists between a problem sought to be alleviated and the land use application sought to be approved. **See, Holmes v Planning Board of Town of New Castle**, 78 AD 2d 1, 433 NYS 2d 587 (2d Dep't 1980). Based on the foregoing, the Court rejects petitioner's request to annul the determination based on alleged inappropriate conditions.

VILLAGE CODE

Section 220-27 (F) (1) of the Village Code provides, in pertinent part that: "(i)n general, a tributary area of eight acres or more shall be deemed to necessitate a stormwater recharge basin". **Section 220-27 (B)** also provides, in part, that the Planning Board engineer approve the design and size of the facility "(b)ased on runoff from a ten-year storm . . . .".

As set forth above, there exists a disagreement with regard to the meaning of drainage capacity to handle anticipated capacity from a ten year storm. Since the Court accepts, as having a rational basis, the interpretation of the Respondents' engineers and Planner, the Court need not revisit this issue here. However, the issue of the need for a recharge basin is somewhat more problematic. As set forth in Petition at paragraph 113, Petitioners' Memorandum of Law and Reply Memorandum of Law, after the preliminary subdivision was approved, the applicant's engineer actually recalculated the tributary drainage area for the subject project. **(Return, vol. 2, site Development Application 5/10/06).** The new drawing showed such area, for the first time, to be more than 8 acres, bringing the tributary area within the dividing line set forth in the Village Code. The applicant's attorney argues that other portions of the Village Code, such as **§ 220-27 (D)** set forth "(p)iping, dry wells, swales or other suitable means of runoff collection" as being within the discretion of the Planning Board to demonstrate on its approved drainage plan.

While the Court does not substitute its judgment for that of the Village's own experts concerning the desirability of a recharge basin, the Court cannot simply ignore the plain

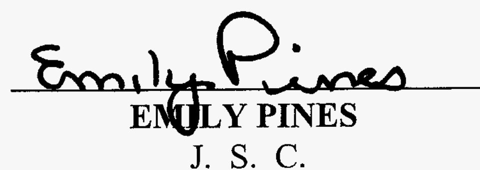
meaning of Code § **220-27 (F)(1)**. The legislative body that adopted such language placed the 8 foot tributary area as the dividing line between when a recharge basin would be "deemed" necessary and when not. Although the Respondents are correct that Code § **220-12** provides that the Planning Board is entitled to waive any such provision, when it does so, it must "(e)nter upon its records the reason or reasons why the particular improvement is not necessary and attach appropriate conditions or require such guaranties as may be necessary to protect the public interest". Interestingly, both the Planning Board and the applicant submit Verified Answers to the Petition denying knowledge or information to respond to the allegation that the Village failed to set forth its grounds on the record for waiving the provisions of **Village Code §220 - 27(f) (l)**. A review of the Return demonstrates that this never happened.

In view of the above, the Court finds that the Planning Board, in issuing the final subdivision approval for the subject project, violated the procedures of its own Code. Accordingly, the Article 78 Petition is granted, the Planning Board's December 14, 2006 final approval of the subject subdivision is annulled based on error of law, and the matter remanded for further action. In granting the Petitioners' application, this Court has not determined that the previously issued negative declaration should be rescinded, since it has not found a violation of **6 NYCRR § 616.7 (f)** as alleged. While it is possible that future changes in the process may require such relief, that determination would be made, in the first instance by the Planning Board, on notice to the applicant. **6 NYCRR § 617.17 (f).**

The Court notes that because it is annulling the Planning Board's determination and the matter is remanded for further proceedings to the Village Planning Board, it need not address the remaining issue of the alleged violations of the Open Meetings Law. The Court trusts and expects, especially in view of the public interest in this proceeding, that the Planning Board will conduct its proceeding in an open manner in full compliance therewith.

This constitutes the ***DECISION*** and ***JUDGMENT*** of the Court.

Dated: April 2, 2008
Riverhead, New York



EMILY PINES
J. S. C.