SUPREME COURT OF THE STATE OF NEW YORK
IAS PART XXI - COUNTY OF SUFFOLK

PRESENT:

HON. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

OYSTER BAY ASSOCIATES LIMITED PARTNERSHIP and **WPIX, INC,**

Petitioners,

- against -

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

Respondents,

- and -

BIRCHWOOD CIVIC ASSOCIATION AT JERICHO INC, Debbie Hunter, as President of **BIRCHWOOD CIVIC PARK AT SYOSSET HOMEOWNERS ASSOCIATION** and Warren Church as President of **SYOSSET GROVES CIVIC ASSOCIATION,**

Intervenors Respondents.

INDEX NO. 2001-16830

MOTION SEQ. NO.: 008 - Mot D
ORIG. MOTION DATE: 11/09/07

MOTION SEQ. NO.: 009 - MD
ORIG. MOTION DATE: 12/03/07

FINAL SUBMIT DATE: 12/05/07

UPON the following papers numbered 1 to 414 read on these Motions:
Petitioners' Motion **(008)** (Pages 1-94 & Exhibits A-K & A-G);
Respondent's Cross-Motion **(009)** (Pages 95-247 & Exhibits A-P);
Intervenors' Opposition (Pages 248-288 & Exhibits A-F & one unmarked Exhibit);
Petitioners' Reply (Pages 289-359, Exhibits A-L & Appendices A-C);
Respondent's Reply (Pages 360-414);
it is,

ORDERED, that the application of Petitioners (**008**), is hereby granted to the extent set forth herein below; and the application of Respondent **(009)**, is hereby denied in all respects.

Petitioners move this Court **(008)** for an Order directing Respondent to adopt the Town Environmental Quality Review Commission's July 25, 2000 SEQRA Findings, pursuant to this Court's July 8, 2002 Decision and Order, and the Appellate Division, Second Department's March 3, 2003 Decision and Order, and issue to Petitioners a special use permit and site plan approval for its proposed shopping mall.

Respondent moves this Court **(009)** for an Order, pursuant to CPLR 3211 and 7804[f]:

1. Denying Petitioners' purported Motion, in the language of Respondent's Counsel "apparently brought pursuant to CPLR Rule 3212 for summary judgment compelling and" directing Respondent to issue a special use permit and approve Petitioners' proposed site plan; and
2. Granting judgment to Respondent summarily dismissing and denying this Article 78 proceeding, upon the grounds that:

a. The Court has no subject matter jurisdiction over the non-final deliberations of Respondent as lead agency under SEQRA;

b In as much as Petitioners have admittedly failed to comply with Respondent's demand for a letter of conversion, revised site plans and a Supplemental EIS (Environmental Impact Statement), Petitioners' claim is not ripe, and they have not exhausted their remedies within the primary jurisdiction of Respondent, which has yet to reach a final determination. The Court has no authority, in violation of the separation of powers, to interpose its own judgment for the discretionary will of Respondent, which has yet to complete its SEQRA deliberations, reach a final determination and render its SEQRA statement of Findings, as required by law.

HISTORICAL SYNOPSIS:

In the interests of brevity, and in order to curtail further waste of judicial resources, the facts as set forth in the decision of Justice James M. Catterson, dated July 8, 2002 (the 2002 Decision), an objective source, are hereby incorporated by reference.

The June 11, 2007 Decision of the undersigned (the 2007 Decision) directed that this matter be re-remitted to Respondent (Town Board of the Town of Oyster Bay, the Town Environmental Quality Review Commission [TEQR] no longer being in existence) for proper action, in specific compliance with the 2002 Decision, within 90 days of service of a copy of said Order upon Respondent.

Petitioners first filed their application before Respondent on January 21, 1998, seeking to develop a retail shopping mall (mall) on approximately 39 acres of land located along the Long Island Expressway in the Hamlet of Syosset, Town of Oyster Bay, County of Nassau, State of New York. The parcel is bounded by: Robbins Lane (a two-way four-lane road) on its west side; the right-of-way containing the tracks of the Long Island Railroad on its north side; Miller Place (the North Service Road of the Long Island Expressway) on its south side; and the Syosset Landfill and Department of Public Works maintenance facility of Respondent on its east side.

The area immediately surrounding the parcel consists of industrial and commercial uses, and the parcel in question continues to be occupied by the vacant facilities of the former Cerro Wire and Cable Company, which used it for industrial manufacturing, after which it went through seven years of decommissioning, listed as an inactive hazardous waste site by the New York State Department of Environmental Conservation, resulting in site clean-up and delisting, making it suitable for development without restriction.

By prior Supreme Court decision, dated December 10, 2001, Birchwood Civic Association at Jericho Inc, Birchwood Park at Syosset Homeowners Association and Syosset Groves Civic Association were granted Intervenor status in this action. Petitioners have consistently taken the position throughout these actions that said civic associations are merely a "front" for Simon Properties, the owner of two competing shopping malls in the region, that Simon Properties is funding said opposition, and that the members of these associations are not homeowners immediately adjacent to or abutting the parcel. While taking no position on the other matters, the Court finds the participation of these Intervenors to be both curious and unusual, in that they are clearly not within the zone of interest, and therefore lack standing to participate herein, but same having not been appealed, their inclusion remains the law of the case. In the instant proceeding, Intervenors have contributed nothing additional to the arguments herein other than the parroting of some of Respondent's

positions, aside from a recent court decision (***Riverkeeper v Planning Board, Town of Southeast***, 10 NY3d 741 (2008), which this Court finds to be of assistance to Petitioners herein, as set forth herein below.

As pointed out in this Court's 2007 Decision, the 2002 Decision clearly and unequivocally vacated the 2001 determination of Respondent (which determination had denied Petitioners' application for a special use permit to construct the mall), setting forth with great specificity the shortcomings of said determination, and what was necessary to correct it. It is indisputable that the 2002 Decision required Respondent to clearly and specifically identify each issue, in detail, to enable:

1. Respondent to meet the standards required of them by SEQRA;
2. Petitioners to respond to any further demands (such as a Supplemental Environmental Impact Statement, **IF** determined to be necessary pursuant to identified additional information Respondent claimed to be in possession of) in order to mitigate impacts; and
3. the Court to properly review any determinations subsequent thereto in an informed manner, within the parameters of applicable law.

The Appellate Division, Second Department, affirmed the 2002 Decision in an opinion dated March 3, 2003 (the 2003 Appellate Decision) (*see:* ***Oyster Bay Associates Limited Partnership v Town Board of Oyster Bay***, 308 AD2d 410 [2 Dept 2003]), (hence forth, for the sake of brevity, the 2002 Decision As Affirmed). This Court notes that the 2003 Appellate Decision does not overturn that portion of the 2002 Decision retaining jurisdiction over this matter; and not only concurred that said Decision properly determined Respondent's denial of Petitioners' application was arbitrary and capricious, possessing insufficient evidence to support deviation from TEQR's initial SEQRA determination, but that Respondent abused its discretion by failing to consider Petitioners' offer to mitigate impacts.

In response to the 2007 Decision, Respondent sought leave to appeal, and Intervenors sought a declaration allowing appeal as of right, from the Appellate Division, Second Department, both of which were denied) (*see:* ***Oyster Bay Associates Limited Partnership v Town Board of Oyster Bay***, 15 Misc3d 1147A [2007]). The times to further appeal any of the prior decisions rendered in this matter by the Supreme Court and/or the Appellate Division have long since expired, and said decisions remain valid, subsisting and enforceable.

Apparently, during discussions between Petitioners and Respondent in 2005, Petitioners readily agreed to undertake and submit to Respondent an analysis of changes in background traffic conditions between 2001 and 2005, resulting in the preparation of a Technical Memorandum which evaluated the potential traffic impacts based on current baseline traffic conditions, to determine if changes in same had potential for significant adverse impacts different from or significantly greater than those evaluated in the Final Environmental Impact Statement (FEIS), said Technical Memorandum having been previously made part of the record in these proceedings, without objection. Petitioners have demonstrated to this Court that said Technical Memorandum was not only submitted to various Departments and officials engaged in those discussions regarding the instant application, but that copies of same were forwarded to the members of Respondent prior to adoption of the 2007 Resolution cited immediately herein below. This matter will be further discussed hereinafter.

It is also apparent that, during said discussions, a revised complete site plan application was also prepared and significantly reviewed, as attested to in the Broderick Affidavit, resulting in a March 3, 2006 meeting where representatives of Respondent and Petitioners allegedly resolved practically all the issues previously

raised by Respondent's representatives, leaving only a few minor design details to be approved. The Court notes that these negotiations are not binding on Respondent, and only reference same for the purpose of establishing all information that was before Respondent at the time of the passage of the 2007 Resolution, since Respondent has failed to make a Return available to this Court for review.

On September 25, 2007, Respondent adopted a Resolution (the 2007 Resolution) that was supposed to comply with the 2007 Decision, which directed Respondent to comply with the 2002 Decision As Affirmed. Of all the tasks Respondent was charged with clearing up in the "proper action" with which it was supposed to comply, paramount was the identification of post-FEIS submissions that allegedly constituted substantial evidence to support its prior adverse Findings regarding Petitioners' application. Said post FEIS submissions were requisite in determining whether there was justification for a Supplemental Environmental Impact Statement (SEIS), or not.

Petitioners Argue: The 2007 Resolution fails to identify any such evidence, instead continuing Respondent's baseless and misplaced arguments that the 2002 Decision As Affirmed was wrong, in fact rearguing the same issues already determined by said prior Decisions five years ago. Petitioners also request that:

1. Respondent having failed to identify credible post FEIS submissions necessary to require an SEIS (to evaluate the potential impacts of alleged changed traffic conditions); and
2. Respondent having taken the incredulous position that (because Petitioners submitted a successful Rebuttal [in 2001] refuting the post-FEIS submissions of the Civics [now Intervenors]) an SEIS is now necessary to contain all relevant information in one document;

this Court should vacate Respondent's demand for an SEIS in the 2007 Resolution.

STRATEGIES:

First, the Court feels compelled to dispose of the conundrum of strategies employed by Counsel for Respondent, generally broken down into three categories that require discussion and comment: redefinition of facts, obfuscation of issues and *ad hominem* attacks.

Habitually, throughout the entirety of the submissions on behalf of Respondent, Peter Sullivan, Esq., recklessly engages in self-serving redefinition of what everyone on behalf of Petitioners, and the Court, did, meant or intended, re-interpreting every fact and word, liberally alleging facts that may not be in keeping with Respondent's position to be "purported", rather than actual. This conduct results in useless obfuscation of the issues, requiring a cumbersome and laborious process of rereading, reanalyzing and reinvestigating every element, in order to insure a proper and reasoned review. The consequence thereof is waste of judicial and attorney resources that is preposterous, and sanctionable (*see:* 22 NYCRR § 130-1.1).

This simply, or rather not so simply, continued the style of the submissions received from Sullivan in the prior request for relief adjudicated by this Court, and once again Sullivan provided the Court with a plethora of collateral but irrelevant arguments that were highly unnecessary in addressing Petitioners' Motion, which served no other purpose than to prolong the journey to a decision.

What is far more disconcerting and grievously disturbing to this Court are the unnecessary and ill-conceived *ad hominem* attacks on other professionals. (In order to avoid a redefinition of *ad hominem* attack, the Court clearly sets forth same to be generally defined as replying to an argument or factual claim by attacking the

person, rather than addressing the substance of the argument or producing evidence against the claim, subverting the process of proving or disproving the claim by changing the subject.) In Sullivan's Affirmation in Support/Opposition: he accuses Petitioners' Counsel, Sy Gruza, of "unethically" submitting documents to this Court that are *de hors* the record (addressed later herein); he attacks the Technical Memorandum of Cameron Engineering and Associates of "purportedly" being revised in March, 2006, while the document clearly represents that it was revised at such time, and same is attested to by Alan J. King, PE, of said firm (also addressed later herein); and in a footnote he not only laments that this Court did not recuse itself from this matter, but goes on to claim, twice, that this Court "...refused to say..." certain things in denying said recusal, same being complete fabrications on the part of Sullivan, but used by him to falsely claim the these alleged actions by the Court resulted in "...raising even more questions and an appearance of impropriety...".

This attitude seems to permeate the Ellsworth Affidavit (attached to Sullivan's above referenced Affirmation in Support/Opposition), as well, wherein Ellsworth deposes that Petitioners are engaged in a "...continued strategy of attempting to besmirch Dr. Koppelman's reputation and motives...". Not only does this Court find nothing in the record to support this accusation, but rather, in the Gruza Affirmation this is clearly identified as a false accusation. Of course, this is a predictable result of the stage environment created by Sullivan's manner.

It seemed at times as if Counsel had thrown all discretion, caution and prudence to the wind, this being the final battle of battles, a "*gotterdammerung*", if you will, with no limit to the tactics employed, because without absolute victory there was no tomorrow. As unreasonably passionate, unusual, counterproductive and even annoying as Sullivan's conduct served to be, this Court remained steadfast in its commitment to tediously and patiently wind its way through the maze created by Respondent's Counsel, and correctly determine the facts and the applicable law, that and only that being the Court's charge.

STANDARD OF COURT REVIEW:

As this Court has repeatedly and consistently stated in prior decisions, it is well settled law in the State of New York that a Court may not substitute its own judgment for that of the reviewing board (*see:* ***Janiak v Planning Board, Town of Greenville***, 159 AD2d 574, 552 NYS2d 436 [2 Dept], *appeal denied*, 76 NY2d 707, 560 NYS2d 989, 561 NE2d 889 [1990]; ***Mascony Transport and Ferry Service v Richmond***, 71 AD2d 896, 419 NYS2d 628 [2 Dept 1979], *aff'd*, 49 NY2d 969, 428 NYS2d 948, 406 NE2d 803 [1980]). Therefore, if the decision rendered by the reviewing board is within the scope of the authority delegated to it, the Court may not interfere and annul it, unless said decision is arbitrary, capricious or unlawful (*see,* ***Castle Properties Co. v Ackerson***, 163 AD2d 785, 558 NYS2d 334 [3 Dept 1990]).

That being said, the Court notes these other following relevant laws and these following relevant facts, and their impacts on the instant proceedings:

SPECIAL USE PERMIT:

The parcel in question is located in a Light Industry Zoning District of the Town of Oyster Bay, and the Town Code expressly allows development of a retail shopping mall in said zoning district, pursuant to a special use permit. As-of-right permitted uses in said zoning district include warehousing and light manufacturing, a 1.4 million square foot office building, or a 1.6 million square foot hospital (operating 24 hours a day, seven

days a week). The instant applications, whether 860,000 or 750,000 square feet, requires no variances.

As previously set forth in the 2002 Decision As Affirmed, it is well settled in New York law that a special use permit confers authority to use property in a manner that is permitted by a zoning ordinance under stated conditions, requiring the granting of such permit unless reasonable grounds exist for its denial (*see:* ***7-Eleven Inc v Board of Trustees, Inc Village of Mineola***, 289 AD2d 250 [2 Dept 2001]); and that in determining whether such grounds for denial exist, the Town Board's discretion is limited to the extent that its determination must not be arbitrary or capricious, and must be supported by substantial evidence, and that it is impermissible for a town to base such a denial upon generalized objections by community members uncorroborated by empirical data (*see:* ***Weok Broadcasting Corp v Planning Board, Town of Lloyd***, 79 NY2d 373). The 2002 Decision As Affirmed concluded that Respondent failed to articulate any real grounds for denial, and remanded the matter to Respondent, affording it the opportunity to correct this. The 2007 Decision re-remitted this matter, because Respondent had failed to comply with said prior Decisions. Respondent having finally adopted a new formal instrument, the 2007 Resolution, this Court must now determine whether Respondent has finally met its legal obligations, or not.

LAW OF THE CASE:

The Court notes the following relevant decisions on the issue of the doctrine of law of the case:

> The doctrine of the law of the case seeks to prevent relitigation of issues of law already determined at an earlier stage of the proceeding (*see:* ***Brownrigg v New York City Hous Auth***, 29 AD3d 721). It applies to determinations that were necessarily resolved on the merits in the prior order (*see:* ***D'Amato v Access Mfg***, 305 AD2d 447; ***Hampton Valley Farms Inc v Flower & Medalie***, 40 AD3d 699 [2 Dept 2007]).
>
> Contentions that were previously raised and decided, or that could have been raised on a prior appeal (*see:* ***Stone v Stone***, 19 AD3d 404 [2005]), cannot later be re-litigated and reconsidered, as they are barred by the doctrine of law of the case *(see:* ***Suzuki-Peters v Peters***, 37 AD3d 726 [2007] *quoting* ***Palumbo v Palumbo***, 10 AD3d 680 [2004]; ***Shondel J v Mark D***, 18 AD3d 551 [2005] *affd* 7 NY3d 320 [2006]; ***Jacobs v Macy's E, Inc***, 17 AD3d 318 [2005]).
>
> The doctrine of law of the case sets forth that a court should not reconsider, disturb or overrule an order in the same action of another court of coordinate jurisdiction (*see:* ***Dondi v Jones***, 40 NY2d 8), or in other words, a Justice should not modify or overrule an order of a fellow Justice of coordinate jurisdiction (*see:* ***Vaseghi v Vaseghi***, 114 AD2d 501; ***Martin v City of Cohoes***, 37 NY2d 162; ***Trakansook v 39 Wood Realty Corp***, 18 AD3d 633; ***Post v. Post***, 141 AD2d 518; ***Glover Bottled Gas Corp v Local 282, IBT***, 89 AD2d 1007; ***Solomon v Reich***, 84 AD2d 812. This doctrine is designed to eliminate the inefficiency and disorder that would follow if Courts or Judges of coordinate jurisdiction were free to overrule one another in an ongoing case (*see:* ***People v Evans***, 94 NY2d 499; 1 Carmody-Wait 2d, NY Prac, Section 2:297; 28 NY Jur 2nd Section 236; ***Bansi v Flushing Hosp Medical Center***, 15 Misc.3d 215 [SupCt, Queens Co 2007]).

Furthermore, as adeptly pointed out by Petitioners' Counsel, the law of the case doctrine is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter (*see:* ***Martin v City of Cohoes***, *supra*); the law of the case has been aptly characterized as a kind

of intra-action *res judicata* (*see:* Siegel, New York Practice § 448 @ 723 [3d ed]); a trial court may not reconsider and amend its prior determination in the case once it has been affirmed by the appellate division (*see:* ***Shroid Const Inc v Dattorna***, 250 AD2d 590 [2 Dept 1998]); similar issues that have been resolved by an appellate court on a prior appeal in the action will not be reviewed even on a subsequent appeal to the same appellate court (*see:* ***City of New York v Stringfellow's of New York Ltd***, 268 AD2d 216 [1 Dept 2000]; ***Shroid Const Inc v Dattorna***, , *supra*; ***Mobil Oil Corp v Syracuse IDA***, 224 AD2d 15 [4 Dept 1996]; ***Hubbard v Town of Sand Lake***, 223 AD2d 794 [3 Dept 1996]).

The law of the case herein, pursuant to the prior decision of the Supreme Court and the Appellate Decision, is that the FEIS does not contain information that can justify a denial of Petitioners' application, and that the repeated remittals to Respondent were solely to give Respondent an opportunity to clarify and specifically identify information in post-FEIS submissions upon which Respondent allegedly relied, and which purportedly constitutes substantial evidence to support its denial of the application, or whether there is the need for an SEIS, based upon said post-FEIS submissions, before Respondent can effectively render a determination based upon substantial evidence, which is not arbitrary and capricious.

The Court notes that, in the introductory sections of the 2007 Resolution (the Findings of which are reviewed in detail later herein), Respondent sets forth language establishing a position clearly at variance with the 2002 Decision, 2003 Appellate Decision and 2007 Decision, for example, mischaracterizing those decisions as applying "unusual deference and weight ... not consistent with the SEQRA regulations or its governing case law", "The Town Board believes that the Court has given undue importance and weight...", "The Town Board is concerned that the Court's ruling... appears to be creating an unusual standard...", "Notwithstanding the foregoing objections and concerns, the Town Board has prepared this analysis...". The Court finds itself mystified why Respondent stubbornly refuses to accord proper deference and due importance to the usual standard of honoring the doctrine of the law of the case, regarding Court decisions dating back to 2002, spending its energy and resources preparing yet another analysis (more accurately, yet another redefinition) of those Court decisions, instead of complying therewith.

In fact, a profusion of argumentation is heaped upon the Court by Respondent and its Counsel in the 2007 Resolution, as well as affirmations, affidavits and memoranda of law, that serve no purpose other than to improperly revisit and reargue matters decided long ago, in the 2002 Decision, the 2003 Appellate Decision and the 2007 Decision. Not only do Respondent and its Counsel improperly and incredibly seek to have this Court rule upon the prior determination of a justice of coordinate jurisdiction, but also the prior determination of an appellate court's affirmance of the decision of said justice of coordinate jurisdiction. This is nothing short of absurd. As mere examples of the shocking waste of judicial and attorney resources herein, the Court is constrained to note the following:

> At one point in the Affirmation in Support/Opposition submitted by Respondent's Counsel it is argued that an Article 78 proceeding could not have reviewed the TEQR Findings submitted to Respondent (a subject contained in the 2002 Decision As Affirmed). In fact, the 2003 Appellate Decision states, "There was insufficient evidence to support a deviation from the initial SEQRA finding of the Town Environmental Quality Review Commission, which was in favor of the proposed project...". In order to leave any misunderstanding resulting in redefinition or re-characterization of what this Court actually just stated, the Town Environmental Quality Review Commission is TEQR. The 2002 Decision and 2003 Appellate Decision are the law of this case.

At another point in the same Affirmation, Respondent's Counsel (as just one example of a constantly recurring theme) boldly attempts to tell this Court what this Court said or did, in this instance alleging, albeit incorrectly, that this Court "apparently deemed" Petitioners' application amended, without affording Respondent the right to answer or raise affirmative defenses. On the same page he gratuitously includes a footnote lamenting that this Court denied an application to recuse itself, just in case this Court had forgotten. These matters were all contained within an appeal to the Appellate Division, Second Department, wherein relief was denied to both Respondent and Intervenors. The 2007 Decision is the law of this case.

There are far too many instances of this conundrum of what the Courts meant or did, or what Petitioners did or didn't do (including an allegation that Petitioners made a "formal binding judicial admission" that reducing the size of the mall could further mitigate potential environmental impacts, couched as if same were a staggering confession) to address each and every one, but it is noted here that much time and consideration has been given to how they are *de hors* the facts and the law of the case herein.

THE PURPOSE OF SEQRA:

As previously stated in the 2002 Decision As Affirmed, the primary purpose behind SEQRA is to inject environmental considerations directly into governmental decision making (***Weok Broadcasting Corp v Planning Board, Town of Lloyd***, *supra, quoting* ***Coca-Cola Bottling Co v Board of Estimate***, 72 NY2d 674 [1988]), ***Weok*** further stating that the Court's role in reviewing SEQRA determinations is not to weigh the desirability of any proposed action, but to determine whether the agency reviewing the application took a hard look at the proposed project and made a reasoned elaboration of the basis for its determination, and if the agency's determination was arbitrary and capricious, or not supported by substantial evidence, said determination may be annulled, as the agency is not free to ignore or disregard the information that the environmental review process was designed to elicit.

TEQR issued its Final Scoping Memorandum in March, 1998, after having held a public scooping session to delineate the issues to be addressed in the Draft Environment Impact Statement (DEIS). As previously noted in the 2002 Decision As Affirmed, thereafter Petitioners prepared an exhaustive DEIS, complete with voluminous supporting appendices, dealing with the issues identified in said Final Scoping Memorandum, and examined 25 road intersections, road movements, soil, air, noise, socioeconomic issues and development alternatives, and on December 14, 1999, Respondent accepted the DEIS with respect to its scope, content and adequacy for the purposes of SEQRA and local environmental codes. On January 27, 2000, TEQR held a public hearing, after which Petitioners prepared an FEIS addressing all post-DEIS comments. That document, together with TEQR's own FEIS, written comments received regarding the DEIS and the transcript of the public hearing (constituting the complete FEIS), was accepted by the Town Board on June 13, 2000, with the requisite SEQRA 24 day review period held open for comment by involved agencies and interested parties. Thereafter, at the follow-up public hearing on September 7, 2000, community members presented strong opposition to the project, and Respondent sent the matter back to TEQR, directing it to rescind and annul its Finding Statement.

Petitioners Argue: The longer Respondent continues to prolong the SEQRA process and the litigation its conduct provokes, the more likely that additional development will occur, which Respondent will then

identify as the basis to demand yet another updated traffic SEIS (a scheme to delay), absent judicial determination of finality. Petitioners are not seeking Court override of Respondent's discretion, nor pre-emption of Respondent's administrative priorities, but rather takes the position Respondent has already exercised its discretion and priorities, and Petitioners are merely seeking relief, to prevent Respondent from engaging in delay, unnecessarily imposing a demand for an SEIS. SEQRA was never intended to be used render an applicant hostage to a hostile lead agency, impotent to protect itself from transparent intention of forcing further rounds of litigation and further SEQRA demands, in order to continue to block an application, under color of law.

2008 Court Review: Not only does the Court find Petitioners' arguments compelling and convincing, but additionally the Court is also distressed by what, in some respects, appears to be attempts by Respondent to amend the SEQRA scoping issued many long years ago, with no reasoned demonstration for such an extreme and burdensome action. The purpose of SEQRA was never intended to be a weapon, indiscriminately used to frustrate legitimate applications by property owners for reasonable development of the property for which they pay taxes. The purpose of SEQRA was to require responsible redress of actual environmental concerns, in order to mitigate impacts in a rational and productive manner.

THE 2002 DECISION *versus* THE 2007 RESOLUTION:

As previously stated herein above, and in the 2003 Appellate Decision and the 2007 Decision, the 2002 Decision As Affirmed indubitably vacated the 2001 determination of Respondent, and set forth, with great specificity, the short comings of said determination, and what was necessary to correct it. Respondent adopted the 2007 Resolution on September 17, 2007, allegedly to comply with said Court decisions. What follows is this Court's step-by-step analysis of Respondent's Finding, as set forth in its 2001 actions, vacated by the 2002 Decision As Affirmed, and whether Respondent met its burden in correcting the inadequacies thereof in its 2007 Resolution. As with Justice Catterson's 2002 Decision, this Court has also found that said analysis flows more practically when Finding #1 is dealt with last in this review.

FINDING # 2 (Traffic Volume Comparison):

The 2002 Decision As Affirmed: The Court vacated this Finding because it determined that it was arbitrary, capricious and not supported by substantial evidence, Respondent having failed to identify data upon which its conclusions were based, specifically as regards "industrial use"; that Respondent used evidence not in the record; and that Respondent failed to identify specific information supporting said conclusions. Furthermore, the Court determined that Respondent improperly used raw traffic generation numbers alone as proof of an adverse impact, without considering mitigation offered by Petitioners in the form of road improvements (*see*: ***Lerner v Town Board, Town of Oyster Bay***, 244 AD2d 336 [2 Dept 1997]).

Petitioners Argue: Respondent's 2007 Resolution fails to resolve the grounds upon which the Courts based their prior determinations vacating this Finding because it does not present a single post-FEIS reference, and that pursuant to the law of the case, Respondent has failed to identify any potential substantive evidence to support its determination regarding this Finding.

2008 Court Review: Respondent's 2007 Resolution, under the section "Comparison to "As-of-Right" Alternatives", states that the 2002 Decision As Affirmed "...appears to presume that a so-called "as-of-right"

alternative would entail essentially no exercise of discretion by the Town… this simply is not true…", and then "…the only alternative whose analysis is mandated under the SEQRA regulations, at § 617.9(b)(5)(v), is the "no action" alternative…".

Then, under "'Office" Alternative", it engages is stating numerous points in the 2002 Decision As Affirmed, and juxtaposes each with its own "However", continuing the reargument and appeal of a decision of a Justice of coordinate jurisdiction, claiming to expose "…apparent misunderstanding…" in the 2002 Decision As Affirmed, an concludes that. By the Court requiring an as-of-right comparison, the only way to comply would be preparation of an SEIS, concluding that the Technical Memorandum (that its Counsel claims it didn't consider) does not include the capacity analysis that would be required to satisfy the Court.

Under ""Industrial" Alternative", it admits the FEIS does contain intersection capacity analysis results, but that they contain inconsistencies and are biased, and therefore problematic, presenting no basis for such a conclusion; then describes the impact of the requirement of the 2002 Decision As Affirmed that traffic impacts must be compared with mitigations in the form of road improvements proposed by Petitioners as follows: "This inequity unfairly and unjustifiably biases the comparison ordered by the Court in favor of the proposed project.".

What Finding #2 doesn't do is what the Court directed it to do. It doesn't identify data upon which its conclusions were based; it uses evidence *de hors* the record; it doesn't identify specific information supporting said conclusions; it doesn't present a post-FEIS reference; it improperly uses raw traffic generation numbers again; it doesn't identify any potential substantive evidence to support Respondent's determination. Therefore, once again the Court must vacate this Finding because it is arbitrary, capricious and not supported by substantial evidence (*see*: ***Lerner v Town Board, Town of Oyster Bay***, *supra*).

FINDING # 3 (Specific Roadway Impacts):

The 2002 Decision As Affirmed: The Court vacated this Finding because it determined that it was arbitrary, capricious and not based upon substantial evidence, Respondent having failed to include an as-of-right development comparison, as required by law, addressing only the no-build scenario to show deterioration that would result in level of service and vehicle capacity ratio, and therefore said analysis was fatally flawed (*see*: ***7-11 Inc v Board of Trustees, Inc Village of Mineola***, 289 AD2d 250 [2 Dept 2001]; ***Lerner v Town Board, Town of Oyster Bay***, *supra*).

Petitioners Argue: Respondent's 2007 Resolution fails to resolve the grounds upon which the Courts based their prior determinations vacating this Finding because, despite its unrelenting argument that the mall would produce gridlock and long delays on adjacent roadways and intersections, it does not and cannot identify any post-FEIS submissions to substantiate this Finding other than a September 5, 2000, letter, from VMI-Maris, which Respondent concedes in the Resolution is based on the same data contained in Appendix C of the FEIS, making it neither a new impact not evaluated in the FEIS, nor new data not considered in the FEIS.

2008 Court Review: Respondent's 2007 Resolution again relies herein on alleged deficiencies in the DEIS and FEIS, which it proffers "…completely preclude the comparison specified by the court with respect to the office alternative…". As to industrial alternatives, it claims that the Court's 2002 Decision As Affirmed only addresses one of the intersections, ignoring the fact that the Court vacated the entire Finding. Once again,

Respondent resorts to re-justifying their 2001 determination, claiming that if same is not persuasive, then an SEIS is necessary. As pointed out by Petitioners, the Resolution relies upon the September 5, 2000 letter from VMI-Maris relying upon data contained in Appendix C of the FEIS, clearly not a new impact that the FEIS failed to evaluate, nor new data not considered therein.

What Finding #3 doesn't do is what the Court directed it to do. It isn't based upon substantial evidence; it doesn't include an as-of-right development comparison; it doesn't identify post-FEIS submissions of substantive value; and it doesn't establish a new impact not evaluated in, nor new data not considered in, the FEIS. Therefore, once again the Court must vacate this Finding because it is fatally flawed (*see:* ***7-11 Inc v Board of Trustees, Inc Village of Mineola***, , *supra*; ***Lerner v Town Board, Town of Oyster Bay***, *supra*).

FINDING #4 (Trip Distribution):

The 2002 Decision As Affirmed: The Court vacated this Finding because it determined that it was unclear, not based upon substantial evidence, arbitrary and capricious. Respondent failed to render any findings as to Trip Distribution, and did not find that there was significant adverse impact due to Trip Distribution patterns as compared to an as-of-right development, as required by precedent (*see:* ***7-11 Inc v Board of Trustees, Inc Village of Mineola***, *supra*; ***Lerner v Town Board, Town of Oyster Bay***, *supra*).

Petitioners Argue: Respondent's 2007 Resolution fails to resolve the grounds upon which the Courts based their prior determinations vacating this Finding because it does not refer to any post-FEIS submission.

2008 Court Review: Respondent's 2007 Resolution once again questions the accuracy of data in the EIS, without substantiating same based upon actual evidence (either pre or post-FEIS); re-states Respondent's prior determination; and instead of providing substantiation for their position states "...the Town Boar remains convinced that the concerns regarding the apparent deficiencies in the information provided by Petitioners are legitimate...", using same to justify the alleged need for an SEIS. The Court notes that again said Resolution references the "Technical Memorandum" their counsel claims they never considered.

The Resolution also states "It is not clear how this ruling should be applied..." regarding the 2002 Decision As Affirmed (again claiming apparent discrepancies in the information provided by Petitioners without substantiation), and claims the meaning and intent of a footnote in said Decision As Affirmed is not clear, using all of same apparently as justification for offering no as-of-right comparison, instead claiming the Courts requirement that the project be compared with as-of-right development in itself requires further analysis (as in an SEIS).

What Finding #4 doesn't do is what the Court directed it to do. It again doesn't render any findings that there was significant adverse impact due to Trip Distribution patterns as compared to an as-of-right development, (*see:* ***7-11 Inc v Board of Trustees, Inc Village of Mineola***, *supra*; ***Lerner v Town Board, Town of Oyster Bay***, *supra*), and doesn't refer to any post-FEIS submission. Therefore, once again the Court must vacate this Finding because it is unclear, and subsequently arbitrary and capricious, lacking substantive evidence.

FINDING #5 (Traffic Impacts During the Holiday Season):

The 2002 Decision As Affirmed: The Court vacated this Finding because it determined that Respondent

demonstrated no basis for its conclusions; that without an analysis based upon empirical evidence, without any factual basis (*see:* ***7-11 Inc v Board of Trustees, Inc Village of Mineola***, *supra*; ***Lerner v Town Board, Town of Oyster Bay***, *supra*), it was arbitrary, capricious and without substantial evidence in the record.

Petitioners Argue: Respondent's 2007 Resolution fails to resolve the grounds upon which the Courts based their prior determinations vacating this Finding because it only references a letter from VMI-Maris dated October 5, 2000, as a post-FEIS submission, but same neither provides new data nor new analysis that might constitute substantial evidence, in that said letter merely states that the comment regarding increased traffic is very valid.

2008 Court Review: Respondent's 2007 Resolution does, in fact, credit the October 5, 2000 VMI-Maris letter with validity absent substantiation. Furthermore, while admitting the 2002 Decision As Affirmed correctly points out that no analysis has been performed (in its prior Finding #5) to determine the actual impact herein, it states "Clearly, however, an increase in traffic volume from the subject property of the magnitude identified in the FEIS would propose the potential for substantial impacts, which at a minimum would require further analysis before substantial findings could be derived..." (as in an SEIS) (emphasis added by the Court.

The Resolution goes on to state "The Court seems to recognize that the manner in which the DEIS and the FEIS deal with the issue of Holiday Season traffic may be fatally flawed..." claiming this is one of two places where said Decision As Affirmed expressly identified a need for an FEIS being. Instead of providing bases for this Finding, it engages in a litany of attempts to justify Respondent's pre-determined position that an SEIS must be provided, instead of considering Petitioners' Rebuttal or Technical Memorandum.

What Finding #5 doesn't do is what the Court directed it to do. It doesn't provide new data nor new analysis that might constitute substantial evidence; and it doesn't identify empirical evidence or any factual basis for its conclusions (*see:* ***7-11 Inc v Board of Trustees, Inc Village of Mineola***, *supra*; ***Lerner v Town Board, Town of Oyster Bay***, *supra*). Therefore, the Court must once again vacate this Finding because it is arbitrary, capricious and without substantial evidence in the record.

FINDING #6 (Neighborhood Cut-Through Traffic):

The 2002 Decision As Affirmed: The Court vacated this Finding because it determined that Respondent once again drew speculative conclusions regarding another traffic issue, without comparison to as-of-right development, and without any empirical data as a basis, therefore being insufficient (*see:* ***7-11 Inc v Board of Trustees, Inc Village of Mineola***, *supra*; ***Lerner v Town Board, Town of Oyster Bay***, *supra*). Furthermore, Respondent rejected Petitioners' conclusion that the project would not have significant increase in said traffic patterns in residential neighborhoods, concluding that same was speculative (even though based upon the only analysis in the record), therefore such speculation which is wholly unsupported by factual data, is at best mere conjecture (*see:* ***SCI Funeral Service of New York Inc v Planning Board, Town of Babylon***, 277 AD2d 319 [2 Dept 2000]; ***Ernalex Construction Realty Corp v Bellissimo***, 256 AD2d 340), and therefore this Finding was without substantial evidence, arbitrary and capricious.

Petitioners Argue: Respondent's 2007 Resolution fails to resolve the grounds upon which the Courts based their prior determinations vacating this Finding because there is no merit in attempting to support this Finding

through references to September 5, 2000 letters from VMI-Maris to TEQR and Avrutine, in that same consist of only unsubstantiated conjecture (that south-bound headed vehicles would mistakenly exit the mall north-bound onto Robbins Lane, and then cut through a neighborhood to access the Long Island Expressway or the Northern State Parkway, ignoring extensive signage on the mall property), and therefore neither letter provides any additional factual data or analysis.

2008 Court Review: Respondent's 2007 Resolution clearly admits to repeating its prior conclusion regarding this finding, and in fact rely on the above referenced September 5, 2000 letters with unsubstantiated claims.

What Finding #6 doesn't do is what the Court directed it to do. It continues to engage in speculative conclusions regarding traffic, without an as-of-right comparison, and without any empirical data, merely rejecting the only analysis in the record (Petitioners'). Therefore, this Court must once again vacate this Finding, as it is continues to be insufficient (*see: **7-11 Inc v Board of Trustees, Inc Village of Mineola**, supra*; ***Lerner v Town Board, Town of Oyster Bay**, supra*), engaging in wholesale speculation, unsupported by factual data, hence mere conjecture (*see: **SCI Funeral Service of New York Inc v Planning Board, Town of Babylon**, supra*; ***Ernalex Construction Realty Corp v Bellissimo**, supra*), rendering it without substantial evidence, arbitrary and capricious.

FINDING #7 (Impacts to Syosset Library and Robbins Lane School):

The 2002 Decision As Affirmed: The Court vacated this Finding because it determined that Respondent failed to consider a comparison to an as-of-right development, once again completely contradicting findings in the DEIS and FEIS, with no data presented to justify its Findings and no basis for its conclusion that unconditionally permitted uses would experience reduced level of activity, rendering this Finding unsupported by substantial evidence, arbitrary and capricious (*see*: ***7-11 Inc v Board of Trustees, Inc Village of Mineola**, supra*; and ***SCI Funeral Service of New York Inc v Planning Board, Town of Babylon**, supra*).

Petitioners Argue: Respondent's 2007 Resolution fails to resolve the grounds upon which the Courts based their prior determinations vacating this Finding because Respondent admits that the post-FEIS submissions it references do not contain any data or information relating to traffic comparison between potential impacts of the mall and as-of-right developments at the sites of the Syosset Library or the Robbins Lane School, relying on: (a) a July 10, 2000 VMI-Maris letter regarding the Syosset Library (speculating more cars would exit the Long Island Expressway at the South Oyster Bay exit rather than the Robbins Lane exit, using raw number of trips generated, a standard previously rejected by the Court in the 2002 Decision As Affirmed); and (b) a September 12, 2000 VMI-Maris letter (speculating South bound traffic exiting the mall would go North and then make a U-turn on Robbins Lane, said conjecture being insufficient to support this finding).

2008 Court Review: Respondent's 2007 Resolution, in addition to that cited in Petitioners' argument, also relies on raw traffic generation trips because, as it states "Although the Court ruled that..." such data was "...not a valid measure of roadway impacts, these data are pertinent...", and then goes on to rely on the sheer speculation of the above referenced VMI-Maris letters, offering nothing new.

What Finding #7 doesn't do is what the Court directed it to do. It again doesn't consider a comparison to an as-of-right development. Therefore, the Court must once again vacate this Finding because it is unsupported by substantial evidence, arbitrary and capricious (*see*: ***7-11 Inc v Board of Trustees, Inc Village***

of Mineola, *supra*; and ***SCI Funeral Service of New York Inc v Planning Board, Town of Babylon***, *supra*).

FINDING #8 (Railroad Grade Crossing at Robbins Lane):

The 2002 Decision As Affirmed: The Court vacated this Finding because it determined that Respondent reached a conclusion contrary to both the original and revised TEQR Finding Statements (which found that the mitigations proposed by Petitioners would alleviate potential dangers); and Respondent further failed to compare the project to an as-of-right development, rendering this Finding arbitrary, capricious and unsupported by substantial evidence (*see*: ***7-11 Inc v Board of Trustees, Inc Village of Mineola***, *supra*; ***SCI Funeral Service of New York Inc v Planning Board, Town of Babylon***, *supra*; and ***Ernalex Construction Realty Corp v Bellissimo***, *supra*).

Petitioners Argue: Respondent's 2007 Resolution fails to resolve the grounds upon which the Courts based their prior determinations vacating this Finding because it does not identify any post-FEIS information that constitutes substantial evidence, referencing a September 5, 2000 VMI-Maris letter which fails to distinguish how many vehicles would be attributable to the mall as opposed to how many vehicles would be generated by an as-of-right development; nor does it provide necessary data and analysis to justify this Finding. Furthermore its reliance on their consultant's representation (that he is not aware of any regional mall that is located adjacent to an at-grade railroad crossing on the primary access road for a project) is not substantiation of relevant data, nor is it evidence that Petitioners' mitigation is not sufficient.

2008 Court Review: Respondent's 2007 Resolution claims that "Extensive expert testimony was entered into the record disagreeing emphatically with the EIS' conclusions on this issue, instead finding that the construction of a regional shopping mall immediately adjacent to an at-grade railroad crossing posed a significant public safety hazard.", then proceeding to recite the September 5, 2000 and September 12, 2000 letters from VMI-Maris, as referenced herein above.

What Finding #8 doesn't do is what the Court directed it to do. It again doesn't compare the project to an as-of-right development; it doesn't identify any post-FEIS information that constitutes substantial evidence; it doesn't provide necessary data and analysis to justify this Finding; it doesn't substantiate relevant data nor provide evidence that Petitioners' mitigation is not sufficient. Therefore, the Court must again vacate this Finding because it is arbitrary, capricious and unsupported by substantial evidence (*see*: ***7-11 Inc v Board of Trustees, Inc Village of Mineola***, *supra*; ***SCI Funeral Service of New York Inc v Planning Board, Town of Babylon***, *supra*; and ***Ernalex Construction Realty Corp v Bellissimo***, *supra*).

FINDING #9 (Proposed Project Density (Floor Plan Ratio):

The 2002 Decision As Affirmed: The Court vacated this Finding because it determined that Respondent reached a conclusion contrary to the TEQR Findings Statement; that it ignored its own SEQRA results; that there was no basis in either its Decision or Findings, no new evidence or empirical date presented to it, to support its conclusions; and that accordingly this Finding was arbitrary, capricious and unsupported by substantial evidence (*see*: ***Weok Broadcasting Corp v Planning Board, Town of Lloyd***, *supra*; ***SCI Funeral Service of New York Inc v Planning Board, Town of Babylon***, *supra*; and ***Ernalex Construction Realty Corp v Bellissimo***, *supra*). The Court cited the language of the original TEQR Finding Statement, which pointed out that the residential communities in this area are buffered from this property by industrial-type

development and some commercial uses, and given that the project conforms to the Town zoning requirements, development of the mall at this location is not expected to represent a significant impact with respect to land use and zoning considerations.

Petitioners Argue: Respondent's 2007 Resolution fails to resolve the grounds upon which the Courts based their prior determinations vacating this Finding because it does not even attempt to justify its prior determination regarding this Finding, in any manner.

2008 Court Review: Respondent's 2007 Resolution contains nothing regarding this Finding.

What Finding #9 doesn't do is what the Court directed it to do. Therefore, the Court must again vacate this Finding because it is arbitrary, capricious and unsupported by substantial evidence (*see*: ***Weok Broadcasting Corp v Planning Board, Town of Lloyd***, *supra*; ***SCI Funeral Service of New York Inc v Planning Board, Town of Babylon***, *supra*; and ***Ernalex Construction Realty Corp v Bellissimo***, *supra*).

FINDING #10 (Traffic Related Quality of Life Considerations and Community Character):

The 2002 Decision As Affirmed: The Court vacated this Finding because it determined that Respondent concluded this project would have an adverse impact (due to increase traffic volume as compared to as-of-right development, regardless of the success of roadway mitigation features), but, as set forth throughout the 2002 Decision As Affirmed, there was no comparison to as-of-right development in Respondent's Decision or Findings, nor TEQR's original or revised Finding Statements; and that, indeed, there is no mention of any studies or analyses in any of those documents to suggest a basis for this broad conclusion regarding as-of-right development, rendering this Finding wholly speculative in nature, not based upon empirical data, arbitrary, capricious and unsupported by substantial evidence (*see*: ***Weok Broadcasting Corp v Planning Board, Town of Lloyd***, *supra*; and ***7-11 Inc v Board of Trustees, Inc Village of Mineola***, *supra*). As a footnote, the Court noted (regarding Respondent's determination that the project's road improvements would be negative in terms of community character) that the property is currently a delisted superfund site that is not enhancing community character.

Petitioners Argue: Respondent's 2007 Resolution fails to resolve the grounds upon which the Courts based their prior determinations vacating this Finding because it simply attempts to re-argue its determination regarding this Finding, which must be rejected because Respondent fails to identify a post-FEIS submission.

2008 Court Review: Respondent's 2007 Resolution claims that the conclusions reached in the 2002 Decision As Affirmed appears to conflict with that Justice's prior decision of December 10, 2001, granting "interested party" status to the Intervenors, and that it is not clear to Respondent what additional information came to light in the 7 months between the Justice's two decisions that have influenced the "...apparent divergence in the Courts opinion..." regarding the impacts on surrounding communities, critiquing the Court rather than doing the job they were supposed to do. As stated by Petitioners, this new finding does nothing more than re-argue Respondent's prior determination.

What Finding #10 doesn't do is what the Court directed it to do. It still again doesn't provide an as-of-right comparison; and it doesn't provide a basis for its broad conclusion regarding as-of-right development. Therefore, the Court must again vacate this Finding because it is wholly speculative in nature, not based upon

empirical data, arbitrary, capricious and unsupported by substantial evidence (*see*: ***Weok Broadcasting Corp v Planning Board, Town of Lloyd***, *supra*; and ***7-11 Inc v Board of Trustees, Inc Village of Mineola***, *supra*).

FINDING #11 (Impact on Existing Retail Facilities):
FINDING #13 (Impact on Local Area Downtown Business from a Planning Perspective):

Respondent having combined these two Findings in the 2007 Resolution, the Court hereby combines its review of same.

The 2002 Decision As Affirmed (as to Finding #11): The Court vacated this Finding because it determined that Respondent drew speculative conclusions regarding the impact of the project upon existing retail facilities (admitting that the magnitude of this "possible" or "likely" impact is unknown); and that Respondent supplied no data to support its conclusions, rendering said Finding arbitrary, capricious and unsupported by substantial evidence (*see*: ***SCI Funeral Service of New York Inc v Planning Board, Town of Babylon***, *supra*; and ***Markowitz v Town Board of Oyster Bay***, 200 AD2d 673 [2 Dept 1994]).

The 2002 Decision As Affirmed (as to Finding #13): The Court vacated this Finding because it determined that it was a summary of the concerns expressed in earlier Findings, and while laudable, the proposed special use is a permitted use, and as such it is tantamount to a legislative finding that it will not adversely affect the surrounding areas (*see:* ***Holbrook Associates Development Co v McGowan***, 261 AD2d 620 [2 Dept 1999]); that the Town Board is required to grant, whether desirable or not, unless reasonable grounds exist for its denial (*see*: ***7-11 Inc v Board of Trustees, Inc Village of Mineola***, *supra*; ***Holbrook Associates Development Co v McGowan***, *supra*); and further, that zoning laws do not exist to insure limited business competition (*see:* ***Sun-Brite-Car Wash Inc v Board of Zoning Appeals, Town of Hempstead***, 69 NY2d 406 [1987]); and therefore the Court concluded that this Finding is not based upon substantial evidence necessary to deny the special use permit; that this subject was not defined in the Scoping process (nor considered in the SEQRA review); and that this generalized statement (based upon conjecture) cannot form a basis to defeat an application, rejecting this Finding as it is not based upon substantial evidence.

Petitioners Argue: Respondent's 2007 Resolution fails to resolve the grounds upon which the Courts based their prior determinations vacating these Findings because it refers to and relies on various statements and submissions by Lee R. Koppel man, PhD, at the public hearing conducted on September 7-8, 2000, consultant for the Intervenors, same being generalized opinions that malls are likely to have some impact on retail stores and central business districts (unsupported by any analysis concerning the alleged specific impact of this mall on Oyster Bay's retail stores and downtown business district).

Respondent Argues: The Ellsworth Affidavit sets forth that Dr. Koppelman's statements before and submissions to Respondent cannot be construed as mere opinion of experts retained by opponents to the project, because they included the *Long Island Regional Strategic Economic Development Plan* (dated November, 1993) and *Commercial Development* (dated 1999).

2008 Court Review: Respondent's 2007 Resolution states, "It is difficult to understand the premise of the Court's statement... It appears in the case of this particular issue, and throughout much of the Decision for that matter, that the Court has applied a different standard for conclusion that support the proposed shopping mall versus those that are adverse to the project." regarding the 2002 Decision As Affirmed, once again

taking the opportunity to criticize the Court, instead of doing the job they were supposed to do, and once again resorting to the tactic of *ad hominem* attacks, rather than substantial evidence or empirical data. Most interesting is the attempt to qualify Dr, Koppelman's opinions by reliance on his use, as an expert representing the opposition, of documents he prepared in this former public position, giving it the aura of unquestionablilty, even though it still provides absolutely no specific impact of this mall on the specific retail stores and specific downtown business district of the surrounding areas of the Town of Oyster Bay.

With respect to the Ellsworth Affidavit, the Court is somewhat amazed that it is supposed to recognize the relevance of documents dated 1993 and 1999 (which are in no way specific to Oyster Bay's retail stores and downtown business district), but is simultaneously supposed to find that Petitioners' 2001 FEIS (which is specific to the impacted area) is so significantly outdated as to require an SEIS, replete with protracted public review and response times, and in-depth reanalysis.

What Findings #11 and #13 don't do is what the Court directed them to do. It does not supply data to support its conclusions; and isn't based upon substantial evidence necessary to deny the special use permit; nor was this subject defined in the Scoping process (nor considered in the SEQRA review). Therefore, as to Finding #11, the Court must again vacate this Finding because it is arbitrary, capricious and unsupported by substantial evidence (*see*: ***SCI Funeral Service of New York Inc v Planning Board, Town of Babylon***, *supra*; and ***Markowitz v Town Board of Oyster Bay***, *supra*); and as to Finding #13, the Court must again vacate this Finding because it is nothing more than a summary of concerns expressed in earlier Findings, the proposed special use being permitted, and as such tantamount to a legislative finding it will not adversely affect the surrounding areas (*see:* ***Holbrook Associates Development Co v McGowan***, *supra*); the Town Board is required to grant, unless reasonable grounds exist for denial (*see*: ***7-11 Inc v Board of Trustees, Inc Village of Mineola***, *supra*; ***Holbrook Associates Development Co v McGowan***, *supra*); and zoning laws do not exist to insure limited business competition (*see:* ***Sun-Brite-Car Wash Inc v Board of Zoning Appeals, Town of Hempstead***, *supra*).

FINDING #12 (Impact on Residential Real Estate Values in the Surrounding Areas):

The 2002 Decision As Affirmed: The Court vacated this Finding because it determined that Respondent's conclusion 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", was not only speculative and inconclusive, but also flawed in that it relied upon expert analysis submitted by opponents' consultant (who did no empirical studies of his own, but merely critiques the study done in the EIS). Furthermore, said expert did not compare the impact of the project on property values with the impact of an as-of-right development, and therefore this expert critique is insufficient, and this Finding is therefore arbitrary, capricious and not based on substantial evidence (*see*: ***SCI Funeral Service of New York Inc v Planning Board, Town of Babylon***, *supra*).

Petitioners Argue: Respondent's 2007 Resolution fails to resolve the grounds upon which the Courts based their prior determinations vacating this Finding because it merely insists the 2002 Decision As Affirmed was wrong, and that its reliance on the opinion submitted by Michael Haberman, consultant for Intervenors, was sufficient, which is contrary to the law of the case.

2008 Court Review: Respondent's 2007 Resolution seems to conclude that it was unnecessary to do what the Court directed, as Respondent is unaware of any standards under SEQRA, as the Court seemed to indicate in its 2002 Decision As Affirmed, and therefore the Court was creating standards which would have a chilling effect on Respondent, and criticizes what the 2002 Decisions As Affirmed didn't address, raising questions in Respondent's mind(s).

What Finding #12 doesn't do is what the Court directed it to do. It does not supply empirical data upon which its determination was based, instead merely critiquing the study done in the EIS; and it does not compare the impact on property values of the project as opposed to an as-of-right development. Therefore, the Court must again vacate this Finding because it is insufficient, rendering it arbitrary, capricious and not based on substantial evidence (*see*: ***SCI Funeral Service of New York Inc v Planning Board, Town of Babylon***, *supra*).

FINDING #14 (The Project Does Not Comply With Standards):

The 2002 Decision As Affirmed: The Court vacated this Finding because it determined that it was once again a mere conclusory statement by Respondent, lacking elaboration or support, and therefore cannot be deemed a reasonable elaboration of its determination, rendering it arbitrary, capricious and not based upon substantial evidence (*see*: ***Weok Broadcasting Corp v Planning Board, Town of Lloyd***, *supra*).

Petitioners Argue: Respondent's 2007 Resolution fails to resolve the grounds upon which the Courts based their prior determinations vacating this Finding because it makes not attempt to justify its determination regarding this Finding.

2008 Court Review: Respondent's 2007 Resolution contains nothing regarding this Finding.

What Finding #14 doesn't do is what the Court directed it to do. It doesn't provide elaboration or support for its determination. Therefore, the Court must again vacate this Finding because it is arbitrary, capricious and not based upon substantial evidence (*see*: ***Weok Broadcasting Corp v Planning Board, Town of Lloyd***, *supra*).

FINDING #15 (Credibility of Expert Opinions and Conclusions):

The 2002 Decision As Affirmed: The Court determined that this was merely Respondent's recognition of various submissions placed upon the record (pronouncing itself to have fulfilled its obligations, accordingly), requiring no judicial review.

Petitioners Argue: Respondent's 2007 Resolution does not address this Finding in the 2007 Resolution

2008 Court Review: The Court finds no action was necessary regarding same, as it is not, in actuality, a Finding.

FINDING #1 (Project Reviewed by the Town Board):

The 2002 Decision As Affirmed: The Court vacated this Finding because, by failing to take the mandatory

hard look at Petitioners' further proposed reduction of the project to 750,000 square feet, Respondent could not certify whether or not any potential adverse environmental effects identified in the EIS process would be minimized or avoided to the maximum extent possible, as required by law (*see:* ECL § 8-0109(1) &(8); 6 NYCRR § 617.9; ***Glen Head-Glenwood Landing Civic Council Inc v Town of Oyster Bay***, 88 AD2d 484 [2 Dept 1982]); and that Respondent's reliance on anonymous submissions deprived the Court of the ability to determine whether Respondent fulfilled its function based upon substantial evidence in making a decision that was neither arbitrary nor capricious.

Petitioners Argue: Respondent's 2007 Resolution fails to resolve the grounds upon which the Courts based their prior determinations vacating this Finding because (even if the Court on remittal was able to identify post-FEIS information constituting substantial evidence of unacceptable environmental impacts from a proposed 860,000 square foot mall) Respondent could not deny Petitioners application, but rather would have to evaluate whether a reduction in the size of the mall to 750,000 square feet would mitigate those impacts; and that this Finding in the 2007 Resolution does not contain a single reference to post-FEIS submissions.

2008 Court Review: In Respondent's 2007 Resolution, the "Whereas" clauses and this Finding reference a the September 30, 2003 letter from of its Special Counsel (the Shapiro letter) to Petitioners' Counsel, claiming it was issued pursuant to the 2002 Decision, and that it represented the determination of Respondent. As set forth in the 2007 Decision, it is well established that a Town Board (Respondent, herein) can only take action by enactment of a formal instrument, such as a resolution. (While this Finding alleges that "Justice Spinner has deemed the requested letter as "not unreasonable" ", a review of the part of the 2007 Decision "Compliance with the Court's Decision of July 8, 2002" clearly demonstrates that this alleged quote can't even be credited with being simply out of context, but rather sinks to the level of gross distortion and/or intentional misrepresentation, obfuscating the issue.) In fact, Respondent never set forth the demands of the Shapiro letter in a formal instrument adopted by the Town Board, such as a resolution that the Court could have reviewed upon a motion by Petitioners, and therefore said letter failed to serve as an action by Respondent. In order to make that portion of the 2007 Decision abundantly clear (not open to manipulation, reinterpretation or reinterpretation for the sake of further argumentation or transgression), said reference in the 2007 Resolution does not serve to now make Special Counsel's letter an action of Respondent (Town Board), *ex post facto* or otherwise.

The 4th paragraph of this Finding is yet another adventure into the theater of the absurd that seems to define Respondent's approach to this matter. Herein, Respondent (or whoever prepared this Resolution for it, but which it bears responsibility for, as it adopted same) states that the language of the prior Order of this Court requiring "follow through" by Respondent in considering Petitioners' offer to further reduce the size of the mall, is inconsistent with the initial TEQR recommendation that the 860,000 square foot mal avoided impacts to the maximum extent practicable, thereby supporting the 2001 determination of Respondent. Respondent seems to completely fail to understand the 2002 Decision, the 2003 Appellate Decision or the 2007 Decision. In fact, it seems probable the Respondent never will understand. (In all futility, it is referred back to the first paragraph of this section reviewing Finding #1.) Of course, this is Respondent's lead in to why an SEIS is necessary, after all, there must be great concern as to what novel, new significant impacts might result from a proposal to build LESS.

Of further interest herein is Respondent's reference to a "...recent submission to the Court on behalf of Petitioners... dated August 3, 2007, from Petitioners' architect, William J. Beitz, Jr...". Interestingly, this

referenced Affidavit is dated some two months after this Court issued its 2007 Decision. The Court is confronted with the question, what Court was it submitted to? Of further interest is the fact that this Affidavit seems to contain language stating the identical points made in the Broderick Affidavit, submitted in the instant proceeding and dated October 19, 2007, after Respondent adopted the 2007 Resolution. In any respect, it appears to be an admission by Respondent that, when it adopted said Resolution, it was already aware the a revised site plan for a reduced mall would not be very different than the site plan it acknowledges it is has in its possession. Alas, in an interesting adoption of the tactics of its Counsel, Respondent doesn't miss the opportunity for an *ad hominem* attack Beitz, another professional, so hence deserving of no respect, questioning his qualifications and expertise to make evaluations, and describing his Affidavit as a "...thinly veiled attempt by Petitioners to circumvent..." Respondent's site plan approval authority.

As admitted by Respondent's Counsel, in his Affirmation in Support/Opposition, Petitioners first offered to reduce the size of the mall to 750,000 square feet in correspondence dated May 31, 2001, which the Town Board declined to consider as untimely, a position that was clearly rejected by the 2002 Decision As Affirmed. The Court is confronted with the question of whether Respondent, after all these years, used this opportunity to meet its legal obligation to consider this reduction, or did it merely run the clock further, awaiting surrender. The answer is disconcerting, to say the least.

This Finding continuously seeks to redefine what this Court purportedly meant by its 2007 Decision, always conveniently skewed decidedly toward Respondent's previously stated positions. There are two specific areas of the language of this Finding that are particularly disturbing to the Court:

> The first is the sidetracking of the discussion to requirements in the Town Code for site plan review. Quickly disposed of, the predominant issue is a special use permit, after which comes the issue of specific site plan. Same is readily admitted in Respondent's Broderick Affidavit and Gruza Affirmation, both of which state that a revised site plan application will be necessary. Instead, opportunity is taken by Respondent's Counsel to criticize the project engineers, and allege Petitioners made an admission of some sort by "voluntarily" undertaking an analysis of their proposal. The Court is struck by the question, what "analysis"?
>
> The second (more importantly, in fact at the very crux of the instant matter) is couched in the claim that Petitioners did not comply with Special Counsel's letter, which is later propounded in Respondent's Cross-Motion/Opposition submissions as indignation at the mention by Petitioners' Counsel of settlement negotiations that were conducted between Petitioners and Respondent from the fall of 2005 through the summer of 2006.

Instead of addressing the inadequacy of this Finding and meeting its obligation of correcting same, if possible, Respondent engages in tactics that obfuscate the issues, reargue the Courts Decisions, and fail to meet its obligations pursuant to the law and the law of the case. Once again, the Court must vacated this Finding because, by failing to take the mandatory hard look at Petitioners' further proposed reduction of the project to 750,000 square feet, Respondent could not certify whether or not any potential adverse environmental effects identified in the EIS process would be minimized or avoided to the maximum extent possible, as required by law (*see:* ECL § 8-0109(1) &(8); 6 NYCRR § 617.9; ***Glen Head-Glenwood Landing Civic Council Inc v Town of Oyster Bay***, *supra*).

What Finding #1 doesn't do is what the Court directed it to do. It doesn't take the mandatory hard look at Petitioners' proposed reduction of the project. Therefore, the Court must again vacate this Finding because, by failing to do so Respondent could not certify whether or not any potential adverse environmental effects identified in the EIS process would be minimized or avoided to the maximum extent possible, as required by law (*see:* ECL § 8-0109(1) &(8); 6 NYCRR § 617.9; ***Glen Head-Glenwood Landing Civic Council Inc v Town of Oyster Bay***, 88 AD2d 484 [2 Dept 1982]).

CHANGES IN CIRCUMSTANCES RELATED TO THE PROJECT:

After the sections regarding the Findings, reviewed herein above, the 2007 Resolution includes this section, as entitled above, seeking to justify the need for an SEIS because, in all the years since the FEIS was adopted, a building at 300 Robbins Lane was "redeveloped" (as in converted) into a 203,326 square foot office building, a Lowe's Home Center is the subject of a pending application for special use permit at 300 Robbins Lane, and the Syosset Library was, pursuant to a decision of Respondent, approximately doubled in size.

Petitioners Argue: There is no merit to Respondent's position that, even if it fails to identify post-FEIS submissions constituting substantial evidence to support its Findings, an SEIS is required to evaluate potential traffic impacts of caused by these alleged changed circumstances; that it is specious for Respondent to demand an SEIS to evaluate alleged changes in background traffic conditions purportedly resulting from two minor construction projects and a long pending application for a proposal that has been inactive for over two years (and was later withdrawn, as set for herein below); and that said demand is not only arbitrary and capricious, but also contrary to prior determinations by Respondent's Planning Advisory Board and the Board of Trustees of the Syosset Public Library, both of which determined that those construction projects would not result in any significant change in background traffic conditions.

As to the Lowe's application, Petitioners have presented evidence that, in a letter dated October 8, 2007, Counsel handling said application informed Respondent it was being withdrawn, as set forth in a resolution adopted by Respondent on November 27, 2007. Petitioners' Counsel further points out that, even if it had not been withdrawn, SEQRA does not require an FEIS to evaluate the cumulative impacts of a speculative project which may never be built (*see:* ***Village of Tarrytown v Planning Board, Village of Sleepy Hollow***, 292 AD2d 617 [2 Dept 2002]; ***Service Station Dealers of Greater NY Inc v NYSDEC***, 145 AD2d 777 [3 Dept 1988]);

As to the Office Building conversion, in 2003 TEQR determined that it had the potential for only *de minimis* increases in delays at relevant intersections, therefore, Counsel for Petitioners argues, Respondent cannot now allege said conversion is a changed circumstance requiring an SEIS. The Court further notes that same was an as-of-right conversion.

As to the Syosset Library expansion, Counsel for Petitioners points out that the Board of Trustees of the Syosset Public Library, in its SEQRA review for the Library expansion, found that same did not have the potential to result in significantly increased use of the Library, or significantly traffic volumes, which is supported by the Technical Memorandum Petitioners submitted to Respondent. The Court notes that said Library has a parking lot that, at most, accommodates 110 vehicles.

2008 Court Review: Not only is there nothing in the Resolution to support the need for an SEIS due to

changed circumstances, a review of these three projects demonstrates they do not possess an impact that would justify a complicate and laborious review, such as an SEIS, a position determined by the decisions of Respondent's own Planning Advisory Board and the Board of Trustees of the Library. Further discussion of the Towns demand for an SEIS is continued herein below in this decision.

SEQRA COMPLIANCE ISSUES:

This section of the 2007 Resolution, following the "Changes" section discussed herein above, in actuality is a further critique of the 2002 Decision As Affirmed, presenting nothing of substance that requires further review, as Respondent's time to appeal the affirmance of the Appellate Division, Second Department expired years ago.

The remainder of the 2007 Resolution regards Respondent's position that it has justified the need for a Supplemental Environmental Impact Statement, which is discussed at length herein below in this decision, in a section by the same name.

THE ISSUE OF THE 2005 SITE PLAN & TECHNICAL MEMORANDUM:

In his affirmation in Support/Opposition (and in his Memorandum of Law) Respondent's Counsel affirms that Petitioners submitted to the Court a Technical Memorandum, as well as affidavits from three individuals that "purport" to detail alleged settlement negotiations between themselves and representatives of Respondent; that "...the Court has no authority to consider these materials for a) they are *de hors* the administrative records presented to, and actually considered, by the Town Board; and b) evidence of purported settlement discussions... must be stricken from Petitioners' motion..."; and further that same were "...unethically submitted to the Court...". The Court finds these affirmed statements nothing less than astounding, considering the facts, the first of which is that said Technical Memorandum was attached to the King Affidavit submitted to this Court in support of Petitioners' prior request for relief, leading this Court to issue the 2007 Decision.

Reading Finding #1 of the 2007 Resolution, and the Affirmation in Support/Opposition of Counsel for Respondent, one would not know that Petitioners had submitted substantial documents, copies of which were later provided to Respondent's members (the July 5, 2007 letter from Petitioners' Counsel to Respondent's Commissioner of Environmental Resources, copied to all members of Respondent). The position proffered by Respondent's Counsel is not only undermined by the established facts, the indignation seems all the more theatrical when viewed against the above noted reference to a "voluntarily" undertaken analysis, and further eroded by the approximately 31st of the unnumbered "Whereas" clause, which references "...***subsequent discussions*** with Petitioners regarding the requirements for the "further proceedings" ordered in Justice Catterson's 2002 Decision...to comply with the conditions set forth in Shapiro & Reich's letter of September 30, 2003" (emphasis added by the Court); "subsequent discussions", as in settlement negotiations (interestingly permissible for Respondent to allude to, but reason for indignation when stated with specificity by Petitioners).

Furthermore, this indignation takes on the aura of disingenuousness when one reads (in the final paragraph of the section of Finding #2, entitled ""Office" Alternative") the words "..."Technical Memorandum" received from Petitioners...". IF the Technical Memorandum is *de hors* the record considered by

Respondent, then how does Respondent make reference to it in its 2007 Resolution? And how does Respondent's Counsel justify his disgraceful professional assault on Petitioners' Counsel, when the record (by way of Respondent's own 2007 Resolution) obviously and irrefutably demonstrates that said Technical Memorandum was, IN FACT, considered by Respondent well enough to be criticized?

This deplorable theme is then repeated in the Ellsworth Affidavit, attached to the Affirmation of Respondent's Counsel, wherein five pages are dedicated to the proposition entitled "Petitioners' Renewed Motion Improperly Requests the Court to Render Decisions Regarding Highly Technical Documents that Were Not Previously Submitted to the Town Board". Still further, this Court is astonished that Respondent belabors this point in the Morgan Affidavit, claiming that Respondent only had opportunity to perform a limited, preliminary review of the Technical Memorandum, when in fact the March 2006 revisions were the result of a 3 month review by the maker of the Affidavit, and Respondent adopted a resolution on July 10, 2007, to retain an engineering firm to review the "Taubman Mall Traffic Analysis" (the proposed mall herein) to the tune of over $38,000.

Instead, the Court notes that, in fact, Respondent has failed to submit a Return setting forth what it considered in taking the proper action this Court instructed, same being required in responding to Article 78 proceedings. If it were not for Petitioners, the Court would once again be deprived of the proper record upon which to review Respondent's decision making process, in order to determine whether same was based on sufficient evidence, or whether it was arbitrary, capricious or unlawful. Respondent has effectively created a default by its failure to provide such a Return, and furthermore, would have created yet another default if it had failed to consider the Technical Memorandum in determining whether an SEIS was necessary, seven years after its initial determination. Whether Respondent properly considered the contents of same in determining the need for an SEIS is the subject of further review herein below.

In October 2005, the Town retained an engineering consultant, LIOR Engineering, to review Petitioners' site plan and engineering drawings, and in December 2005, the Town retained a traffic engineering consultant, Gannett Fleming, to review the Technical Memorandum, which Petitioners submitted to the Town on December 9, 2005, which was updated in March 2006, after conferences and comments from said engineering consultants.

Respondent's Counsel further argues that the Affirmations of Petitioners' experts, and the "purported" alternative site plan cannot be properly before the Court, because they were not considered by Respondent:

> As regards the alternative site plan, if it is true that same was not considered, then shame on Respondent's representatives, as that was their paid obligation (by salary and contract) pursuant to the discussions they participated in, but this is of little substance, since the revised site plan can be reviewed after granting of a special use permit, and the Broderick Affidavit makes it abundantly clear that there would be minor differences for the site plan of the reduced mall, not involving any change in location or basic structure of the mall or the associated roadways and traffic patterns.
>
> As to the Affirmations of Petitioners' experts, the Court finds it bewildering, since Respondent's Counsel provided the Affirmations of Respondent's experts for the Court's consideration. Is not what is good for the gander also good for the goose? These documents provide analysis of submissions by both sides, and even through represented as far too technical for the Court to understand by

Respondent's expert, the Court did not find that to be the case, at all, and found then all to be very informative, for their purposes.

Petitioners argue that the Technical Memorandum establishes that an SEIS is not require because the updated analysis does not identify any adverse traffic impacts significantly different from, or greater than, the traffic impacts evaluated in the FEIS. Respondent would have this Court believe it can look to inadequate information to support its demand for an SEIS, but it cannot consider the hefty weight of the Technical Memorandum (which Respondent obviously DID consider) or affirmations supporting said conclusions.

In ***Coalition Against West Inc v Weinshall***, 21 AD3d 215 [1 Dept 2005], the developer prepared and submitted a technical memorandum in 2003, evaluating whether a highway exit closure would result in significant adverse impacts not identified in the 1992 FEIS for the comprehensive project. The use of this Technical Memorandum (studying whether background traffic conditions had changed since the drafting of the FEIS and containing updated traffic analysis establishing there would not be significant impacts not identified or considered in the original FEIS) was expressly upheld by the Appellate Division.

As to Respondent's Counsel's histrionics regarding materials produced during settlement negotiations, leading to his unjustified professional attack on Petitioners' Counsel, the law clearly does not support his position. As pointed out by Petitioners' Counsel, in fact CPLR 4547 excludes admission of settlement evidence only when the purpose of admitting same is to prove validity or weakness of a claim, amount of a claim or amount of damages (*see:* McKinney's Practice Commentaries following CPLR 4547 [2007 Main Volume]). Specifically, CPLR 4547 states that settlement offers and discussions:

> "...shall be inadmissible as proof of liability for or invalidity of the claim or the amount of damages. Evidence of any conduct or statement made during compromise negotiations shall also be inadmissible. The provisions of this section shall not require the exclusion of any evidence which is otherwise discoverable, solely because such evidence was presented during the course of compromise negotiations. Furthermore, the exclusion established by this section shall not limit the admissibility of such evidence when it is offered for another purpose..." (emphasis added).

The Court hereby determines that the Technical Memorandum and Site Plan as revised in 2005 were properly before this Court, for ALL of the reasons set forth herein above, and Respondent's objections were completely unfounded.

THE ISSUE OF THE DEMAND FOR AN SEIS:

The 2007 Resolution spends much verbiage attempting to justify the need for an SEIS, going so far as to attempt to convince the Court that its own words demonstrate such a requirement, but as accurately pointed out by Petitioners' Counsel, SEQRA provides (*see:* 6 NYCRR § 617.9(a)(7)) that an SEIS may be required, limited to the specific significant adverse environmental impacts not addressed or inadequately addressed in the EIS, if there is potential for adverse impacts different from, or significantly greater than, the impacts identified in the FEIS, arising from:

a) changes proposed for the project;
b) newly discovered information; or
c) a change in circumstances related to the project.

Petitioners Argue: Regarding these limited grounds for requiring an SEIS:

> As to a), the proposed change herein is a reduction of 100,000 square feet, which logic dictates does not have the potential for significantly different or greater impacts than the larger project evaluated in the FEIS, but will, in fact, reduce impacts.
>
> As to b), this relates to new information not previously available regarding environmental significance or vulnerability of the site, such as discovery of previously unidentified wetlands, species or habitat, or previously unavailable data regarding hazardous substances, none of which has come to light regarding the instant site.
>
> As to c), there is no such change in circumstances related hereto that has the potential for significantly different of greater impacts than those evaluated in the FEIS.

In furtherance thereof, Petitioners point out that the Technical Memorandum provides a detailed and comprehensive updated traffic impact analysis for the proposed reduced mall, based on current background traffic conditions, establishing that:

1. the current background traffic volume is virtually the same as the 2001 background traffic volume used in the FEIS analysis; and
2. the updated traffic impacts are neither significantly different from, nor greater than, the traffic impacts identified in the FEIS.

Counsel for Petitioners adroitly points out, it is well settled that the mere passage of time does not require the preparation of an SEIS to update information in the EIS, an SEIS being required only if there exists factual information demonstrating significant change in relevant conditions during the interim years which has potential for significant adverse impacts not considered in the FEIS (*see:* ***Jackson v NYSUDC***, 67 NY2d 400 [1986]; ***Doremus v Town of Oyster Bay***, 274 AD2d 390 [2 Dept 2000]); conclusory allegations that the passage of time or a changed circumstance have a potential for significant impacts are not sufficient to require an SEIS (*see:* ***Stewart Park and Reserve Coalition v NYSDOT***, 157 AD2d 1 [3 Dept 1990]); even where change in circumstances have potential for some isolated and limited adverse impacts, an SEIS is not required as long as there is basis to conclude overall impacts will remain substantially similar (*see:* ***Roosevelt Islanders for Responsible Southtown Development v Roosevelt Island Operating Corp***, 291 AD2d 40 [1 Dept 2001]), said decision having established that the standard for requiring an SEIS is high.

As further pointed out by Petitioners' Counsel, in ***Gordon v. Rush***, 100 NY2d 236 [2003], the Court of Appeals declared that an applicant can seek judicial review of a lead agencies issuance of a positive declaration requiring a DEIS, the Court having determined that the positive declaration would inflict actual harm, consisting of the time and resources necessary to prepare the DEIS and proceed through the requisite review process, and that even if same resulted in issuance of the requested approvals, same would not lessen the injury nor compensate the applicant, if the expenditures were unnecessary because the positive declaration was invalid (*see:* ***Oak Beach Inn Corp v Harris***, 108 AD2d 796 [2 Dept 1985]). This ruling was consistent with the Courts earlier pronouncement that the determination of whether an agencies action is final for the purposes of allowing judicial review must be based on a pragmatic evaluation of whether the decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury (*see:* ***Essex County v Zagata***, 9 NY2d 447 [1998]). Again, as pointed out by Petitioners' Counsel, Respondent's reliance on ***Sour***

Mountain Realty Inc v. NYSDEC, 260 AD2d 920 [3 Dept 1999]) is misplaced, as said decision was rendered prior to ***Gordon v. Rush*** (*supra*).

Petitioners further argue that the Court of Appeals established a straightforward analysis to be used in determining whether an agency action is ripe for review - the action must impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process; in other words, a pragmatic evaluation must be made as to whether the decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; and further there must be a finding that the apparent harm inflicted by the action may not be prevented or significantly ameliorated by further administrative action or steps available to the complaining party (*see:* ***Gordon v Rush***, *supra*).

2008 Court Review: It is evident from a pragmatic evaluation of the record that Respondent has arrived at a definitive position concerning alleged traffic impacts of the project, and that its position will inflict an actual, concrete injury. As pointed out by Petitioners' Counsel, while the standard for justifying judicial review and disposal of the requirement for an FEIS requires a higher standard, as it can not be based on a record for review, since such a determination is rendered at the beginning of the application and SEQRA process, the case for providing judicial review of a decision to require an SEIS is far more compelling, as the record has been made, and therefore is ripe for review.

In examining the decision of the decision of the Court of Appeals in ***Riverkeeper Inc v Planning Board, Town of Southeast***, (*supra*), submitted by Counsel for Intervenors, the Court notes the following conclusions contained therein:

> The decision to prepare an SEIS as a result of newly discovered information must be based on: a) the importance and relevance of the information; and b) the present state of the information in the EIS (*see:* NYCRR § 617.9 [a][7][ii]); in making this fact-intensive determination, the lead agency has discretion to weigh and evaluate the credibility of reports and comments submitted to it, assessing environmental concerns in conjunction with other economic and social planning goals (6 NYCRR § 617.1[d]).
>
> Furthermore, judicial review of an agency decision under SEQRA is limited to whether the agency identified relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration for the basis of its determination (*see:* ***Jackson v NYS Urban Development Corp***, 67 NY2d 400 [1986]); this standard of review applies to a lead agency's determination regarding necessity for an SEIS, and it is not providence for the Court to second guess thoughtful agency decision making; accordingly such a decision should only be annulled if it is arbitrary, capricious or unsupported by evidence.
>
> A lead agency's discretion to solicit comments at a late stage in the SEQRA process must be balanced against SEQRA's mandate that the regulations be implemented with minimal procedural and administrative delay, in the interest of prompt review (*see:* NYCRR § 617.3[h]).

This Court has determined that the record conclusively demonstrates that Respondent failed to properly identify relevant areas of environmental concern that were not substantially and significantly addressed satisfactorily in the FEIS; failed to take a hard look at the mitigation that Petitioners' proposed further reduction of the project's size would have accomplished; and therefore failed to make a reasoned elaboration

for the basis of its determination, causing all of their Findings to be annulled because they are arbitrary, capricious or unsupported by evidence. Furthermore, Respondent has abused a lead agency's discretion to solicit comments at a late stage in the SEQRA process, attempting to stonewall Petitioners' application, instead of trying to identify legitimate, significant environmental concerns that required mitigation.

As stated in Respondent's Ellsworth Affidavit, "Given the low threshold for an EIS set forth in SEQRA regulations, at 6 NYCRR § 617.7(a)(1), each and every basis for the Town Board's September 25, 2007 decision must be found to be invalid.". This Court absolutely agrees, and this Court has, in fact, determined that each and every basis for Respondent's 2007 Resolution is invalid, as determinations that are arbitrary, capricious and/or unsupported by evidence possess absolutely no validity.

ASSORTED ADDITIONAL RESPONDENT ISSUES:

Respondent Argues: Respondent's Counsel contends, *ad nauseam*, for a variety of spurious reasons: that the Court lacks jurisdiction to grant relief herein; that, in the absence of a final determination by Respondent, its determination is not ripe for judicial review; that Petitioners' Notice of Motion fails to seek relief from the 2007 Resolution; and that Petitioners failed to attach the original Pleadings herein, rendering the moving papers defective.

Petitioners Argue:

It is well settled that, when a Court remits a matter to a municipal body (such as Respondent), while retaining jurisdiction of same, there is no need for a new action to challenge the new determination of the municipal body (*see:* ***Ferruggia v Zoning Board of Appeals, Town of Warwick***, 233 AD2d 505 [2 Dept 1996]; ***Seeler v Planning Board, Town of East Hampton***, 53 AD2d 632 [2 Dept 1976]).

2008 Court Review:

This Court retained jurisdiction of this matter, for all purposes. This point seems to be lost on Respondent's Counsel. None of his arguments, nor the actions of Respondent, seem to recognize nor honor the prior Orders of the Courts. Furthermore, they seem to refuse to recognize that failure to act pursuant to a Court Order is, without question, ripe for judicial review, and obstructionist tactics, sooner or later, can certainly have their judicially imposed final chapter. Still further, they apparently fail to recognize that this Court retained jurisdiction over this matter specifically to insure that Respondent would take proper action, pursuant to the 2007 Decision, to resolve this matter, and therefore, again, the issues are squarely and properly before the Court for determination. Further yet, they seemingly again refusing to recognize that, by this Court retained jurisdiction over this matter, it was unnecessary to append the original Pleadings to their Motion, as the pleadings had remained before the Court, and therefore, again, the issues are squarely and properly before the Court for determination.

As capably argued by Petitioners' Counsel, the Court herein retained jurisdiction over this matter for all purposes, including the equitable power to prevent Respondent from unfairly manipulating SEQRA in a manner calculated to further frustrate Petitioners' application and cause it economic injury. In the 2007 Decision, this Court rejected Respondent's argument that Petitioners had to commence a new action to seek relief pursuant to the 2002 Decision As Affirmed, and as with everything else in these continuing proceedings

(as humorously pointed out by Petitioners' Counsel), this it is all very reminiscent of Yogi Berra's famous comment that this is like "déjà vu all over again".

CONCLUSION:

In ***Kaywood Properties Ltd v Forte***, 2008 NY Slip Op 31127(U), dated April 10, 2008, an interesting decision by Justice Paul J. Baisley, Jr, Supreme Court, State of New York, County of Suffolk, the following points relevant to the instant proceeding were set forth:

> The length and complexity of Respondent's determination, with 10 pages of 20 detailed Findings supporting 7 conclusions, may be evidence of Respondent's determination to throw in everything but the kitchen sink in, in order to thwart Petitioners' efforts to develop their property.
>
> The record lends indirect support to Petitioners' claim that Respondent's essentially ignored Petitioners' application, until forced to address it by the Court; then imposing roadblock after roadblock to keep Petitioners from succeeding in their efforts. It is the cumulative effect of these subtle indicators that tilts the balance in favor of Petitioners, and counteracts the superficial reasonableness of Respondent's determination.
>
> As the Courts detailed analysis of Respondent's determination reflects, there is no substantive reasonableness to Respondent's determination. The Court is constrained to conclude that, as alleged by Petitioners, Respondent has deliberately delayed Petitioners' application and concocted reasons to deny it.

Respondent has argued that this Court cannot order it to issue Petitioners a special use permit and site plan approval, because it cannot order a municipality to undertake a discretionary act. In fact, as adroitly pointed out by Petitioners' Counsel, the cases cited by Respondent are entirely consistent with the principle that, where there is a legal right that is not subject to a discretionary administration determination, there is no dispute that the Court possesses the authority to order a municipality to undertake the ministerial act required to effectuate the legal right, such as issuance of a permit (*see:* ***Legal Aid Society of Sullivan County Inc v Scheinman***, 53 NY2d 12 [1981]; ***Altimore v Barrios-Pauli***, 90 NY2d 378 [1997]; ***Klostermann v Cuomo***, 61 NY2d 525 [1984]; ***Kiriloff v AGW Wetwash Laundry***, 282 NY 466 [1940]; ***Vleck v Parry***, 270 NY 371 [1936]; ***Joy Builders Inc v Ballard***, 20 AD3d 534 {2 Dept 2005]; ***Morrison v NYS Div of Housing and Community Renewal***, 241 AD2d 34 [1 Dept 1998]; ***Kaplan v Lipkins***, 19 AD2d 723 [2 Dept 1963]). In the instant matter, Respondent has fully exhausted all of its discretion, as well as all reasonable patience.

As further adeptly pointed out by Plaintiffs counsel, in ***Dobson Jamaica Realties Inc v Town of Brookhaven***, 96 Misc2d 722 (Sup Ct, Suffolk County, 1978), the Court invalidated the Towns zoning designation of Plaintiffs property, and remitted the matter to the Town to hold a hearing and appropriately re-zoned the property. After the Town held the hearing but failed to properly re-zone the property, Plaintiff moved to enforce the prior order of the Court, and the Court entered judgment for Plaintiff and decreed the re-zoning of the property, stating that it was not inconceivable that the Town hoped that the very element of the delay would prevent the construction of the proposed shopping center.

Contrary to the directives of the Courts (in both the 2002 Decision As Affirmed of Justice Catterson, and the 2007 Decision of the undersigned) to provide this Court with information requisite in order to render a

reasoned decision, Respondents have instead deliberately engaged in conduct calculated to, and which actually did, impair, impede and defeat the Petitioners exercise of their rights and remedies, boldly flouting the requirements set forth in said Court decisions, and thwarting Petitioners' rights and remedies, Respondent thereby effectively creating a default by its purposeful affirmative acts of continuing obstinacy and persistent obfuscatory obstructionism.

The point has been reached where this Court must act to resolve this matter, directing Respondent to issue the Special use permit for a 750,000 square foot retail shopping mall; directing Petitioners' to submit a fully revised site plan for such a project; this Court retaining jurisdiction over these proceeding, for all purposed; and further directing all parties to appear and report to this Court on the progress made in complying with all the decisions of the Courts involving this matter at 90 day intervals, as set forth herein below

For all the reasons stated herein above and in the totality of the papers submitted herein, it is, therefore,

ORDERED, that the above referenced application of Respondents **(009)** is hereby denied in all respects; and it is further

ORDERED, that the above referenced application of Petitioners **(008)**, is hereby granted to the extent set forth herein, for the purposes of enforcing the 2002 Decision As Affirmed of Justice Catterson, the 2003 Appellate Decision of the Second Department, and the 2007 Decision of the undersigned, without further unnecessary and unjustified delay:

1 Respondent is hereby directed to immediately adopt the SEQRA Findings as set forth in Town Environmental Quality Review Commission's (TEQR's) July 25, 2000 SEQRA Findings; and

2 Respondent is hereby directed to immediately issue to Petitioners a special use permit for its proposed shopping mall at 750,000 square feet; and

3 Petitioners are hereby directed to submitted a fully revised Site Plan for a 750,000 square foot retail shopping mall to Respondent, as soon as possible; and

4 Respondent is hereby directed to process and review said site plan, with all due haste;

and it is further

ORDERED, that this Court hereby retains jurisdiction over this proceeding, for all purposes; and it is further

ORDERED, that all parties appear before this Court, at the Courthouse at 210 Center Drive, Riverhead, New York, or wherever else directed to appear by this Court, at intervals of approximately 90 days, beginning on September 17, 2008, at 2:30 in the afternoon of that day, the next date thereafter to be set at that time, said Court appearances to be for the purpose of Status Conferences to establish compliance with the Orders of this Court; and it is further

ORDERED, that Counsel for Petitioner is hereby directed to serve a copy on this Order, with Notice of Entry, upon Counsel for all other parties, within 20 days of entry of this Order by the Suffolk County Clerk.

Dated: **Riverhead, New York**
June 9, 2008

HON. JEFFREY ARLEN SPINNER, JSC

FINAL DISPOSITION	✓ **NON-FINAL DISPOSITION**
✓ SCAN	DO NOT SCAN

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