Matter of Village of Islandia v Ball
2020 NY Slip Op 33930(U)
August 21, 2020
Supreme Court, Albany County
Docket Number: 905550/2017E
Judge: Peter A. Lynch

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the matter of the Application of the

VILLAGE OF ISLANDIA,

Petitioner-Plaintiff,

For a Judgment Pursuant to Article 78 of the Civil Practice Laws and Rules,

DECISION AND ORDER
Index No. 905550/2017E
RJI No. 01-17-ST8984
(Lynch, J.)

-against-

RICHARD A. BALL AS COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF AGRICULTURE AND MARKETS, THE SUFFOLK COUNTY LEGISLATURE, SUFFOLK COUNTY, AND PAL-O-MINE EQUESTRIAN, INC.,

Respondents-Defendants.

INTRODUCTION

By Decision and Order dated January 30, 2020, incorporated herein by reference, this Court denied Respondents' motions to dismiss this combined Article 78/Declaratory Judgment proceeding/action.

The issue distills to whether the Suffolk County Legislature's enabling legislation, Resolution No. 1451-2017 adopted on July 25, 2017, to include the subject parcels of land into Agricultural District No. 3, to refer the application to the Commissioner for review and certification, and to issue a negative declaration thereon, complied with SEQRA. It did not.[1]

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[1] The signed copy of Resolution No. 1451-2017 is filed as NYSCEF Doc. 179. By Decision and Order of even date this Court addressed similar issues raised in a subsequent action between the parties (Index No. 908006-19).

SUPPLEMENTAL STATEMENT OF FACTS[2]

By application dated March 22, 2017, Respondent Pal-O-Mine Equestrian, Inc. (also referred to as "Applicant") applied to the Suffolk County Agricultural and Farmland Protection Board (hereinafter the "Board") to add two contiguous parcels to Agricultural District No. 3 (hereinafter the District).[3] The premises at 891 Old Nicholas Road , a/k/a Lot 019, consists of a .84-acre parcel improved with a residential structure and a garage. The premises at 899 Old Nicholas Road, a/k/a Lot 035, consists of a 1.05-acre parcel improved with a residential structure, a greenhouse, a farm stand, and a tilled crop area.[4]

Both lots are in a residential zones, Residential L District and Residential MF District, respectively. Significantly, as more fully appears below, agriculture is not a permitted use in any residential zone under the Zoning Ordinance.[5]

The Applicant represented that these properties have been used since 2016 in conjunction with the equestrian/educational/therapeutic programs conducted at its 7.4-acre farm located at 829 Old Nicholas Road (the "Farm"). The Farm is already in the District, albeit not contiguous to the subject parcels. Applicant claims the properties are being used to house Farm employees,[6] and the first floor of the residence at Lot 035 is used as a classroom.

On April 27, 2017 the Board adopted Resolution No. 12-2017 to recommend inclusion of the PAL-O Mine properties into the District, and further recommended the application be

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[2] The statement of Facts in the January 30, 2020 Decision and Order is incorporated herein by reference.

[3] See NYSEF Doc. 248.

[4] In the Application Chart on page 1 of the application, Lot 019 is identified as 1.05 acres and Lot 035 is identified as .84 acres, but the acreage is reversed in the narrative. Respondent Pal-O-Mine's application neglected to mention that the farm stand was not lawful and had been removed (see Prokop Aff. 7/10/2020 ¶ 53; see also NYSEF Doc 279 Aff. Of Building Inspector Peters ¶26).

[5] NYSEF Doc 279 Aff. Of Building Inspector Peters ¶20.

[6] With respect to the housing of employees, the Court notes that a "Boarding house or rooming house" is prohibited by Village Code § 177-53(B).

designated an unlisted action.[7] The Board identified the properties as "Part of Commercial Equine Operation: Horticulture; vegetables."[8]

On May 4, 2017, Lauretta Fischer, Director of Planning, prepared a Short Form EAF dated May 4, 2017, along with 10 corresponding approval resolutions; she forwarded same to the Council on Environmental Quality (CEQ), and requested review and recommendation to the County Legislature.[9]

The EAF identified 13 parcels of land by tax map number, with a total of 94.2 acres to be added to the District, including the two (2) parcels owned by Pal-O-Mine Equestrian, Inc. The EAF noted the Board had determined the lands "to be viable agricultural lands that would serve the public interest by assisting in maintaining a viable agricultural industry within the district." EAF Part I, Question 1 was answered in the affirmative as a legislative action, and questions 2 to 20 were left blank. EAF Part 2 listed all impacts as "no, or small impact may occur", including but not limited to impact 3, which states: "will the proposed action impair the character or quality of the existing community?" EAF Part 3 (Determination of Significance") was left blank.

Each of the proposed approval Resolutions recommended that the proposal be identified as an unlisted action, that a negative declaration issue thereon, and that the applications be approved.[10] Each resolution was distinguished only by owner name, tax map number, soils type, fiscal impact, and location.

The SEQRA component of each Resolution was identical, to wit:

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[7] (NYSEF Doc. 244, A-47, 60).
[8] The Board's Staff Report dated 4/27/17 (See NYSEF Doc. 244, A-38 to A-41) noted the subject parcels were not recommended for inclusion in the district in 2016. Staff noted the applicant's submissions relative to its classroom operations, housing, and agricultural use since 2016. Staff noted lot 035 also had "prime agricultural soils." Staff also noted both parcels did not meet Board guidelines because, combined, they were less than 7 acres and generated less than $50K annual revenues but further noted the nearby 7.1-acre equine facility. The Farm Board Report recommending inclusion of all the subject properties into the District was served on the Legislature on June 6, 2017 (NYSEF DOC. 244, A-679 to 685).
[9] NYSEF Doc. No. 67
[10] Copies of the introductory/unsigned Resolutions are filed as NYSCEF Doc. 75.

"4th **RESOLVED**, that Suffolk County, as SEQRA Lead Agency, hereby classifies the proposal as an Unlisted Action under the provisions of Title 6 NYCRR Part 617 and Chapter 450 of the Suffolk County Code; and be it further

5th **RESOLVED**, that Suffolk County, as SEQRA Lead Agency, hereby finds and determines that the proposal, pursuant to Title 6 NYCRR Part 617 and Chapter 450 of the Suffolk County Code, will not have significant adverse impacts on the environment for the following reasons:

1. The proposed action will not exceed any of the criteria in Section 617.7 of Title 6 NYCRR which sets forth thresholds for determining significant effect on the environment, as demonstrated in the Environmental Assessment Form;
2. The proposal does not appear to significantly threaten any unique or highly valuable environmental or cultural resources as identified in or regulated by the Environmental Conservation Law of the State of New York or the Suffolk County Charter and Code;
3. The parcels do not appear to suffer from any severe Environmental development constraints (limiting soil properties, a high groundwater table, and/or unmanageable slopes); and be it further

6th **RESOLVED**, that Suffolk County hereby adopts a determination of non-significance (negative declaration) and the Council of Environmental Quality is hereby directed to circulate and file all necessary notices in accordance with this resolution."

Throughout the review process, the text of each resolution remained unchanged.

On May 8, 2017, John Corral, Senior Planner for the CEQ solicited comments on the environmental impacts from the Division of Environmental Quality and from Supervisors in the affected Towns and Villages, including Petitioner.[11]

On May 17, 2017, John Corral, Senior Planner, on behalf of the County of Suffolk, completed Part 3 of the EAF by checking the negative declaration box, and by signing his name and title.[12] It is manifest that this negative declaration was not made by the Lead Agency, and preceded the public hearing and meeting described below.

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[11] (NYSEF DOC 244, A-84-86)

[12] (NYSEF DOC. 244, A-93).

On May 24, 2017, the Council on Environmental Quality sent a memo and its Resolution 26-2017 to all County Legislators with its informal recommendation that the project be considered an unlisted action, and that a negative declaration be issued thereon.[13] The CEQ also advised that if the Legislature had concerns about the environmental impact, they could send the matter back to the CEQ to either amend the EAF or cause a DEIS to be prepared. The memo gave the link to view the EAF online.

The Suffolk County Legislature conducted a public hearing on June 20, 2017.[14] Petitioner's Counsel and Village Mayor Dorman addressed the Legislature, identified the properties as residentially zoned, and pointed out that they were not contiguous to the Equine operation at 829 Old Nicholas Road.[15] Mayor Dorman objected to that part of the EAF which indicated the action had no impact on the community character, and asserted inclusion of the Village parcels in the District undermined the Village's zoning authority.[16] The Mayor expressed concern that use of the properties to board employees, constituted a commercial use within the residential zone, conflicting with the single-family homes across the street.[17] The Mayor asked the Legislature to evaluate community impact under SEQRA. [18]

When the issue of SEQRA compliance was raised, it appears that legislative counsel (Mr. Nolan) referenced the "fairly tight time frame" to consider the application, stating "it's the end of July that we have to get this done," and that they "have to approve or not these resolutions by the

[13] (NYSEF Doc. 244, A-69-70)
[14] The minutes of the June 20, 2017 Public Hearing are filed as NYCEF Doc. 173.
[15] (Minutes, p. 63-64). See also NYSEF Doc. 279 Aff. Of Building Inspector Peters ¶4, 12-14.
[16] (Minutes, p. 69-70).
[17] (Minutes, p. 74, 91, 92)
[18] (Minutes, p. 79).

end of July." [19] Legislative Counsel also acknowledged that inclusion in the Agricultural District can diminish local zoning power.[20]

Respondent Pal-O-Mine, through Counsel Snead, acknowledged that the properties are to be used by interns, as a first-floor classroom, and for farming.[21] He also noted that trailers could potentially end up on these parcels, albeit there was no current intent to do so.[22] A Legislator questioned the proposed use as a commercial use.[23] When asked what the impetus for the application was, Attorney Snead replied: "if we intend to do something that the Village doesn't want, that we have the right to bring that to the State if it unreasonably restricts farming." [24] The Legislators elected to close the public hearing in order to meet the 120-day approval deadline to include the parcels in the District. [25]

By memo dated June 23, 2017, three (3) days after the June 20, 2017 public hearing, the CEQ forwarded the EAF and resolutions to the County Legislature, and recommended approval thereof, i.e. "unlisted action/Negative Declaration," without giving any site-specific information about the subject parcels.[26]

On July 17, 2017, the application was discussed at a meeting of the Environmental, Planning, and Agricultural Committee of the County Legislature.[27] Village Mayor Dorman testified that the proposed commercial use of the properties conflicts with the residential character of the neighborhood, and inclusion in the Agricultural District effectively usurps the

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[19] (Minutes p. 68).
[20] (Minutes, p. 87).
[21] (Minutes p. 95, 105).
[22] (Minutes p. 106) See Town of Lysander v. Hafner, 99 N.Y. 2d 558 [2001].
[23] (Minutes p. 99).
[24] (Minutes p. 111).
[25] (Minutes p. 113-114).
[26] The CEQ recommendation is filed as NYSCEF Doc. 68.
[27] (see NYSCEF Doc.244, A-417 to 427; A- 445-454) The Application was initially tabled by the EPA Committee at its June 12, 2017 Meeting (NYSCEF Doc., A-314).

Village's right to regulate property use through zoning.[28] After the Mayor spoke, a Legislator acknowledged that he also sat on the Farm Board and noted the Board did not have the benefit of the Mayor's concerns when it recommended approval.[29] When a Legislator queried if the Village position was racially motivated, another Legislator noted the Mayor was no longer present at the meeting and not able to respond to the racial discrimination issue.[30]

Attorney Snead advised the Committee that the use was authorized by local zoning and that **"the SEQRA issues have been dealt with."**[31] The Committee then voted to discharge the application without making any recommendation to the full Legislature.[32] Neither the EAF, nor the enabling Resolution, were addressed by the Committee.

The Legislature convened a general meeting on June 25, 2017.[33] Counsel Snead was given an opportunity to speak to the Legislators and acknowledged the intended use was for farm employees and "we had modified the interior to remove two of the dwelling units so it could be used as a **classroom, which is authorized under the code.**" [34] A Legislator expressed concern that the application was being made "to circumvent the local laws and zoning authority," that there was "a disconnect" from the Farm, and noted approval constituted "a slippery slope."[35]

When the discussion ended, a Legislator stated, "We have a motion to approve. All in favor? Opposed? Abstentions?", and the record evidenced 18 in favor. [36] The July 25, 2017 Minutes do not contain any discussion about the EAF, nor any discussion about the stated

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[28] (see NYSCEF Doc.244, A-419 to 420).
[29] (A-452).
[30] (A -449-450).
[31] (A – 451; emphasis added) This statement is consistent with the fact that the Planner had already signed Part 3 of the EAF on May 17, 2017, giving the appearance that the SEQRA review was a fait accompli.
[32] (see NYSCEF Doc.244, A- 454).
[33] Minutes of the meeting are in NYSEF Doc. 178 and Doc. 244 A-336-394.
[34] " (Minutes p. 23-24, 86 [emphasis added]).
[35] (Minutes p. 85, 89, 91).
[36] (Minutes p. 91-92; Return A-221-226)

reasons to issue a Negative Declaration set forth in Resolution No. 1451-2017. Resolution 1451 was signed by the Chief Deputy County Executive on July 26, 2017.

AGRICULTURAL USE

Respondent Pal-O-Mine claims that agricultural use is permitted under the Village Zoning Ordinance. In fact, agricultural use is not permitted.

Islandia Code, §177-52 entitled "Residential Districts; Table of Use Regulations" provides:

Use Classification	District			
	L	M	MF	MF-18
'agriculture or nursery, including farm stands for the retail sale of products raised on premises'	--	--	--	--

Key: -- Not permitted

In fine, Respondent has continuously misrepresented that agricultural use of the premises complied with the zoning Ordinance when, in fact, it did not. To the contrary, a "use variance" is required to establish an agricultural use in any residential zone pursuant to Village Code § 177-103 and Village Law § 7-712-b (2).

SPECIAL USE PERMIT

The record evidences that Respondent Pal-O-Mine has long been using the premises as a classroom. Attorney Snead's representation that the classroom was authorized by the code was misleading for such use requires a special use permit, and they have not even applied for same.

Village of Islandia Code §177-52 Attachment 1, Residence Districts: Table of Use Regulations, provides:

Use Classification	District			
	L	M	MF	MF-18

'private or parochial school' SP S SP --
Key: SP Special permit from Village Board after public hearing).

Village of Islandia Zoning Ordinance §§ 177-109 and 110 govern special use permits as follows:

"§ 177-109 **Special permit determination.**

Before such approval for such special exception, the Board of Appeals shall determine that:

A.
The use shall not prevent the orderly and reasonable **use of adjacent properties** or of properties in adjacent use districts.

B.
The use shall not prevent the orderly and **reasonable use of permitted or legally established uses** in the district wherein the proposed use is to be located or of permitted or legally established uses in adjacent use districts.

C.
The safety, health, welfare, comfort, convenience or order of the Village shall not be adversely affected by the proposed use and its location.

D.
The use shall be in harmony with and promote the general purposes and intent of this chapter.

§ 177-110 **Special permit considerations.**
In making a determination for a special permit approval, the Board of Appeals shall, among other things, give consideration to the following:

A.
The **character** of the existing and probable development of uses in the district and the peculiar suitability of such district for the location of any such permissive uses.

B.
The **conservation of property values** and the encouragement of the most appropriate uses of land.

C.
The effect that the location of the proposed use may have upon the creation of undue increase of **vehicular traffic** congestion on public streets, highways or waterways.

D.
The availability of adequate and proper public or private facilities for the treatment, removal or discharge of sewage, refuse or other effluent (whether liquid, solid, gaseous or otherwise) that may be caused or created by or as a result of the use.

E.
Whether the use or materials incidental thereto or produced thereby may give off obnoxious gases, odors, smoke or soot.
F.
Whether the use shall cause disturbing emission of electrical discharges, dust, light, vibration or noise.
G.
Whether the operations in pursuance of the use shall cause undue interference with the orderly enjoyment by the public of parking or of recreational facilities if existing or if proposed by the Village or by other competent governmental agency.

H.
The necessity for bituminous-surfaced space for purposes of off-street parking of vehicles incidental to the use and whether such space is reasonably adequate and appropriate and can be furnished by the owner of the plot sought to be used within or adjacent to the plot wherein the use shall be had.
I.
Whether a hazard to life, limb or property because of fire, flood, erosion or panic may be created by reason or as a result of the use or by the structures to be used therefore or by the inaccessibility of the property or structures thereon for the convenient entry and operation of fire and other emergency apparatus or by the undue concentration or assemblage of persons upon such plot.
J.
Whether the use or the structures to be used therefore shall cause an overcrowding of land or undue concentration of population.
K.
Whether the plot area is sufficient, appropriate and adequate for the use and the reasonably anticipated operation and expansion thereof.
L.
The physical characteristics and topography of the land.
M.
Whether the use to be operated is unreasonably near to a church, school, theater, recreational area or other place of public assembly." (emphasis added)

Clearly, the issuance of a special use permit is not a ministerial act, and any application therefore is subject to discretionary review, as well as SEQRA compliance (see Village Law §7-725-b (1) (2) (6) (8); see also, Robert Lee Realty Co. v. Village of Valley Spring, 61 N.Y. 2d 892 [1984],

where the Court held, "The classification of a particular use as a use permitted in a particular district subject to the granting of a special exception constitutes a legislative finding that if the special exception standards of the zoning ordinance are met the use accords with the general plan of the ordinance and will not adversely affect the neighborhood " (emphasis added); Wegmans Enterprises, Inc. v. Lansing, 72 N.Y.2d 1000, 1001 [1988], where the Court held, "Failure to meet any one of the conditions set forth in the ordinance is, however, a sufficient basis upon which the zoning authority may deny the permit application"; PDH Props., LLC v. Planning Bd., 298 A.D.2d 684, 685 [3d Dept. 2002], where the Court held, "The applicant must establish compliance with the conditions legislatively imposed upon the permitted use"; see also Burke v. Denison, 203 A.D. 2d 642 [3d Dept. 1994]). Moreover, the Village Mayor has consistently argued Respondent's use is in direct violation of the Ordinance and that the AML permit process is undermining the Village authority to regulate zoning within its jurisdiction (see AML §305-a).

SYSTEMIC SEQRA FAILURE

There is no specified time limit for the conduct of a SEQRA review under ECL Article 8 or its regulations thereunder (6 NYCRR Part 617). AML §303-b, however, imposes an annual 180-day time limit to complete the certification process. AML §303-b (1) provides that the legislative body "**shall** designate an annual thirty-day period within which a land owner may submit to such body a request for inclusion of land which is predominantly viable agricultural land within a certified agricultural district…" (emphasis added). AML §303-b (2) provides that the Farm Boars "**shall**, within thirty days report to the county legislative body its recommendations." (emphasis added) AML §303-b (4) governs legislative action and provides "such action **shall** be taken no later than one hundred twenty days from the termination of the thirty day period described in subdivision one," i.e. bringing the review period to 150 days.

(emphasis added) AML §303-b (5) provides "the commissioner **shall** certify" within 30 days of its receipt of the legislative resolution, i.e. bringing the review period to 180 days. (emphasis added)

In turn, Respondent Legislature assumed, incorrectly, it must achieve SEQRA compliance within the annual 180-day period.[37] The crunch of the timeline was evidenced by the Legislators' continuing concerns about meeting the approval deadline for the applications identified in the consolidated bare bones EAF. Lumping all properties into a single EAF to facilitate the review, however, effectively foreclosed a true opportunity to take a hard look at the environmental impacts arising out of the Pal-O-Mine project. This is evidenced by the Lead Agency's abrogation of its SEQRA review duties by delegating the determination of significance to Planning Staff. In fine, there was a systemic failure in SEQRA compliance.

SEQRA

As a preliminary matter, since inclusion of additional land into the District necessitates County Legislative approval and a Commissioner Certificate, they are each an "involved agency" (6 NYCRR 617.2 (t)). In turn, since the Village of Islandia's approval is not required under AML 303-b, it is not an involved agency. Rather, the Village of Islandia is an "interested" agency (6 NYCRR 617.2 (u)).

There are three distinct SEQRA issues. As a threshold matter, there is a dispute relative to the classification of the action as Type II or as unlisted. Classification of the action is a threshold SEQRA determination (6 NYCRR 617.6 (a) (1)). Next, compliance with the SEQRA

[37] The Court notes that AML §303-b does not specify that the application is deemed denied if not concluded within the 180 period. Moreover, AML §303-b must be read in conjunction with ECL Article 8, which necessitates that the application is not deemed complete until such time as the SEQRA review is completed. Accordingly, the Legislators incorrectly assumed that they were under a mandate to complete the process within 180 days.

coordinated review process (6 NYCRR 617.6 (b) (3)) is at issue. Last, the sufficiency of the negative declaration (6 NYCRR 617.7 (a) – (c)) is at issue.

SEQRA ACTION

Notwithstanding the fact that Respondent County attempted to go through the SEQRA process, it now claims adoption of Resolution 1451 was a Type II action, exempt from SEQRA, citing 6 NYCRR § 617.5 (c) (3) (20) (21) and (27).[38] This argument is belied by the record, is wholly unpersuasive and misplaced.

6 NYCRR § 617.5 (c) (4) (26) (27) and (33) provides:

> (c) The following actions are not subject to review under this Part:
>
> (4) **agricultural farm management practices**, including construction, maintenance and repair of farm buildings and structures, and land use changes consistent with generally accepted principles of farming;
>
> (26) **routine or continuing agency administration and management**, not including new programs or major reordering of priorities that may affect the environment;
>
> (27) conducting concurrent environmental, engineering, economic, feasibility and other **studies and preliminary planning and budgetary processes** necessary to the formulation of a proposal for action, provided those activities do not commit the agency to commence, engage in or approve such action;
>
> (33) adoption of regulations, policies, procedures and local legislative decisions in connection with any action on this list.

Here, the local legislative action to add land to the District does not constitute "agricultural farm management practices" (c.f. Matter of Humane Socy of U.S. v. Empire State Dev. Corp., 53 A.D. 3d 1013 [3d Dept. 2008]; and Pure Air & Water, Inc. v. Davidson, 246 A.D. 2d 786 [3d

[38] (see Memo of Law p. 19) Under the SEQRA Regs. Updated through 1/17/2020, the cited sections are now renumbered 6 NYCRR § 617.5 (c) (4) (26) (27) and (33).

Dept. 1998]). The Resolution is certainly not "routine or continuing agency administration or management," nor "studies and preliminary planning and budgetary processes."

Passage of the challenged Resolution clearly constitutes an action subject to SEQRA review (see 6 NYCRR §617.2 (b) (3); and 6 NYCRR § 617.5 (c)(46), which exempts actions of the State Legislature and Governor from SEQRA, "but not actions of local legislative bodies"). While creation of the District in the first instance constitutes a Type 1 action (6 NYCRR 617.4 (b) (1)), and expanding that District constitutes an unlisted action (6 NYCRR 617.2 (al)). In all the proceedings below, Respondent County acknowledged it was an unlisted action.

SEQRA **"actions"** also include "the issuance…of a…**certificate**", including a certification under AML §303-b (5) (ECL §8-0105 (4) (i); 6 NYCRR 617.2 (aa)). Respondent Pal-O-Mine also claims the Commissioner's issuance of a Certificate is a Type II action in accord with its Agency regulation 1 NYCRR §362.3 (a) (4), i.e. exempt from SEQRA review. [39] Notably, Pal-O-Mine's position conflicts with Respondent Commissioner, who concedes this is an unlisted action subject to coordinated review.[40]

SEQRA regulation 6 NYCRR 617.5 (b) provides:

> **"(b) Each agency may adopt its own list of Type II actions** to supplement the actions in subdivision (c) of this section. **No agency is bound by an action on another agency's Type II list.** The fact that an action is identified as a Type II action in an agency's procedures does not mean that it must be treated as a Type II action by any other involved agency not identifying it as a Type II action in its procedures.
>
> An agency that identifies an action as not requiring any determination or procedure under this Part is **not an involved agency. Each of the actions on an agency Type II list must:**

[39] (see Memorandum in Opposition to Verified Petition, p. 4).

[40] (See Commissioner's Memorandum, of Law p. 18-21; Somers Aff. ¶ 22-26; Latham Aff. ¶ 28; See NYSEF DOCS 276, 261 and 272, respectively.

> **(1) in no case, have a significant adverse impact on the environment based on the criteria contained in section 617.7(c) of this Part;** and
> **(2)** not be a Type I action as defined in section 617.4 of this Part." (emphasis added)

Agriculture and Markets regulation §362.3 (a) (4) provides:

> "**(a)** As required by SEQR, this department has reviewed its statutory authority, regulations, policy, procedures, and the various types of actions with which it is involved. In the light of such review, the department has determined that its actions (with the exception of future capital construction projects) fall within the following categories:
> **(1)** consumer protection;
> **(2)** economic regulation;
> **(3)** prevention and control of plant and animal diseases, and human diseases which are transmitted or vectored by food or animals; and
> **(4) promotion, and marketing assistance to agriculture. The department finds that all of its actions are Type II actions as defined by section 617.12 of Title 6 and do not have a significant effect upon the environment within the meaning of SEQR and the regulations of ENCON adopted pursuant thereto, and therefor do not require an EIS."** (emphasis added)

By its express language, "promotion, and marketing assistance to agriculture" does not include the issuance of a certificate under AML §303-b, which is a two-step process involving approvals from both the County Legislature and then the Commissioner. Moreover, inclusion of additional lands into the District must be evaluated to determine whether a significant adverse impact on the environment exists based on the criteria contained in section 617.7(c). Issuance of the Certificate is not a Type II exempt action.

While Petitioner persists in its argument that the subject is a Type I action, this Court does not agree.[41] Inclusion of lands within an agricultural district does not constitute a change in allowable uses within the zoning district as required by 6 NYCRR 617.4 (b) (2), for the lands are

[41] (see Prokop Aff. 7/10/2020 ¶ 96).

still subject to local zoning, albeit with a potential Commissioner override. Moreover, cumulative review was not required (c.f. Save the Pine Bush, Inc. v. Albany, 70 N.Y. 2d 193, 206 [1987], where the Court required cumulative review, holding "the project at issue…is only a larger plan designed to resolve conflicting specific environmental concerns in a subsection of a municipality with special environmental significance").

SEQRA COORDINATED REVIEW

Respondent Commissioner asserts "the Department, acting as an involved agency, complied with SEQRA by undertaking a coordinated review with the County serving as Lead Agency."[42] Based on the de facto coordinated review, Respondent Commissioner asserts it had the right to rely on the County's binding negative declaration without making any additional SEQRA determination.[43]

Coordinated review for unlisted actions is optional but is authorized. SEQRA regulation 617.6 (b) (3) and (4) provides, inter alia:

> **"(3)** Coordinated review.
>
> **(i)** When an agency proposes to directly undertake, fund or approve a Type I action or an Unlisted action undergoing coordinated review with other involved agencies, it **must**, as soon as possible, transmit Part 1 of the EAF completed by the project sponsor, or a draft EIS and a copy of any application it has received to all involved agencies and notify them that a lead agency must be agreed upon within 30 calendar days of the date the EAF or draft EIS was transmitted to them…
>
> **(iii)** If a lead agency exercises due diligence in identifying all other involved agencies and provides written notice of its determination of significance to the identified involved agencies, then **no involved agency may later require the preparation of an EAF, a negative declaration or an EIS in connection with the action.** The determination of significance issued by the lead

[42] (Memo of Law p. 18; Somers Aff. ¶ 22-26; Latham Aff. ¶ 28).
[43] (See Commissioner's Memorandum, of Law p. 19).

> agency following coordinated review is **binding** on all other involved agencies.
>
> (4) Uncoordinated review for Unlisted actions involving more than one agency.
>
> (i) An agency conducting an uncoordinated review may proceed as if it were the only involved agency..." (emphasis added)

Respondent Commissioner concedes that the record does not evidence compliance with the notice procedure set forth in 617.6 (b) (3) (i) but argues that it was "understood" the County would act as Lead Agency in a coordinated review.[44]

In Matter of Village of Ballston Spa v. City of Saratoga Springs, 163 A.D. 3d 1220, 1222 [3d Dept. 2018], the Court held, "A lead agency must **strictly** comply with SEQRA's mandates" (see N.Y. City Coalition to End Lead Poisoning, Inc. v. Vallone, 100 N.Y.2d 337, 348 [2003]; Schenectady Chemicals, Inc. v. Flacke, 83 A.D.2d 460, 463 [3d Dept. 1981]). (emphasis added) Does non-compliance with the notice provisions of 617.6 (b) (3) in context of a AML § 303-b application necessitate reversal? I think not (see Mtr. of Cade v. Stapf, 91 A.D. 3d 1229, 1232 [3d Dept. 2012]).

AML § 303-b provides, inter alia:

> 1. The **legislative body of any county** containing a certified agricultural district shall designate an annual thirty-day period within which a landowner may submit to such body a request for inclusion of land which is predominantly viable agricultural land within a certified agricultural district prior to the county established review period.
> **4.** After the public hearing, the **county legislative body shall adopt or reject the inclusion of the land requested to be included within an existing certified agricultural district...** Upon the **adoption of a resolution to include** predominantly viable agricultural land, in whole or in part, within an existing certified agricultural district, **the county legislative body shall submit the resolution** ...to the commissioner.

[44] (Memo of Law p. 20).

> **5.** Within thirty days after receipt of a resolution to include land within a district, the **commissioner** shall certify to the county legislative body whether the inclusion of predominantly viable agricultural land as proposed is feasible and shall serve the public interest by assisting in maintaining a viable agricultural industry within the district or districts.
> **6.** If the **commissioner certifies** that the proposed inclusion of predominantly viable agricultural land within a district **is feasible and in the public interest**, the land shall become part of the district immediately upon such certification.

Given this structure, the County Resolution is a condition precedent to the Commissioner's certification, through a two-step coordinated process. The County Legislature necessarily must act as the "Lead Agency" (6 NYCRR 617.2 (v)). Moreover, the de facto coordinated review process is recognized by the parties for "the Department has historically advised counties that they are responsible for agricultural district SEQRA reviews."[45] The procedural error (i.e. failure to serve notice 617.6 (b) (3) (i)) does not vitiate the de facto coordinated review conducted by Respondent County Legislature and the Commissioner.[46]

NEGATIVE DECLARATION

Does Resolution 1451 comport with the SEQRA regulations? It does not. A negative declaration must comply with SEQRA Regulation §617.7 (a) (2) and (b), which provides:

> **"(a)** The lead agency must determine the significance of any Type I or Unlisted action in writing in accordance with this section.
>
> **(1)** To require an EIS for a proposed action, the lead agency must determine that the action may include the potential for at least one significant adverse environmental impact.
> **(2) To determine that an EIS will not be required for an action, the lead agency must determine either that there will be no adverse environmental impacts or that the identified adverse environmental impacts will not be significant.**

[45] (Somers Aff ¶20; Latham Aff ¶28).
[46] Of course, the better practice is to simply adopt the notice procedures set forth in the regulations.

> **(b)** For all Type I and Unlisted actions the lead agency making a determination of significance must:
>
> **(1)** consider the action as defined in section 617.2(b) and 617.3(g) of this Part;
> **(2) review the EAF**, the criteria contained in subdivision (c) of this section and any other supporting information to identify the relevant areas of environmental concern;
> **(3) thoroughly analyze the identified relevant areas of environmental concern to determine if the action may have a significant adverse impact on the environment**; and
> **(4) set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation."**

(see Friends of P.S. 163, Inc. v. Jewish Home Lifecare, Manhattan, 30 N.Y. 3d 416 [2017], the Court succinctly stated "we review the record to determine whether the agency identified the relevant areas of environmental concern, took a **hard look** at them, and made a **reasoned elaboration of the basis for its determination**"; See also, Matter of Save the Pine Bush, Inc. v. Common Council of the City of Albany, 13 N.Y. 3d 297, 306-307 [2009]; Chinese Staff & Worker's Assn v. New York, 68 N.Y. 2d 359, 363 [1986]; Jackson v. New York State Urban Dev. Corp., 67 N.Y. 2d 400, 416-417 [1986]; In the Matter of Adam Bruner et al v. Town of Schodack Planning Board et al., 2019 NY Slip Op 08753 [3d Dept. 12/5/19]; Matter of Anderson v. Lenz, 27 A.D. 3d 942, 944 [2006]).

The negative declaration portion of EAF Part 3 was completed and signed on behalf of the Lead Agency by a Senior Planner on May 17, 2017, in advance of the Legislature's public hearing on June 20, 2017 and meeting on July 25, 2017. Considering the absence of any discussion concerning the EAF by any Member of the Legislature at the hearing or meeting, it is manifest that the Legislature delegated its duty to determine significance to the planning staff, in gross violation of its SEQRA duties (see Coca-Cola Bottling Co. v. Board of Estimate, 72 N.Y.

2d 674 [1988]; Save Pine Bush v. Planning Bd of Albany, 96 A.D. 2d 986 [3d Dept. 1983] Glen Head-Glenwood Landing Civic Council v. Town of Oyster Bay, 88 A.D. 2d 484 [2d Dept. 1982]). The Legislature violated its mandate to review the EAF and make the determination of significance pursuant to SEQRA Regulation §617.7 (b) (2).

The record includes a discussion of the action's impact on the Village of Islandia's community character at the June 20, 2017 public hearing, the July 17, 2017 EPA meeting, and the July 25, 2017 public meeting. Moreover, EAF Part 2 indicated "no, or small impact may occur" relative to community character. There was no record discussion, however, to articulate any basis to support such determination. This is particularly troubling since Part 3 of the EAF was on completed on May 17, 2017 without consideration of the Mayor's claims (see Matter of Wellsville Citizens for Responsible Dev., Inc. v. Wal-Mart Stores, Inc., 140 A.D. 3d 1767, 1770 [4th Dept. 2016], the Court held, "Because there is no evidence in the record before us that the Town Board even considered the impact of the project on the community character of the Village, we conclude that it failed to take a hard look at that impact, **requiring annulment of the resolution adopting the negative declaration on that ground as well.**" (internal citations omitted) (emphasis added) In view of the fact that agriculture is not a permitted use, and the classroom requires a special use permit, it is manifest that the unsubstantiated conclusion in the EAF, that impact on community character would be "no, or small impact may occur," is belied by the record. Moreover, there is absolutely no reasoned evaluation set forth in the record to support that conclusion.

In relevant part, Resolution 1451 states "the proposed action will not exceed any of the criteria in Section 617.7." The record is silent to explain the basis for that determination (c.f. Matter of Village of Ballston Spa v. City of Saratoga Springs, 163 A.D. 3d 1220, 1224 [3d Dept.

2018]). Such finding evinces the Lead Agency's failure to understand how to determine the environmental significance of the action. Exceeding the stated criteria may be relevant to determining whether an action is Type I under SEQRA Regulation 617.4 (b), where the regulations specify minimum thresholds. As distinguished, the action impacts "must be **compared** against the criteria" to determine significance under 6 NYCRR 617.7 (c) (1) (v). (emphasis added) No such comparison appears in the record.

Resolution 1451 also states "the proposal does **not appear** to threaten" and "the parcels do **not appear** to suffer" from the stated criteria. In fine, Resolution 1451 is couched in wholly conclusory terms, which do not fulfill the reasoned elaboration requirement of SEQRA (see Matter of Neeman v. Town of Warwick, 2020 N.Y. App. Div. LEXIS 3228 [2d Dept. 6/3/2020], where the Court invalidated a negative declaration holding, "SEQRA guarantees that agency decision-makers will identify and focus attention on any environmental impact of proposed action, that they will balance those consequences against other relevant social and economic considerations, minimize adverse environmental effects to the maximum extent practicable, **and then articulate the bases for their choices**" (emphasis added; internal quotations and citations omitted); see also, Matter of Peterson v. Planning Bd. Of the City of Poughkeepsie, 163 A. D. 3d 577, 579 [2d Dept. 2018]).

Equally troubling, by failing to address the content of Resolution 1451 at its July 25, 2017 Public Meeting, the record is unclear if the Legislators were even aware of or ever evaluated the negative declaration language contained therein. A Legislator simply stated, without discussion, "We have a motion to approve. All in favor? Opposed? Abstentions?" In Matter of Troy Sand & Gravel Co., Inc. v. Town of Nassau, 82 A.D.3d 1377, 1379 [3d Dept. 2011], the Court held,

> Here, respondents concede that **the record does not contain a "formal" reasoned elaboration.** A review of the record indicates that the only express reasoning set forth for the negative declaration is found in the full environmental assessment form; respondents **checked a box** indicating that "[t]he project will not result in any large and important impact(s) and, therefore, is one which will not have a significant impact on the environment, [and] a negative declaration will be prepared" (emphasis omitted). While respondents argue that Supreme Court elevated form over substance in annulling the comprehensive plan and zoning law for lack of a reasoned elaboration regarding the negative declaration determination, it is settled that strict compliance with SEQRA is required. The comprehensive plan and zoning law very well may, as respondents assert, represent the considered, thorough product of a long and deliberative legislative process. **A record evincing an extensive legislative process, however, is neither a substitute for strict compliance with SEQRA's reasoned elaboration requirement nor sufficient to prevent annulment**" (internal citations omitted) (emphasis added)

Where, as here, the record fails to contain any elaboration of its basis for the negative declaration, adopting Resolution 1451 is akin to checking the no significance box in an EAF, a process roundly rejected in Matter of Troy Sand & Gravel Co., Inc. v. Town of Nassau, supra.

Wholesale adoption of 10 approval resolutions, with identical conclusory language, manifests the Legislature gave lip service to its SEQRA obligation, and utterly failed to meet its procedural and substantive SEQRA mandate to take a hard look at the community character impact, and to articulate the basis for its determination (see Matter of Adirondack Historical Assn. v. Village of Lake Placid/lake Placid Vil., Inc., 161 A.D. 3d 1256, 1259 [3d Dept. 2018], where the Court vacated the SEQRA findings "given the **wholesale failure** on the part of the Village Board to set forth a record-based elaboration for its conclusion"; c.f. In the Matter of Arthur M. Cady et al v. Town of Germantown Planning Board et al, 2020 NY Slip Op 03440 [3d Dept. 6/18/2020]).

In view of the failure to comply with the provisions of 6 NYCRR §617.7 (a) (2) and (b),

the Negative Declaration is annulled, and the corresponding legislative approval to include the parcels in the Agricultural District rendered null and void. In context of the coordinated review, the Commissioner's Certificate is also vacated, null and void.

PRELIMINARY/PERMANENT INJUNCTION

Petitioner seeks injunctive relief. Pursuant to CPLR §6301, "a preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do...an act in violation of the plaintiff's rights respecting the subject action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff" (see also CPLR § 6311 and CPLR Rule 6312 (a)).

In the ordinary course, the movant must demonstrate: "(1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor" (see c.f. Doe v. Axelrod, 73 N.Y. 2d 748, 750 [1988], where Court set review standard but held plaintiff failed to meet its burden of proof). When the movant is a Village, however, the standard requires a meritorious ordinance violation claim and a balancing of the equities (see Incorporated Vil. of Plandome Manor v. Ioannou, 54 A.D.3d 364 [2d Dept. 2008] where the Court held, "When a village seeks injunctive relief pursuant to Village Law § 7-714, it may obtain a preliminary injunction without satisfying the traditional three-pronged test for preliminary injunctive relief. The village must demonstrate only a likelihood of success on the merits and that the equities are balanced in its favor; it need not demonstrate irreparable harm.")

The standard for a permanent injunction is essentially the same as the foregoing but requires that the party seeking the injunction prevail on the underlying merits of the case (see Town of N. E. v Vitiello, 159 A.D.3d 766 [2d Dept. 2018] where the Court held, "Where a town seeks to enforce its building and zoning laws, it is entitled to a permanent injunction upon demonstrating that the party sought to be enjoined is acting in violation of the applicable provisions of local law"; Town of Brookhaven v. Mascia, 38 A.D.3d 758, 759 [2d Dept. 2007]; Town of Nassau v. Nalley, 52 A.D. 3d 1013 [3d Dept. 2008], lv denied 11 N.Y. 3d 771 [2008]).

In Town of Brookhaven v MMCCAS Holdings, Inc., 137 A.D.3d 1258 [2d Dept. 2016], the record established that defendant was engaged in a "composting and mulch-processing operation" allegedly in violation of the zoning ordinance. Denying the issuance of a preliminary injunction, the Court held, "although the Town ultimately may be successful in this action, it failed to demonstrate that the **balance of the equities** weighed in its favor. While the harm to the defendants if the injunction is granted would prove substantially burdensome and likely irreversible, the harm to the Town should the injunction be denied is more remote and uncertain." (emphasis added) (id. at 1259) Let's balance the equities.

It is manifest that grant of a permanent injunction will be immediately and substantially burdensome on the existing facilities of Respondent Pal-O-Mine. With respect to harm to the Village, same is real yet less direct. Moreover, the Pal-O-Mine property is still subject to local zoning restrictions and enforcement pursuant to Village Code § 177-119.[47] Respondent Pal-O-Mine may either seek Village approval of the use or renew its application for inclusion in the Agricultural District, prompting in either event, a new, and hopefully thoughtful, SEQRA review. On balance, it is the determination of the Court to deny injunctive relief, without

[47] § 177-119 provides for penalties of $500 or 15 days in jail, or both, for each week of continuing violations.

prejudice to Village enforcement of their Ordinance pursuant to Village Law § 7-714 and/or Village Code § 177-119.

CONCLUSION

For the reasons more fully stated above, the Petition is ***Granted***. The Suffolk County Legislature's Resolution No. 1451-2017, adopted July 25, 2017, and the Commissioner's corresponding Certification pursuant to AML §303-b, are vacated, null and void.

This memorandum constitutes both the decision and order of the Court.[48]

Dated: Albany, New York
August 21, 2020

PETER A. LYNCH, J.S.C.

PAPERS CONSIDERED:
All e-filed pleadings, with exhibits.

08/21/2020

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[48] Notice of Entry by e-filing and service in accord with CPLR R 2220 is required.

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