SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

----------X

In the Matter of the Application of

Index No.55933/2020

HAMPSHIRE RECREATION, LLC,

Petitioner,

DECISION AND ORDER

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

-against-

THE VILLAGE OF MAMARONECK, and THE VILLAGE OF MAMARONECK PLANNING BOARD,

Respondents.

----------X

After rendering a Decision and Order that ordered a hearing in this matter to address three issues, the Court held a hearing at which it took testimony from two witnesses, over respondents' objections that such testimony was not allowed "because it was not in the administrative record before the Planning Board." Thereafter, the parties submitted post-hearing memoranda and reply memoranda. This Decision and Order follows.

As stated, there were three issues that the Court sought to explore at the hearing. The first was whether respondent Village of Mamaroneck Planning Board (the "Planning Board") at the last minute changed the standard that petitioner should use

for its flood modeling from 2070 to 2080. The second was whether petitioner established that it complied with the Village's Flood Damage Prevention Regulations (the "Regulations"). The applicable section of the Regulations, Section 186-5(A)(3)(c), requires that the volume of fill used for construction be "compensated for and balanced by a hydraulically equivalent volume of excavation." The third issue was whether the Planning Board's finding that the project would result in a loss of green space was based on the evidence submitted to it.

The Court begins by examining the applicable standards for this sort of review. It has long been settled that "In a proceeding seeking judicial review of administrative action, the court may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether there is a rational basis for the decision or whether it is arbitrary and capricious. This is true even where the court would have reached a different result. An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts." *Shapiro v. Plan. Bd. of Town of Ramapo*, 155 A.D.3d 741, 742–43, 65 N.Y.S.3d 54, 56–57 (2d Dept. 2017). All that the Court may do is assess "whether the agency

procedures were lawful and 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." *Falcon Grp. Ltd. Liab. Co. v. Town/Vill. of Harrison Plan. Bd.*, 131 A.D.3d 1237, 1239, 17 N.Y.S.3d 469, 472 (2d Dept. 2015). *See also E.F.S. Ventures Corp. v. Foster*, 71 N.Y.2d 359, 370 (1988) ("A large measure of discretion is afforded to local authorities with respect to the decision on whether to approve the site plans provided, however, that they comply with both the letter and spirit of the SEQRA review process.").

Beginning with the issue concerning the applicable year, the Planning Board contends that "the use of 2080 data in connection with the concerns over flooding of Cooper Avenue was raised and discussed for years prior to the Board's ultimate determination and was not a 'last minute' consideration." It thus asserts that it did not need to consider petitioner's eleventh-hour submission of its plan to combat the 2080 sea level scenario. In support of its position, the Planning Board cites in its papers three examples that reference the year 2080: (1) the May 2017 scoping document prepared by the Planning Board's engineer, which noted that "DEIS is silent on sea level

rise. . . . According to the official NYS sea level rise projections for the region inundation at the site may occur as early as the 2080s.";[1] (2) petitioner's document dated August 29, 2017, which respondent quotes: "Under the Rapid Ice Melt scenario, the sea level rise in year 2080 is approximately 4 feet;"[2] (3) the DEIS accepted on December 13, 2017, which respondent also quotes: "Under the Rapid Ice Melt scenario, the sea level rise in year 2080 is approximately 4 feet."[3]

A review of respondents' papers shows that the specific issue of the accessibility of Cooper Avenue was first raised in December 2018. There is no dispute that petitioner was never asked explicitly "for years prior to the Board's ultimate determination" to address the accessibility of Cooper Avenue using the 2080 standard; all of the Planning Board's directives are more oblique.

In contrast, petitioner identifies multiple instances where the Planning Board's engineers, The Chazen Companies ("Chazen"),

[1] Significantly, this sentence continues on to state ", or as late as beyond 2100. According to the median projection, which is the most accurate based on today's data, the site wouldn't be inundated until after 2100."

[2] The Court was unable to locate this reference in the exhibits used at the hearing or in the documents uploaded to NYSCEF, given the voluminous nature of the Certified Record and the lack of identification as to what pages are in which volume.

[3] Nor could the Court locate this reference in the exhibits or

used 2070 (or the phrase "50 years")[4] as the applicable standard. For example, in a September 25, 2019 memo, Chazen stated "Under the 50-year median 2' sea rise scenario, Cooper Avenue would be inundated. . . ." In a document with the notation "Received November 17, 2019," petitioner repeatedly references the 2070 standard. In a section discussing "Future Sea Rise Impact on Access," petitioner analyzes two scenarios, 2045 and 2070. In response, Chazen merely states "As discussed above, higher sea level rise is possible, but the extent, if any, is not known at this time." This is hardly a directive to use the 2080 standard. Although petitioner references the 2070 standard twice more in that document, there is no comment from Chazen stating that it is the wrong one and that petitioner should use the 2080 standard instead. Similarly, in petitioner's document marked "Received Jan. 15, 2020," Chazen inserts the words "50-year" (which is 2070) in a discussion of estimated future sea level rises. This document also uses the 2045 and 2070 scenarios, with no directive to use the 60-year (2080) model. (The Court notes that during the hearing, petitioner's witness testified about conversations with Chazen in which they

Certified Record.

[4] The 50-year median sea rise scenario refers to 2070, not 2080, which would have been approximately 60 years later.

discussed that they should use the 2070 standard. The Court does not consider this testimony in its analysis, however.).

A review of the evidence reveals that while 2080 was mentioned a few times obliquely, the first time it was ever flagged as the standard that petitioner should use was in February 2020. Prior to that time, it is clear that the parties had agreed – whether expressly or implicitly - to analyze the safety of Cooper Avenue using the 2070, or 50 year, assumptions. Once the Planning Board made it clear that it wanted to use the 2080 standard, petitioner rapidly re-analyzed the data and presented a solution to the issues that the Planning Board had raised. The Planning Board, however, determined that it was too late and rejected petitioner's rejiggered plan.

The Court finds that this violates the "well settled" rule "that procedural due process in the context of an agency determination requires that the agency provide an opportunity to be heard in a meaningful manner at a meaningful time." *Kaur v. New York State Urban Dev. Corp.*, 15 N.Y.3d 235, 260 (2010). *See also In re Est. of Sheppard*, 129 A.D.3d 1127, 1129, 11 N.Y.S.3d 697, 699 (3d Dept. 2015) ("Review of the record reveals that the scope of the hearing changed on a critical issue without notice to Buono and with no accommodation to allow Buono to respond

thereto in a meaningful manner."). The Court thus finds that respondents failed to take a "hard look" at petitioner's last-minute solution to a last-minute change in the parameters. *See Evans v. City of Saratoga Springs*, 202 A.D.3d 1318, 1322, 164 N.Y.S.3d 227, 232 (3d Dept. 2022) ("In light of this determination, we cannot find that the City Council took the requisite hard look at the relevant areas of environmental concern prior to issuing its negative declaration."). On this basis alone, the Court finds that the petition must be granted to the extent of remitting the matter back to the Planning Board for consideration of petitioner's mitigation proposal using the 2080 standard.[5]

The Court next examines respondents' assertion that petitioner failed to comply with Village Code § 186-5(A)(3)(c).[6] Petitioner asserts that "the hydraulic conditions of the floodplain post-construction would remain equivalent to conditions existing at the Site today. This empirical fact is

[5] The Court declines petitioner's request for this Court to make the determination that the plan should be approved.

[6] This section provides that "whenever any portion of a floodplain is authorized for development, the volume of space occupied by the authorized fill or structure below the base flood elevation shall be compensated for and balanced by a hydraulically equivalent volume of excavation taken from below the base flood elevation at or adjacent to the development. All such excavations shall be constructed to drain freely to the watercourse. No area below the waterline of a pond or other body of water can be credited as a compensating excavation."

not in dispute. As the Planning Board acknowledged in its Findings: 'Flood elevations were shown to be identical to existing conditions. No impact was shown on the Project Site or adjacent properties.'" A review of this section of the Findings shows that it refers to flood modeling, and not the hydraulic equivalency issue. It does not appear to be relevant. However, in its reply papers, petitioner argues that the Planning Board "never calculated the 'hydraulically equivalent volume of excavation' necessary to 'compensate for and balance' the floodplain once fill is introduced. Had the Planning Board performed this calculation, it would have had to conclude that the volume of excavation required to comply with the Floodplain Regulations is zero (0) square feet." Respondents counter that "Mr. Junghans clearly acknowledged Hampshire's non-compliance by testifying that Hampshire proposed to bring in approximately 80,000 cubic yards of fill onto the Site and did not propose to remove any other fill below the base flood elevation. Tr. 135. Hampshire thus refused to comply with this requirement and failed to show in its submissions to the Court or during the hearing that the Planning Board's denial of either the floodplain permit or the variance is arbitrary and capricious." This response does not appear to address petitioner's assertion

that there was no volume of excavation required. That being said, the Court does not understand how bringing in 80,000 cubic yards of fill could result in no excavation being required. Accordingly, Court directs that the matter be remitted to the Planning Board to set forth more clearly whether any excavation is required and, if so, for petitioner to address it as soon as practicable thereafter.

Finally, the Court addresses the open space issue. Petitioner claims that "The Planning Board's Findings ignore the open space areas included in Hampshire's Project. As shown on the Open Space Plan, the Project included a 15-acre public green space in the center of the development, denoted as an "HOA" area. Hampshire also included two other 3-acre community green "HOA" areas on the north and south sides of the development. In addition, the Project included several habitat enhancement areas adjacent to the golf course, marked as "GO" on the Open Space Plan. . . . These "GO" open space areas "would attract a more robust wildlife species assemblage, resulting in an overall increase in species habitat" on the Property." In contrast, respondents contend that "the open space would not provide meaningful recreational opportunities because, as illustrated by FEIS Figure 5 in Appendix C, portions would be isolated from any

other open space, portions are comprised of long, linear areas adjoining roadways, portions comprise the embankments of the development platform, several can only be accessed by crossing the golf course, and much of the remainder would effectively function as golf course rough. These findings are rational and were based on the evidence in the record."

Respondents further argue that this issue had been addressed as early as May 2017, citing multiple comments from a law firm hired by a neighborhood opposition group and certain individuals, presumably neighbors. The Court does not see any reference to any expert or other persuasive authority in support of respondents' conclusion that the open space in the plan would be diminished or not meaningful. Instead, the only "evidence" is that submitted by interested community members. This is inadequate. The Second Department has explained that "While an agency's ultimate conclusion is within the discretion of the agency, it must be based upon factual evidence in the record and **not generalized, speculative community objections**." *Falcon Grp. Ltd. Liab. Co. v. Town/Vill. of Harrison Plan. Bd.*, 131 A.D.3d 1237, 1240, 17 N.Y.S.3d 469, 472 (2d Dept. 2015) (Emphasis added). *See also Hells Kitchen Neighborhood Ass'n v. City of New York*, 81 A.D.3d 460, 462, 915 N.Y.S.2d 565, 567-68 (1st Dept.

2011) ("petitioners' concerns about Clinton Cove Park are not supported by any factual or expert evidence, and are based only on their conjecture as to how the project may impact the park. Generalized community objections are insufficient to challenge an environmental review that is based on empirical data and analysis, such as the one here.").

The Court has reviewed the evidence submitted to the Planning Board on this issue, as it must. *City of Rye v. Korff*, 249 A.D.2d 470, 472, 671 N.Y.S.2d 526, 528 (2d Dept. 1998). It sees that the open space is not as scant or tainted as respondents make it out to be. While there are "portions [that] would be isolated from any other open space," and "portions [that] are comprised of long, linear areas adjoining roadways," "portions [that] comprise the embankments of the development platform," and "several [that] can only be accessed by crossing the golf course," a review of the map shows that these are all very minor areas. The main open spaces are accessible to all, not near the roads and accessible without crossing through the golf course. There is simply no support for the Planning Board's conclusion that the green space "would not provide meaningful recreational opportunities" given that it provides substantially more open, accessible space than there is at the

present. It is thus clear that, in the words of the Court of Appeals, "the Board's determination should be annulled because it is not supported by substantial evidence — substantial evidence being such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact or the kind of evidence on which responsible persons are accustomed to rely in serious affairs." *WEOK Broad. Corp. v. Plan. Bd. of Town of Lloyd*, 79 N.Y.2d 373, 383 (1992). In *WEOK Broadcasting*, the Court of Appeals further explained that "although a particular kind or quantum of 'expert' evidence is not necessary in every case to support an agency's SEQRA determination, here, the record contains no factual evidence, expert or otherwise, to counter the extensive factual evidence submitted by petitioner. To permit SEQRA determinations to be based on no more than generalized, speculative comments and opinions of local residents and other agencies, would authorize agencies conducting SEQRA reviews to exercise unbridled discretion in making their determinations and would not fulfill SEQRA's mandate that a balance be struck between social and economic goals and concerns about the environment." *Id.* *See also Tupper v. City of Syracuse*, 71 A.D.3d 1460, 1462, 897 N.Y.S.2d 573, 575 (4th Dept. 2010) ("We reject that contention inasmuch as

conclusory statements, unsupported by data will not suffice as a reasoned elaboration for its determination of environmental significance or nonsignificance."). Accordingly, the Court remands the matter to the Planning Board to take a "hard look" at the open space.

With respect to the issue of the conflicted Planning Board member, the Court is troubled by several things: her "wrestle control of this from the consultant" email, which appears to exhibit a desire for a preordained result,[7] and frustration that the consultant was thwarting that result; as well as her multiple admissions in her Ethics Board testimony that the traffic from the project would affect her "extremely minimally," and that the noise would not "be any worse." Even though she was only one vote, her active, vocal participation in the deliberations may well have influenced other members. *See generally Schweichler v. Vill. of Caledonia*, 45 A.D.3d 1281, 1284, 845 N.Y.S.2d 901, 904 (4th Dept. 2007) ("We conclude that the appearance of bias and actual bias in this case require annulment of the Planning Board's site plan approval."). To avoid the appearance of impropriety, the Court directs that upon

[7] This email went to two other people.

remand, the residences of all Planning Board members must be disclosed to petitioner.

All other requests for relief are denied.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
November 15, 2022

HON. LINDA S. JAMIESON
Justice of the Supreme Court

To: Zarin & Steinmetz
Attorneys for Petitioner
81 Main St., #415
White Plains, NY 10601

Abrams Fensterman et al.
Attorneys for Respondents
81 Main St., #306
White Plains, NY 10601