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TO: Village of Mamaroneck Board of Trustees
FROM: Lester D. Steinman, Esq. 
RE: Army Corps Flood Control Project
DATE: April 1, 2016

MEMORANDUM

At your Board's request, Linda Whitehead and I have consulted on the preparation of this memorandum addressing questions regarding the process for the consistency review of the Army Corps of Engineers' proposed flood control project for the Mamaroneck and Sheldrake Rivers in the Village.

Background

By letter dated January 29, 2016, the Army Corps of Engineers ("Army Corps") forwarded to the New York State Department of State ("DOS") the Army Corps' negative determination that the proposed federal activity (the Mamaroneck and Sheldrake Rivers flood control project in the Village) has no effect on any coastal use or resource. By letter dated February 12, 2016, the DOS wrote to Cindy Goldstein, Chair of the Village's Harbor and Coastal Zone Management Commission ("HCZMC"), advising of the Army Corps submission (inaccurately described as a consistency determination rather than a negative determination) and soliciting comments on the consistency of the proposed federal action with the Village's LWRP. An email making this request was also sent to the Village Manager.

By letter dated March 9, 2016, within the 60 day response period provided by the federal regulations, the DOS sent a letter to the Army Corps objecting to the Army Corps' negative determination that the proposed federal activity has no effect on any coastal use or resource. Rather, the DOS letter stated, "it is apparent that the proposed activities will have foreseeable direct and indirect effects" on a coastal use or resource.

Under these circumstances, and consistent with the applicable federal regulations, the DOS letter invited the Army Corps to submit a consistency determination describing the coastal effects of the proposed activities and indicating whether the proposed activities will be undertaken in a manner consistent to the maximum extent practicable with the enforceable policies of the Village's LWRP. In extending that invitation, the DOS letter further advised the Army Corps that its January 29, 2016 letter "did not contain all the information and data necessary for a consistency determination". Based upon this, the Army Corps is required to resubmit to DOS and there is currently no clock running on the DOS review.

At its meeting on March 16, 2016, the HCZMC reviewed the proposed Army Corps project and received presentations from an outside consultant, HydroQuest, and from the Commission's environmental consultant, Sven Hoeger. Based upon its review and these presentations, the HCZMC unanimously determined that the project was not consistent with Policies 7, 9, 17, 19, 23, 33, 38 and 44 of the Village's LWRP.

The Consistency Review Process

For federal agency actions such as this one, the federal agency initiating the action, here the Army Corps, would prepare a consistency determination and submit it to the DOS. The consistency determination shall state whether the proposed activity will be undertaken in a manner "consistent to the maximum extent practicable" with the enforceable policies of approved State coastal management programs (New York State, Town of Mamaroneck and Village of Mamaroneck). "Consistent to the maximum extent practicable" means fully consistent with the enforceable policies of approved State management programs unless full consistency is prohibited by existing law applicable to the Federal agency. Unless provided for in a certain statutory "Presidential exemption" (based upon a finding by the President that the activity is in the "paramount interest of the United States"), Federal agencies may not use a lack of funding or insufficient appropriated funds as a basis for a lack of full consistency.

The consistency determination is required to be provided to the DOS at least 90 days before final approval of the Federal agency activity, unless the parties agree to an alternative schedule. Upon receipt by the DOS of the Army Corps' consistency determination, accompanied by the additional information required by the federal regulations ("a detailed description of the activity, the associated facilities, and their coastal effects, and comprehensive data and information sufficient to support the Federal agency's consistency statement"), a sixty (60) day review period commences.

However, if the requisite additional information is not submitted, the DOS shall so notify the Army Corps in writing within 14 days of receipt of the consistency determination, specifying the missing information and advising that the 60 day review period has not begun and will not begin until the missing information required by the federal regulations is provided. The DOS may not require the Army Corps to submit NEPA (the federal version of SEQRA) documents as information required to be submitted with the consistency determination. Note, that if the additional information has been provided by the Army Corps, DOS may not assert the

substantive deficiency of that information as a basis for maintaining that the 60 day review period has not begun. The DOS may also request a 15 extension to the 60 day review period.

Within the 60 day review period, or as same may be extended as described above, the DOS shall notify the local governments in the areas of the coastal zone likely to be affected by the federal agency action and provide a sufficient period for public comment on the Army Corps' consistency determination. **The DOS is responsible for securing review and comment from other State, regional and local governments that may be affected by the proposed federal action. However, only the DOS is authorized to comment officially on or concur with or object to a federal consistency determination or negative determination.**

Prior to the expiration of the 60 day review period, the DOS shall inform the Army Corps of its concurrence with or objection to the Army Corps' consistency determination. If the Army Corps does not receive a response from the DOS within the allotted time frame, the Army Corps may presume DOS concurrence with the consistency determination.

If DOS objects to the Army Corps' consistency determination, its response shall, citing the specific policies, detail how the proposed activity is inconsistent with the enforceable policies of the approved State management programs. The DOS response may also describe alternative measures that, if adopted by the Army Corps, would allow the activity to proceed in a manner consistent to the maximum extent practicable with the enforceable policies of the approved State management programs.

DOS may base its objection upon a finding that the Army Corps has failed to supply sufficient information. To support that determination, the DOS must specify the nature of the missing information and the necessity of having such information to determine consistency.

Next Steps

Under the federal regulations, the next step in the process would be for the Army Corps to submit a consistency determination to the DOS, or to otherwise resolve its disagreement with the DOS regarding the January 29, 2016 negative determination. If the Army Corps agrees that coastal effects are reasonably foreseeable, the DOS and the Army Corps will agree upon a schedule for the submission of a consistency determination by the Army Corps which will commence a 60 day review period for the DOS. Once that consistency determination is filed with DOS, it will be referred by DOS to the Village for review and comment. At that time, the Board of Trustees ("BOT") may submit its recommendations on consistency to the DOS. The response to DOS may include both the BOT's substantive review, with The Chazen Companies assistance, of the project's consistency with the LWRP, and a narrative regarding the need for the project and the BOT's support for the project. The HCZMC could also submit its own recommendations on consistency to DOS. On the basis of its own review, and in consideration of comments and recommendations received from the Village, other governmental agencies and the public, the DOS will either concur or object to the Army Corps consistency determination in accordance with the procedures described above.

In the event that DOS objects to the Army Corps consistency determination, and the parties cannot resolve their differences through negotiation, the federal regulations provide for both a formal mediation process (invoked by the Governor or the Secretary of Commerce or other federal agency head and agreed to by both parties) and an informal mediation process (through the Office of Ocean and Coastal Resource Management, NOAA).

In the event of an unresolved impasse between the Army Corps and the DOS, the Army Corps may nevertheless proceed with the activity over DOS' objection, and notify DOS accordingly, if it concludes that its proposed action is fully consistent with the enforceable policies of the approved State management programs. The federal regulations allude to the possibility of judicial review of an unresolved dispute "where otherwise available by law".

I will be present at your work session on Monday, April 4, 2016 to answer any questions regarding the matters raised in this memorandum.

cc: Linda Whitehead, Esq., Village Attorney
Richard Slingerland, Village Manager
Chris Round, The Chazen Companies
Barbara Beall, The Chazen Companies
Agostino Fusco, Village Clerk/Treasurer