Disp _____ Dec __x___ Seq. No._2_ Type _intervene_

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

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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.

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The following papers numbered 1 to 7 were read on this motion:

Paper	Number
Notice of Motion, Affidavits, Affirmation and Exhibits	1
Memorandum of Law	2
Affirmation in Support	3
Memorandum of Law in Opposition	4
Affirmation and Exhibits in Opposition	5
Reply Affirmation and Exhibit	6
Reply Memorandum of Law	7

The Court has before it a motion filed by proposed intervenor-respondents the Mamaroneck Coastal Environment Coalition (the "coalition") and Jack Lusk, Jane Herzog, Robert

Goodman, Andrew Potash, Andrea Potash, Arthur Goldstein, Gloria Goldstein, Tara Slone-Goldstein, Wayne Goldstein, Stuart Seltzer, Danielle Seltzer, John Cecil and Celia Felsher (collectively, the "proposed intervenors") seeking to intervene in this Article 78 action. Given the long history of this, and the related matters, before the Court, familiarity with the facts is presumed.

After the Court issued a Decision and Order in a related matter requiring respondent the Village of Mamaroneck Planning Board (the "Planning Board") to deem the final environmental impact statement "complete within 20 days from the date of receipt of Notice of Entry of this Decision and Order, and direct[ed] the Planning Board to issue its findings within 30 days of filing the FEIS, pursuant to 6 NYCRR § 617.11(b)," the Planning Board did so. Not surprisingly, given the acrimonious and prolonged battle over this site, the Planning Board denied petitioner the relief that it sought. Petitioner then filed this litigation, seeking to annul and reverse the Planning Board's SEQRA Findings Statement, as well as the five resolutions denying all requested permits, as "arbitrary, capricious and a violation of the substantive requirements of SEQRA."

The proposed intervenors were all active participants in the prior proceedings. Collectively, they submitted to the Planning Board dozens of comments and testimonials, hired multiple experts, submitted innumerable pages of documents, and "devoted

significant time and resources to participating in the proceedings before the Planning Board and ensuring that the Planning Board had before it accurate information regarding potential adverse impacts of the proposed development. . . ."

The parties do not dispute that "Under CPLR 1013, the court has discretion to permit any person to intervene in an action when the person's claim or defense and the main action have a common question of law or fact. In a proceeding pursuant to CPLR article 78, the court may allow other interested persons to intervene. Intervention in an action or a proceeding pursuant to CPLR article 78 is a matter addressed to the sound discretion of the Supreme Court." *E. Deane Leonard v. Planning Bd. of Town of Union Vale*, 136 A.D.3d 866, 867–68, 25 N.Y.S.3d 319, 320–21 (2d Dept. 2016).

Petitioner argues that the Court cannot allow the proposed intervenors to intervene because they failed to attach to their moving papers a proposed answer. *Zehnder v. State*, 266 A.D.2d 224, 224–25, 697 N.Y.S.2d 347, 348 (2d Dept. 1999) ("The Supreme Court was correct in denying the motion of Harold Rosenbaum for leave to intervene in the absence of a proposed pleading."). *See also Serdaroglu v. Serdaroglu*, 209 A.D.2d 608, 608, 621 N.Y.S.2d 879–880 (2d Dept. 1994) ("This court has repeatedly held that such a motion should not be granted when, as here, it is not accompanied by pleadings as required by CPLR 1014.").

Naturally, in response, movants attach the missing pleading to their reply papers. They claim that it was a deliberate strategy, so as not to delay the proceedings: "Proposed Intervenors' decision not to file a proposed verified answer with their initial motion was not an effort to conceal a weakness in their position, as Petitioner suggests but an effort to avoid unduly delaying their intervention motion. Proposed Intervenors filed their motion before the original return date of July 10 and did so even before the Administrative Record (which was not filed until July 15) had been filed. Now that the Administrative Record is available, the Proposed Intervenors have filed, simultaneously with this reply memorandum, their proposed verified answer.".

This appears to the Court to be a post-hoc rationalization. A review of the proposed answer shows that, although the proposed intervenors did cite to the Administrative Record in their statement of facts, each one of these facts is an assertion that they made in their moving papers **without** the citations. In other words, because having the Record added nothing to their proposed pleading, they were not waiting for it to be filed to draft their pleadings. None of the cases cited by proposed intervenors (all of which are distinguishable, and almost none of which are authoritative) persuades the Court that it can disregard this procedural error. Indeed, in one of the cases that proposed

intervenors cite, the Second Department reiterated that a court **cannot** grant the relief that proposed intervenors seek. Specifically, the Second Department held that "A motion seeking leave to intervene, whether made under CPLR 1012 or 1013, must include the proposed intervenor's proposed complaint or answer (CPLR 1014). It is undisputed that Famek failed to include a proposed answer with its motion for leave to intervene, thereby failing to comply with CPLR 1014. The court has no power to grant leave to intervene where, as here, the prospective intervenor did not include in its motion papers a proposed pleading setting forth the claim or defense for which intervention is sought." *New Hope Missionary Baptist Church, Inc. v. 466 Lafayette Ltd.*, 169 A.D.3d 811, 812, 94 N.Y.S.3d 379 (2d Dept. 2019).

To allow the proposed intervenors to rectify this clear procedural error in their reply papers is not fair to petitioners. Accordingly, the Court denies the motion to

intervene.[1]

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
September 25, 2020

HON. LINDA S. JAMIESON
Justice of the Supreme Court

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[1]The Court notes that given the extensive, over 28,000 page record in this matter, much of which was provided by the proposed intervenors to the Planning Board, there is no doubt that the proposed intervenors are interested in this matter. Because of this extensive participation, however, it does not appear that their intervention in this Article 78 would add anything for the Court's benefit; indeed, a review of respondents' wholehearted support of the proposed intervention demonstrates that the proposed intervenors' and respondents' interests are aligned in seeking to uphold the SEQRA Findings and resolutions denying the permits.