To be Argued by:
AMY B. MARION
(Time Requested: 15 Minutes)

New York Supreme Court
Appellate Division – Second Department

Docket No.: 2016-10030

In the Matter of the Application of

RESIDENTS OF THE CITY OF GLEN COVE, RESIDENTS OF THE VILLAGE OF SEA CLIFF, RESIDENTS OF THE HAMLET OF GLEN HEAD, RESIDENTS OF THE HAMLET OF LOCUST VALLEY, RESIDENTS OF THE VILLAGE OF OLD BROOKVILLE, and RESIDENTS OF THE VILLAGE OF ROSLYN

Action No. 1
Index No.: 9704/15

DAVID BERG, KATHRYN BERG, ROY BERG, DIANE BERG, GORDON BERG, LEO BERG, BRIAN BERG, MICHELLE CAPOBIANCO, MARIA DORIS CERMINARA, EILEEN COLES, ANTHONY DISTEFANO, RONI EPSTEIN, MICHAEL FREDRICKSON, DENNIS GASSMAN, LOU GISERMAN, KATE GLINERT, STEPHEN GRONDA, CATHERINE HARRIS, CINDY HILL, ERIN HOGAN, ROBERT JAKOBSZE, STEVEN MCFADDEN, DORIS MEADOWS, RON MENZEL, MARIE O'SULLIVAN, TRACEY OSBORNE, AMY PETERS, ANNE PHILLIPS, PHILIP PIDOT, ADAM RAMADAN, FILOMENA RICCIARDI, DAVID ROGERS, DIANE SANTOSUS,

(For Continuation of Caption See Reverse Side of Cover)

BRIEF FOR PETITIONERS-PLAINTIFFS-APPELLANTS

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Nassau County Clerk's Index Nos. 9704/15 and 9706/15

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Petitioners-Plaintiffs-Appellants,

For a Judgment in the Nature of Mandamus to Review Pursuant to Article 78 of the Civil Practice Law and SEQRA and for a Declaratory Judgment Pursuant to Section 3001 of the Civil Practice Law and Rules and SEQRA,

– against –

THE PLANNING BOARD OF THE CITY OF GLEN COVE, THE CITY OF GLEN COVE, THE CITY OF GLEN COVE CITY COUNCIL, THE CITY OF GLEN COVE INDUSTRIAL DEVELOPMENT AGENCY, CITY OF GLEN COVE COMMUNITY DEVELOPMENT AGENCY, RXR GLEN ISLE PARTNERS, LLC, REXCORP-GLEN ISLE PARTNERS, LLC, GLEN ISLE PARTNERS, LLC, GLEN ISLE DEVELOPMENT COMPANY, LLC,

Respondents-Defendants-Respondents,

– and –

HERB HILL HOLDINGS, LLC, WINDSOR FUEL COMPANY, INC., DOMINICK MASTROIANNI, 47 HERB HILL LLC and COUNTY OF NASSAU,

Respondents-Defendants.

(For Continuation of Caption See Last Page of Cover)

INCORPORATED VILLAGE OF SEA CLIFF, BOARD OF TRUSTEES OF THE VILLAGE OF SEA CLIFF and BRUCE KENNEDY, individually and as Mayor of the Incorporated Village of Sea Cliff,

Third-Party Plaintiffs,

For a Judgment Pursuant to Article 78 of the CPLR, Declaratory Judgment Pursuant to Section 3001 of the CPLR, Injunctive Relief and Contract Breach

Action No. 2
Index No.: 9706/15

– against –

PLANNING BOARD OF THE CITY OF GLEN COVE, CITY OF GLEN COVE, GLEN COVE CITY COUNCIL, CITY OF GLEN COVE INDUSTRIAL DEVELOPMENT AGENCY, CITY OF GLEN COVE COMMUNITY DEVELOPMENT AGENCY, GLEN ISLE DEVELOPMENT COMPANY, LLC, GLEN ISLE PARTNERS, LLC, REXCORP-GLEN ISLE PARTNERS LLC and RXR GLEN ISLE PARTNERS, LLC,

Third-Party Defendants,

– and –

HERB HILL HOLDINGS LLC, WINDSOR FUEL COMPANY, INC., DOMINICK MASTROIANNI, 47 HERB HILL LLC and COUNTY OF NASSAU,

Third-Party Defendants.

STATEMENT PURSUANT TO CPLR 5531

New York Supreme Court

Appellate Division – Second Department

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INCORPORATED VILLAGE OF SEA CLIFF, BOARD OF TRUSTEES OF THE VILLAGE OF SEA CLIFF and BRUCE KENNEDY, individually and as Mayor of the Incorporated Village of Sea Cliff,

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1. The index numbers of the case in the court below are 9704/15 and 9706/15.

2. The full names of the original parties are as above. There have been no changes.

3. The proceeding was commenced in Supreme Court, Nassau County.

4. The proceeding was commenced on or about November 5, 2015, by the filing of a Notice of Petition-Complaint and Verified Petition-Complaint. Subsequently thereafter, a Notice of Amended Petition-Complaint, Amended Summons and Combined Amended Verified Petition-Complaint were served and filed on or about December 7, 2015. The issue was joined on January 27, 2016, by service of Verified Answers on behalf of City Respondents and Respondents RXRGIP.

5. The nature and object of the proceeding is to seek relief pursuant to Article 78 of CPLR §7803(1)(2) and (3), in the nature of mandamus to review as well as pursuant to the State Environmental Quality Review Act (SEQRA), as codified in the Environmental Conservation Law; and to seek a Declaratory Judgment pursuant to CPLR §3001 as well as pursuant to the SEQRA in addition to a preliminary and permanent injunction to same.

6. The appeal is from a decision, order and judgment of the Honorable Antonio I. Brandveen, entered on August 18, 2016.

7. This appeal is being perfected on a full reproduced record. Duplicative exhibits are not reproduced more than one time.

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QUESTIONS PRESENTED

1. Whether Respondents' false statements and changing of the land deed estop imposition of the statute of limitations?

   The court below held no.

2. Whether Respondent Board failed to perform a duty enjoined upon it by law?

   The court below held no.

3. Whether Respondent Board proceeded without or in excess of jurisdiction?

   The court below held no.

4. Whether Respondent Board's determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion?

   The court below held no.

5. Whether the newly discovered information and/or the Project's new design required a supplemental environmental impact statement?

   The court below held no.

BRIEF FOR APPELLANT

NATURE OF THE ACTION

This is an appeal from a decision and order issued August 17, 2016 by the Honorable Antonio I. Brandveen, Justice of the Supreme Court for the State of New York, County of Nassau that (1) denied Petitioners-Plaintiffs-Appellants (herein "Petitioners") an order and judgment for annulment pursuant CPLR Article 78; (2) denied Petitioners' motion pursuant to CPLR §3212; and (3) denied Petitioners' motion pursuant to CPLR 301(c) for declaratory judgment and injunctive relief.

Two related actions were filed within days of each other – this action, brought by residents of the City of Glen Cove (the "City") and residents of the surrounding Villages and Hamlets – and, an action brought by the Incorporated Village of Sea Cliff.[1]

Both actions sought annulment of the Respondent-Respondent City of Glen Cove Planning Board's (the "Board's") October 6, 2015 Resolution (the "2015 determination") that granted a Special Use Permit for Amended Planned Unit Development (PUD) Master Development Plan and Amended PUD Subdivision Approval for the Garvies Point Mixed-Use Waterfront Development Project (the "Project").

[1] *Inc. Vill. of Sea Cliff, et al. v. Planning Bd. of City of Glen Cove, et al.*, App. Div. No. 2017-4579.

Resident Petitioners also sought annulment of the Board's 2011 State Environmental Quality Review Act ("SEQR") findings that granted approval for the redevelopment of the Project Site (the "Site").

Petitioners respectfully submit that the court below erred in failing to annul the Board's 2011 and 2015 determinations or, in the alternative, in failing to order the preparation of a Supplemental Environmental Impact Statement ("SEIS") for the reasons set forth herein; and, request costs in the action pursuant to CPLR § 8101.

INTRODUCTION

Governmental agencies are tasked with the responsibility of ensuring that the quality of environmental review guaranteed by the State is both procedurally and substantively adhered to while at the same time ensuring that the public is adequately and accurately informed.

Respondents failed miserably in this regard. They not only failed to properly inform the public, they deliberately and repeatedly made false statements about the environmental issues that went to the very core of the public concern – that being, the horribly contaminated condition of this land and the Project's impact to the health of the community.

The New York State Department of Environmental Conservation (the "DEC") repeatedly admonished the Board for its false statements and for misinforming the public.[2] Respondents admit to this but choose instead to characterize its false statements as "innocuous."[3]

The Board should have never been approved this Project. Nevertheless, the trial court allowed the plans to move forward because it found the Article 78 Petition in this case time-barred and, it held that a SEIS was not required.

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[2] *See* RA 878; RA 3473. References to the Record on Appeal are referred to herein as "RA" to distinguish from the Administrative Return that contain page numbers preceded by the letter "R".
[3] *See* RA 9443.

Although the statute of limitations to challenge the Board's 2011 approvals of the Project had expired, Respondents' misrepresentations and deceit required invocation of equitable estoppel. Long standing principles embedded in our jurisprudence prevent Respondents from benefitting from their wrongdoing which staved off a challenge by Petitioners in 2011.

Respondents falsely claimed that the land had been remediated or was enrolled in either a State or Federal clean-up program. They lied in the environmental impact statement, telling the public that the DEC would admit certain parcels of land into a State clean-up program when the DEC had repeatedly admonished Respondents for making these false statements that mislead the public.

Respondents responded by changing the deed and the boundary lines for the specific parcels of land that had been excluded from the State's cleanup programs, telling the public that all of the parcels were now on the same tax lot and therefore included in the State cleanup program – the DEC scolded the Board again, telling it this was false.

The public believed the representations made by its appointed officials and did not challenge their 2011 approval of the Project. Two years later, after the dust settled, in 2013, Respondents changed the same deed yet again, this time claiming that there were "errors in the location of the lines of Garvies Point Road and Glen

Cove Creek" – the Project's northern and southern perimeters. *See* RA 2184; RA 3250; RA 3290-3291.

In 2015, the Board repeated this behavior; changing the Project's boundaries yet again to avoid regulatory oversight. The problem however, is that contamination cannot simply be excised with a simple subdivision. Like a cancer, it knows no boundaries and will not be halted merely because property lines are redrawn.

Avoiding a supplemental review, in 2015 the Board also claimed that it had previously studied the newly proposed Plan as an alternative during the 2011 SEQR review. Alternatives are commonly studied alongside a proposed plan to create an option, at a later date, without the need for an entirely new SEQR review. Respondents contend that one of those alternatives studied in 2011 - "Alternative 3" - was the same plan it approved in 2015.

This too was untrue. Respondents exploited Alternative 3's acceptance, approving a much more aggressive design that was never reviewed and was passed off as being Alternative 3. The Developer's own consultant acknowledged that this design represented a "new massing," commenting that "after all of this review . . . [it was now] changing the scheme."[4]

[4] RA 2738.

Demonstrating how entirely arbitrary the Board's decision actually was, this "scheme" is the same design the Board rejected in 2011 because of "the scale and size of the buildings."[5]

Furthermore, Respondents also ignored new information that directly impacted the environmental issues it was presiding over in 2015: the Environmental Protection Agency ("EPA") and the United States Army Corps of Engineers ("USACE") issued environmental impact statements in 2015 that concerned the land and the waterways within the Project Site and the DEC issued a report in 2014 concerning the shellfish life within those waters. The Board did not consider these reports that were "at the heart of the environmental objections to the project."[6]

As they did in 2011, in 2015 Respondents flouted their duty "to protect the environment for the use and enjoyment of this and all future generations."[7]

For the reasons set forth herein, the Board's 2011 and 2015 approvals should be annulled and, at a minimum, a supplemental review should be required based upon the newly proposed design "scheme" and newly discovered information.

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[5] RA 3309.
[6] *See Glen Head v. Oyster Bay*, 88 A.D.2d 484 (2d Dept. 1982)
[7] *Green Earth Farms Rockland LLC v. Town of Haverstraw Planning Bd.*, 45 Misc.3d 1209(A) at *10 (Sup. Ct., Rockland Co. 2014) quoting ECL § 8-0103(8).

FACTUAL AND LEGAL BACKGROUND

HISTORY OF THE LAND

The Project Site, commonly referred to as Garvies Point, is approximately fifty-six (56) acres and twenty-seven (27) tax parcels that historically were individually owned and operated. Garvies Point has suffered a long history of irresponsible disposal of hazardous wastes in connection with a variety of industrial uses. The historic uses of Garvies Point included, *inter alia*, a scrap metal yard and tungsten processing facility ("Li Tungsten Site"); a "community dump" for the disposal of sewer sludge, incinerator ash, debris, creek sediment ("Captains Cove Site"); a facility used for the aboveground storage of large quantities of petroleum products ("Doxey Site"); and a marina and marine repair facility ("Gladsky Site").[8] These uses led to soil and groundwater contamination with volatile organic compounds, metals, polychlorinated byphenyl ("PCBs") and radionuclide slag.[9]

The Li Tungsten Site encompasses approximately 26 acres of land and is a Federal and State Superfund Site; the Captains Cove Site is a State Superfund Site with some of its parcels included within the Li Tungsten Federal Superfund Site, it encompasses approximately 15.4 acres.[10]

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[8] RA 348-350; RA 797-800.
[9] *Id*.
[10] RA 797.

The Site is located along the northern side of Glen Cove Creek (the "Creek") within the City of Glen Cove on the north shore of Long Island, New York.[11] The Creek, which had been channelized in 1935[12] by the USACE, was discovered to have radiological contamination in 2001.[13]

In 1999, the City rezoned this district from industrial to marine waterfront (MW-3). *See* City Code Section 280-73.2.[14]

In 2003, the City's Community Development Agency ("Respondent-Respondent CDA" or "CDA") along with the IDA entered into a Contract for the sale of the land with Respondent-Respondent Glen Isles Partners, LLC (the "Developer").[15] The Contract was amended seven times before the Board's 2015 determination.[16]

Pursuant to the Contract, as amended, the Developer was required to seek Planning Board approval of a development program that had been conceptually approved by IDA/CDA as owners of the Site (the "Conceptual Site Plan"). RA 3305.

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[11] RA 116.
[12] RA 854.
[13] *Id.*
[14] This code section was amended in November of 2004.
[15] RA 93. In early 2008, RXR Realty joined Glen Isle Partners, LLC, forming a joint venture known as RXR Glen Isle Partners LLC. (collectively, "RXRGIP") and referred to herein as "Developer", "Applicant", "Developer-Applicant").
[16] RA 93-211.

In July of 2009, the City added code provisions to the Waterfront's MW-3 District to allow for a Planned Unit Development.[17]

THE SEQR PROCEDURAL HISTORY

SEQR Generally

Before undertaking a project, an agency must determine at the outset whether the project, termed an action under SEQRA, requires review of potential environmental impacts. Such determination requires classifying the action into one of three categories, a "Type I" action, a "Type II" action, or an "unlisted action."[18]

If it is determined that an action "may have a significant adverse impact on the environment," then the action is deemed to be a Type I action, requiring the preparation of an Environmental Impact Statement (an "EIS").[19]

Prior to commencing the SEQRA review process required with a Type I action a lead agency[20] must be designated. Such agency is "principally responsible for undertaking, funding or approving [the] action, . . . responsible for determining whether an environmental impact statement is required in connection with the action . . . , and [responsible] for the preparation and filing of the statement if one

[17] *See* City Code Section 280-73.2.
[18] *See* 6 NYCRR 617.2(ai), (aj), and (ak) defining Type I, Type II, unlisted actions, respectively.
[19] *See* 6 NYCRR 617.2(n) defining "EIS;" *see* 617.4(a)(1); ECL § 8-0109 Type I action requiring preparation of EIS.
[20] *See* 6 NYCRR 617.2(u), defining "lead agency"; *see* 6 NYCRR 617.6, establishing Lead Agency.

is required."[21] The lead agency must itself prepare or cause preparation of by a designee, a draft EIS ("DEIS"), which if accepted by the lead agency as sufficient, is then made available for review to interested persons upon request. If the DEIS generates sufficient interest a public hearing will be noticed if it would aid the decision-making process. 6 NYCRR 617.8[d]; 617.10[f].

In any event, a comment period must be provided and the agency must then prepare or cause to be prepared a final impact statement, a "FEIS," which follows the same procedures for filing and distribution as the DEIS.[22]

The FEIS must set forth the architectural and design details of the proposed action, the environmental impacts envisioned, studied, and commented upon, inclusive of independent reports, the alternatives contemplated, analyzed and studied, including a "no-action alternative," mitigation measures to minimize the environmental impact of the project, and the agency's reasoning, rationale, and arguments for supporting the proposed action given the resulting environmental impacts.[23] The purpose of the EIS is "to inform the public and other public agencies as early as possible about proposed actions that may significantly affect the quality of the environment, and to solicit comments that will assist the agency in the decision making process in determining the environmental consequences of

[21] 6 NYCRR 617.2[u]. 617.6; *see also* ECL §8-0111.
[22] The exception being, such report is not necessary if the Agency determines that the proposed action will not have a significant impact upon the environment. 6 NYCRR 617.8[e][f]; 617.10[g],[h].
[23] Environmental Conservation Law (ECL) § 8-0109.

the proposed action."[24]

Based upon the FEIS, an agency is then required to prepare a written Findings Statement setting forth the basis for determining that the requirements of the SEQR review process have been met and its conclusions that the action may proceed.[25]

This Project's SEQR Review

The SEQR process commenced in 2004 with the filing of a Site Plan/Special Use Permit application with the Planning Board. RA 3304.

In January of 2005, the Board classified the Project a Type I action and declared itself "lead agency." *Id*.

Between 2005 and 2015 there were four (4) different Conceptual Site Plans submitted by the Applicant. However, after RXR Realty joined the redevelopment team in 2008, "significant modifications" were made to the previously submitted and approved Conceptual Site Plans. RA 3305. And, even though a DEIS[26] had been accepted (RA 3306), the new redevelopment "team" abandoned the Plan for a completely new Plan that it submitted two years later (RA 3307-3308; 3322-3323).

[24] ECL § 8-0109[4].
[25] 6 NYCRR 617.9[c],[d].
[26] 6 N.Y.C.R.R. Section 617.9(a)(2).

Once it received approval from the IDA/CDA for this new Conceptual Site Plan,[27] the Developer resubmitted its application and, in May, June, and July of 2011, it submitted revised FEISs. *Id*.

On July 28, 2011, the Board determined that the FEIS was complete for the purpose of distributing to the public. *Id*.

The Board held a public hearing on September 20, 2011 and accepted written comment on the FEIS for ten (10) days following the close of the hearing. *Id*.

On December 19, 2011, the Planning Board prepared and adopted a Findings Statement for the "RXR Glen Isle Mixed-Use Waterfront Development Project." RA 3290.

Alternative 3

The Board's Findings Statement indicated that Alternative 3 was considered as part of its environmental review. RA 3393.

The only difference between the action approved in 2011 and this alternative was the substitution of 250 residential units for 250 hotel suites. *Id.*

The Board stated that this alternative "would not result in any material change to the footprint, bulk or height of the buildings as depicted in the Proposed Action," would not result "in a significant adverse impact with respect to ecology,"

[27] As per the Contract, for its review and approval.

and "would have essentially the same open space . . . as the Proposed Action." RA 3393-3396.

Alternative 3 did not contain any changes to the construction of the elevated boardwalk/pier, the bulkhead, wetlands, lawn areas, marinas, nor to any aspect of the shoreline or waterways. *Id.*

The Board determined that "no further SEQRA review shall be required in order for the Planning Board to approve Alternative 3, provided that the submission does not propose changes or modifications to Alternative 3, which would have the potential to result in one or more new significant adverse environmental impacts that were not studied as part of this SEQR review." RA 1720.

The Thresholds

In its 2011 Findings, the Board determined that supplemental review under SEQR during PUD Site Plan review would not be necessary provided modifications fall within the parameters/thresholds (the "Thresholds") set forth in the FEIS and in the IDA/CDA's Resolutions. *See* RA 3321.

The Board provided administrative procedures requiring a "threshold determination" for a proposed phase's consistency "with the proposed uses, conceptual layout, general footprint, and building heights studied in the FEIS." *Id*. The Board determined that an initial review must be conducted to "evaluate

whether the proposed unit count and mix . . . exceeds the Threshold limits . . . regarding aggregate unit count and gross square footage." RA 3322.

The 2015 Amended Plan

On or about June 11, 2015, the Developer submitted its application for an amended Plan and subdivision to amend the "boundaries of the City's Garvie (sic) Point Road Project" (RA 3300) and to separate out one of the parcels commonly referred to as "Lower parcel C" (RA 3237).

Upon submission of its application, the Developer prepared an Environmental Assessment Form ("EAF")[28] with an addendum ("Expanded EAF" or "Expanded Part 3") stating that "the Amended PUD Master Development Plan would not result in any new significant adverse impacts that were not previously studied in the FEIS or evaluated as part of this Expanded EAF." RA 3241.

The amended Plan purported to be Alternative 3 and the subdivision application purported to be a "minor housekeeping" matter. RA 3168; 3241-3242.

Unlike Alternative 3, which merely swapped 250 hotel units for 250 residential units, the 2015 amended Plan drastically altered the mass and density of the western portion of the Project and completely changed the design of the entire

[28] An EAF is the "initial SEAR tool" used to make the determination "regarding the likelihood that the action may have a significant adverse impact on the environment." *See* NYDEC, *The SEQR Handbook*, (3 ed. 2010) ("SEQR Handbook") at pg. 3.

shoreline. RA 1719. No "threshold determination" was ever made before adopting this new Plan that purported to be Alternative 3.

The Board held a meeting on July 7, 2015 and public hearings on July 21, and September 16, 2015.

The Mayor of the neighboring Village of Sea Cliff spoke at the hearing, requesting that a SEIS be conducted in order to study the environmental impacts associated with the amended Master Plan. RA 2445-2446.

The Coalition to Save Hempstead Harbor (the "Coalition") commented at the September 2015 hearing about "the relatively short notice given to the public to evaluate the impact of some significant changes," the lack of outreach to stakeholders, the concern over the increase in nitrogen runoff over and above the 1,399 pounds per year as indicated in the FEIS, and the additional stress which may harm the thriving shellfish beds that have been a major achievement of the Coalition's work for the past thirty years. RA 2501-2506. The Coalition asked to see the updated calculations for the amount of nitrogen generated by the new Site Plan and asked for the studies regarding the implementation of mitigation efforts. *Id*.

That same evening, the Board voted unanimously to close the public hearing, and on October 6, 2015, by resolution, it approved the amended

application and filed its resolution with the Clerk of the Court on October 7, 2015. RA 1719.

THE MISREPRESENTATIONS

In addition to the Captains Cove and Li Tungsten sites, there are a number of smaller sites included within the acreage of the Project that are contaminated and in need of remediation. Those sites are known as the Gladsky, Doxey, Angler's Club, Gateway, and Pump Station sites.

Throughout the SEQR history and continuing through the 2015 review, Respondents repeatedly represented to the public that all of the Project's sites were in regulatory cleanup programs, that they were being monitored by a collaborative multi-agency effort, and that they were fully remediated or in the "final" stages of remediation. RA 1722. These statements were untrue.

Regulatory Programs

The Gladsky Site was the only site that was included in the DEC's Division of Environmental Remediation Brownfield Environmental Restoration Project (ERP). The other sites were not included in the ERP; the City had not submitted applications for their admission and, by the time an inquiry was made, funding was no longer available.

Nevertheless, during the 2009 public hearing for the DEIS, the Developer stated that the Doxey, Angler's Club, Sewage Pump Station and Gladsky

properties are in regulatory programs or will be in "similar programs . . . to continue the remediation." RA 3692-3693.

The DEC's Regional Permit Administrator told the Board that this information was incorrect:

> Doxey, Angler's Club, Gateway and Pump Station parcels are not in a program (ERP, Brownfield, or Superfund). Applications have not been received for admission to the Brownfield Cleanup Program (BCP) for any sites in the project area and applications are not being approved for the ERP as there are no funds available in that Program.

RA 871, 878.

The Board ignored these statements and, in its July 28, 2011 FEIS, it advised the public that the "Angler's Club and Sewage Pumping Station were recognized by the NYSDEC as being part of the Gladsky ERP Site. . . ." RA 1178.

In September of 2011, the DEC wrote:

> As stated previously in the NYDEC comment on the DEIS (July 31, 2009), only the Gladsky site, which is in the Environmental Restoration Program (ERP), is in a regulatory program for remediating environmental conditions on the site. The Angler's Club and Pumping Station property are not in a regulatory program. An application has not been received for admission in the ERP for those properties.

RA 3473 at ¶ 7.

Ignoring the DEC, Respondents continued to tell the public that the "Angler's Club and Sewage Pumping Station were recognized by the NYSDEC as being part of the Gladsky ERP site."[29]

Respondents claimed that their misrepresentation was a mere "innocuous misstatement;"[30] explaining that "the Update mistakenly stated that the Angler's Club and Pumping Station parcels were recognized to be part of the ERP based on verbal communications from DEC. The Update was prepared in June 2011, and perhaps there was some confusion or miscommunication at that time."[31]

There was no confusion. Not only did the DEC repeatedly inform the Board *in writing*, it also explicitly told the Board that it was misrepresenting the facts and misinforming the public:

> [reference] that the environmental cleanup of these parcels will [be] addressed through the BCP and/or ERP must be clarified . . . [i]t should be clear to all who read the document that although the developer may apply for admission to the BCP . . . no applications have been made, and no assurance can be given that admission of any of these sites will occur. The documents currently imply just the opposite to the casual reader.[32]

[29] RA 433-787 (one of the more comprehensive reports relied upon throughout this process is the Environmental Conditions Report. One was prepared in 2009 and submitted with the DEIS and an update was prepared in 2011 and submitted with the FEIS [the "Update"]. The Update made this claim.)
[30] RA 9443.
[31] RA 2235.
[32] RA 871, 878.

Steadfast in its disregard, the Board ignored the DEC and declared in its 2011 Findings Statement that, not only were the properties included in the ERP application, they were already remediated:

> The FEIS contains information that suggests the Angler's Club and Sewage Pumping Station were included in the original ERP application that resulted in the Gladsky remediation.

RA 3330.

Disturbingly, Respondent confidently made this statement because the year before the deed on the properties had been changed with the filing of the first "correction" deed. RA 2184-2186.[33]

Realizing that the City's subterfuge may not have been completely successful in circumventing the DEC's regulations, the Board accounted for this possibility in its Findings Statement: "[i]f the DEC does not concur that the Angler's Club and Sewage Pumping Station sites were included in the original ERP application . . . as DEC indicated in its September 29, 2011 comment letter on the FEIS, then the Applicant" shall "conduct future testing of the sites," make attempts to gain acceptance into a state or federal regulatory program, and if "not

[33] In 2013, *after completion of the SEQR review*, another "correction" deed was recorded because of claimed "errors in the location of the lines of Garvies Point Road and Glen Cove Creek."

accepted into a DEC or EPA program," somehow see if "Nassau County DOH asserts jurisdiction over the environmental conditions." RA 3331.

The 2015 review never addressed this list of unresolved scenarios; the remediation status of these smaller sites, which are to house the many new design features approved in 2015, was never discussed.

Collaborative Multi-Agency Accord

In its campaign to convince the public that the land was cleaned up, Respondents represented that a united-formidable-multi-agency task force was working in a "collaborative effort" to restore the Site "to conditions that are protective of human health and the environment in accordance with the applicable regulatory programs." RA 3301.

The DEC's Department of Environmental Remediation (DER) in charge of the "regulatory programs" warned the Board in 2009 that the DEIS and several of the appendices improperly refer to this "'multi-agency accord' or 'multi-agency agreement' to address environmental conditions on the properties" when no such accord or agreement exists. RA 878. "[A] person not privy to facts surrounding the 'multi-agency accord' would assume that the various agencies have been actively involved in developing such a document . . . None have been involved in developing one." *Id*.

> DER, specifically, has stated to the City and the developer, prior to release of the DEIS, that it had no

> intention of signing such a document. The DEIS should be revised to reflect that although the developer may want such a document, no agreement has been signed or agreed to by any of the agencies. As it appears that all the sections relating to environmental conditions refer back to this document, all of these sections need to be revised to provide the public with the factual information which cannot be misconstrued.

Id.

Nevertheless, at the public hearing for the DEIS, the Developer conveyed to the public that "all of the regulatory agencies" were working on the remediation of the properties together which, it alleged, were all in regulatory programs. RA 3691.

Misrepresentation as to Remediation Status

In its 2015 determination, the Board stated that the subdivision of Lower Parcel C was necessary "to facilitate the final environmental remediation of that parcel." RA 1722. One week earlier, the EPA reported that it had not yet assessed all of the recent soil sampling data from Lover Parcel C. RA 821. It was not until June 2, 2016, while this case was pending before the lower court, that the EPA proposed a plan to do "additional excavation of contaminated soil" on the this parcel (RA 10313); demonstrating that the Board's 2015 representation of "final"

remediation (RA 3300) and its 2011 representation of "*formerly*[34] contaminated land" were factually misleading (RA 3290).

THE 2015 REVIEW

The Expanded EAF

Upon submitting its application for the amended Plan, the Developer submitted an Expanded EAF[35] that does not discuss the lingering presence of low level radioactive waste, lead, arsenic or other unidentified heavy metals in the soils and groundwater. RA 1742-1775. It does not acknowledge any significance of impacts to the wetlands or to Glen Cove Creek, and it fails to address concerns raised about a former solid waste facility directly across from the Project and located on the Creek. RA 9782 at ¶ 36.

The EAF fails to acknowledge that there will be an impact on the public potable water supply even though in 2015 the City had to implement restrictions on water use for residents. *Id*. at ¶ 37. It does not address the significant drainage problems stemming from protecting the people on the surface from the polluted groundwater and soils, which will not be completely removed. RA 9783 at ¶ 38.

The EAF also incorrectly assesses the impact of the construction of a low sill wall as being a reduction in the structural footprint that will not interrupt water

[34] The Cover page to the 2011 Findings Statement indicates "the waterfront Site consists primarily of . . . formerly contaminated land." Webster's defines "formerly" as "at an earlier time." *See* https://www.merriam-webster.com/dictionary/formerly

[35] An Expanded EAF is "intended for use primarily, but not exclusively . . . to assess the importance of each potentially moderate to large impact . . . ." *See* SEQR Handbook, pgs. 73-74.

flow and that will allow for the transport of sediments along the Creek and Captains Cove wetlands. *Id*. at ¶ 39.

The EAF denies that stormwater will flow to adjacent properties when in fact there is a high probability that stormwater will be shifted, conveyed or otherwise moved around between areas.

The EAF fails to acknowledge any of these impacts. RA 9784 at ¶ 45.

The Alternative Considered

In its 2011 Findings, the Board stated that if Alternative 3 was proposed, a new review would not have to be conducted as long as it complied with the Thresholds. RA 1720.

Alternative 3 "would substitute 250 residential units for the 250 hotel suites, resulting in a development containing 1,110 dwelling units (860 + 250) . . . . " RA 1719.

The amended Plan that was approved, calls for an entirely new and redesigned plan and an alternative that was not previously studied, does not comply with the Thresholds, and is not Alternative 3.

Changes to the Western End of the Project

"[T]he revised plans, submitted as part of the July 2nd Submission, . . . relocate[ed] an approximately 3,000 square foot restaurant to the western end of the Project Site . . . [added] other retail space and casual eateries on the west side

of the Project, added a 22-space parking lot [and] . . . 63 new parking spaces . . . within a . . . 300-foot walking distance of the west side destinations . . . . " RA 1723.

In 2011, the Board stated that Alternative 3 "would not result in any material change to the footprint, bulk or height of the buildings as depicted in the Proposed Action." RA 3393.

In 2015, the Developer admitted that this was not the case:

> [Planning Board member]: If I am correct from reviewing my notes as to what transpired, there was no building at that point contemplated to be that size building when you considered the density there; would that be an accurate statement?
>
> [Developer's counsel]: That's an accurate statement. The building is different than what was proposed as part of Alternative 3.

RA 2462. The Board members' comments demonstrate that the modifications to the Plan resulted in "material change [to] building footprints," exceeding the Thresholds:[36]

- It "is three times bigger in the footprint;"[37]
- "everybody is worried about the complete mass of the westerly building. It just seems overwhelming;"[38]
- "[i]t just looks very, very big;"[39]

[36] RA 3320-3321.
[37] RA 2768; see also RA 3320 (clearly exceeding the "threshold").
[38] RA 2766.

- "the building to the west is a lot bigger;"[40]

- "I understand the twelve-foot story -- the twelve-story building on the waterside creates the greatest amount of views, but it's creating the greatest amount of views for people living there, not the people who have to look at it;"[41]

- "as you are so close to the water, you are on top of it;"[42] and,

- "holy cow that western building is going to be huge right on the Point."[43]

The building originally approved in 2011 was 518,320 square feet. The building approved in 2015 is 730,400 square feet. The Developer's consultant acknowledged that this was not the same Plan: "why the new massing?" - - "why after all of this review are we changing the scheme?" RA 2738.

This new "scheme" never underwent SEQR review and was actually a design the Board rejected in 2011 because of "the overall scale and size of the buildings." RA 3309. The rejected design had "mid-rise towers" that stepped back intermittently and rose to 10 and 12 stories. *Id.* The Board seemed to forget its previous concern, when in 2015 it approved the exact design it had rejected: one larger building with towers that step back at the upper levels. *See* RA 1725.

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[39] RA 2751-2752.
[40] RA 2760.
[41] RA 2769.
[42] RA 2771.
[43] RA 2965.

The EAF does not address the "mass" or "density" of this new design and there is no discussion of the rejection of this same design in 2011, the impacts associated with this design, or mitigation of its impacts. RA 1775. The EAF seems to suggest that this new design *is* the mitigation and thus it completely fails to address the impacts of *this* design. *Id*.

Even the Developer came to realize that its initial assessment of Alternative 3 being "similar to what's currently proposed" (RA 2721) was not true; acknowledging at the final public hearing, that the "mass" of the new design is an issue and "the [western-most] building is different than what was proposed as part of Alternative 3" (*see* RA 2475 and RA 2462 respectively).

The Coalition to Save Hempstead Harbor commented on the "sheer massive size of the consolidated eleven/twelve structure and its impact on the surrounding landscape are difficult to imagine and unprecedented for Hempstead Harbor shoreline development." RA 2502-2503. A request was made to float balloons "to get a sense of the sheer mass, the height, the girth, the massiveness of the new concept . . . [and that] a site tour be provided to the public before any decision is made." RA 2503. Vision Long Island[44] commented that the "additional building mass . . . is another concern, the mass of the buildings." RA 2560. And the Mayor of the neighboring Village commented that this is a 30 percent increase in density

[44] http://visionlongisland.org/

and size to the western–most building (RA 2445) and "as the developer has just presented, the mass of this building is actually considerably larger" (RA 2459).

Nevertheless, the Board closed the hearing and did not request any studies nor heed the requests of the numerous residents, community groups, and neighboring Mayor to do so.

The Redesigned Shoreline

The amended application provided for a redesigned shoreline that differed from the Plan adopted in 2011 and from Alternative 3, which did not contain any modifications to the shoreline.

The amended Plan provides for the construction of a new marina, the construction of a low sill wave break, and the construction of approximately 39 new boat slips. It also calls for the relocation of the existing Angler's Marina, the relocation of the Ecology Pier, and the elimination of the Turn Basin (cumulatively referred to herein as "waterfront changes"). *See* RA 1721; 1734.

Respondents claim that the changes to the Project's plans arose from discussions with the DEC, but the DEC has not issued a detailed commentary as the permit application was not completed when the Board approved the amended Plan. RA 9779-9780. Thus, it is impossible to determine if these changes are protective of marine and coastal resources. *Id*.

Petitioners' expert, qualified as a Superfund and Environmental Science expert, examined the reports prepared by the Developer's consultants for the amended Plan and found that their "conclusive statements . . . concerning environmental conditions, wetlands, and 'mitigation' are not supported by any technical evaluation and that these consultants are not qualified ecologists." RA 9779 at ¶ 24. Respondents' consultant acknowledged that a marine biologist did not review the Project or its related impacts. *See* RA 2357.

Dredging

The dredging required for the relocation of the marina, the installation of the boat slips and the Ecology Pier will result in overloading the local environment with pollutants (i.e., nitrogen and other nutrients associated with such pollution) that reside in the sediment of the Creek. RA 9797 at ¶¶90-92.

Although the previous Plan called for the design of a larger marina and an Ecology Pier, the new design's relocation of structures, construction of slips (not required with a large marina) and construction of a low sill wave break actually requires more dredging and dredging closer to critical wetlands. *See* RA 9797-9800.

The newly adopted design moves the Ecology Pier next to the Captains Cove marsh. The dredging, filling and structural activities required by the new design will result in silt and sediment drifting towards the marsh in volumes, as a

result of littoral drift. RA 9799 at ¶99. The contaminants in this sediment will overwhelm the natural ability of the marsh to absorb and withstand such impacts. *Id*. Respondents' consultant, not an expert in this area, confused the concept of placement of spoils with the effects of littoral drift. *Id*.; *see* RA 9224 at ¶¶ 26, 29.

Respondents contend that the new marina's design is positive in that it will allow for sediment to freely flow into the Creek and out to the Harbor. R. 9787 at ¶ 51.[45] Not apprehending the science, Respondents failed to understand that this "free flow" will result in the accelerated placement of nitrogen and existing contaminants, disrupted by construction, into the thriving shellfish beds in the Harbor. RA 9797 at ¶¶ 90, 92.

Additionally, storm surges that will continue to occur in increasing frequency will cause flooding and will overwhelm the marsh, new storm drains or shoreline containment structures (i.e., vortec systems or chambers) intended to prevent pollutants that reside in the groundwater (including nitrogen, metals, and inorganic compounds) from leaching or directly discharging into the Creek and Hempstead Harbor, all contributing to a cumulative impact of degrading water quality and harming marine life, especially shellfish which filter feed from the water flowing around them. RA 9802-9803 at ¶¶ 112-114

[45] Referring to R. 9236 (Reproduced at R. 881-882); *see also* R.30 at 01028.

These compounds that will make their way into the local waters are also toxic for primary contact: meaning that activities that put a person in contact with the water will be harmful, such as swimming, kayaking, canoeing and shoreline wading for fishing. RA 9787 at ¶¶52-53. The harm to the local community will be extensive with the numerous beach and boating clubs surrounding the mouth of Glen Cove Creek. *Id*. No discussion of these threats are found in the SEQR record. *Id*. at ¶ 53.

Plantings

The Planting Plans submitted in 2015 reflect Respondents' inability to comprehend the science necessary to evaluate the impacts of this amended Plan. The Planting Plans list over 30 non-native species.[46] Respondent's consultant claimed to have included only native species in the Plan, but this is incorrect. Non-native species require more fertilizer to keep these species alive.

> Non-native species and invasive exotic species are quickly becoming one of the largest threats to biodiversity in terrestrial and aquatic ecosystems in New York State . . . These aggressive species are associated with numerous environmental problems such as degradation of water quality and fisheries, reductions in agricultural output, and changing the historic biological makeup of many public and private parks and wilderness areas around the state.

[46] RA 9793 at ¶80 citing Risotto's Affidavit at ¶17 (RA 9236 [reproduced at RA 881-882]) (describing habitat mitigation which claims to include only native species).

RA 9794 at ¶¶ 81-82 quoting Update on the Environmental and Economic Costs Associated with Alien Species in the United States, Pimental et al., 2005, Ecological Economics, 52, pp-273-288.

The extra fertilization and watering needing to ensure the survival of these non-native species will result in the introduction of excess nitrogen towards the Creek and Captains Cove marsh, further degrading the Creek waters and in turn degrading the Harbor's water quality, which will harm the shellfish and finfish. *Id*. at ¶84.

The Stormwater Pollution Prevention Plan (SWPPP)[47]

The SWPPP is one of the most important tools for protecting a shoreline under the Clean Water Act; the SWPPP for this Project "has so many errors or incomplete elements that it will not achieve its objectives." RA 9788 at ¶ 55. The SWPPP does not address the larger mass and larger density that the Board approved. The answers provided in the Notice of Intent (NOI) attached to the SWPPP are incomplete and indicate that the Project has not been fully vetted by wetland and storm surge experts. *Id*. at ¶ 56.

[47] After the date of this litigation, the Developer submitted an application for approval of a new Stormwater Management Plan, thus issues relating to this SWPPP are moot. The discussion herein is offered to demonstrate the consultant's lack of expertise in filling in the information on the SWPPP, as well as to provide proof of the incorrect information which Respondents provided on this significant document.

The SWPPP:

- does not mention Hempstead Harbor (#12) (RA 9789 at ¶ 58);
- cites Glen Cove Creek as a 'river' (the Creek, unlike a river, contains important wetlands and living resources) (# 12a) (*id*. at ¶ 59);
- cites to an out-of-date State Pollutant Discharge Elimination System (SPDES) permit from 2010 (# 13) (*id*. at ¶ 60);
- contains the answer "No" with regard to whether State wetland soils will be disturbed, which of course happens with both of the proposed shorefront uses and dredging (# 17) (*id*.);
- fails to list the requirement for NYS DEC permits (#36) (*id*. at ¶ 62);
- answers "No" to Army Corps permits being required (#37) which is incorrect since dredging and construction of marinas requires Federal approval (*id*. at ¶ 63).

All of these errors oversimplify the importance of protecting the shoreline from storms and stormwater runoff including the Developer's misrepresentation that "the project has been designed to ensure proper drainage of this site and the associated watershed." RA 9790 at ¶67. The "discharges have not been approved by any wetland agency, [so the consultant] . . . is merely speculating here with neither regulatory concurrence or scientific basis." *Id.*

The Traffic Review

Counsel, who the Board indicated it "relied heavily upon [for] . . . technical analyses"[48] is also counsel to the City's neighboring Villages of Brookville and

[48] RA 3292.

Old Brookville. Those Villages are involved agencies in a proposal by New York Institute of Technology ("NYIT") to make various improvements at its Old Westbury Campus.[49]

The NYIT campus is 6 miles[50] from the City of Glen Cove. Major intersections in the area, such as Northern Boulevard and Glen Cove Road, as well as Route 107 and Northern Boulevard, are roadways that concern both projects.

The drastically different comments offered as to each matter are staggering,[51] especially since they relate to the exact same roadways. *See* RA 3292.

In the matter before this Court, there was much concern about the adverse impacts upon the access/egress travel routes available for these Long Island-north-shore-area residents. *See* RA 9903.

Of particular concern was the Northern Boulevard and Glen Cove Road intersection as this is the only direct southerly route. The City Respondents' comments in the FEIS were that this intersection "will continue to deteriorate with or without the proposed action . . . and will continue to operate at LOS F [level of service "F" is the lowest rating] during the weekday PM and Saturday peaks." RA 1550. In the NYIT matter, the Board's counsel did not simply abandon this

[49] *See* RA 9953; RA 9963.
[50] *See* RA 9976.
[51] This issue is raised based upon the Board's "[heavy reliance] upon the technical analyses" of counsel and the drastically different analysis employed for two different projects that concern the exact same roadways.

intersection as a lost cause. Instead, there he commented that this is "one of the most congested intersections in the area" and traffic flow must be diverted away from it. RA 9960.

Counsel also demanded that the traffic studies performed in the NYIT study from 2012-2015 be updated as they were stale (*see* RA 9967-R.9968). However, in this case, Respondents vehemently opposed Petitioners' expert's claim that the studies performed between 2005 and 2008 were stale and needed updates (*see* RA 9983).

THE NEWLY DISCOVERED INFORMATION

Three significant environmental reports that were issued days before the Board's October 6, 2015 determination were ignored by the Board: the EPA's Third, Five Year Review for the Li Tungsten Superfund Site issued on September 30, 2015; the EPA's Five-Year Review for the neighboring Mattiace Superfund Site issued in September of 2015, and the USACE's August 2015 Dredged Material Management Plan and Programmatic Environmental Impact Statement for the Long Island Sound that addressed the dredging of Glen Cove Creek. *See* RA 788; 850; 852.

Additionally, in 2014, the DEC issued figures showing that Hempstead Harbor had become the State's second largest producer of hard shell clams. *See* RA 869.

These four significant reports provided newly discovered information that the Board ignored.

The EPA Reports

Li Tungsten 2015 Five Year Review

Lower Parcel C

According to the EPA's September 2015 report, investigations "completed by parties for the potential developer on the property discovered soil contamination in areas *outside of those previously identified or investigated*" resulting in the EPA's performance of additional sampling on Lower Parcel C in August 2015." RA 800 (emphasis added).

The EPA stated that it would be assessing this recent data to "determine how best to address" this contamination. RA 821.

The EPA referred to these areas not previously identified or investigated as "red flag areas;" stating that they present a problem for the "development plans," which the EPA has yet to address. RA 813.

Parcel A

The EPA also reported that *presently* there is contamination from VOCs in the groundwater under Parcel A and under portions of Captains Cove. RA 802; 807; 814.

Mattiace Site 2015 Five-Year Review

The EPA reported that it amended its remediation remedy in September of 2014 and it expected to begin work in 2015 for the plume which contained high concentrations of a variety of VOCs and which was attributed to the leaking underground storage tanks that were removed from the adjacent Mattiace Superfund Site. As of September of 2015, the work had still not begun. RA 801-802.

The EPA's report revealed that a plume of VOCs was detected and that the DEC "is presently conducting pilot test to determine design parameters for soil vapor injection system and, upon its completion, will bid the remedy projected for late 2016." *Id*.

The EPA also reported that "radioactive slag was left in place due to logistical issues regarding removal." RA 795.

The USACE's Draft Report and Environmental Impact Statement

The USACE's Draft Dredging Plan states that if the Creek is dredged it is expected to produce "unsuitable material" that will have to be placed in confined aquatic disposal cells (CADs) "constructed specifically for that project." RA 856.

These CADs, "or simply put, a deep hole in Hempstead Harbor covered with sand" cannot be placed amongst the newly certified shell fish beds. RA 9798-9799 at ¶98.

The Developer assumes the receipt of dredging permits and does not acknowledge that it may not be able to dispose of polluted sediment in a cost effective or practical manner. RA 9798 at ¶96.

New York State Department of Environmental Conservation Report for 2014

Additionally, the Planning Board did not consider the DEC's 2014 report regarding the harvesting of hard shell clams in Hempstead Harbor. This report states that Hempstead Harbor "has become the state's second largest producer of hard clams . . . . " RA 869-870. The impact to these shellfish beds is not addressed anywhere in the record.

THE BOARD'S OCTOBER 7, 2015 RESOLUTION

In adopting its resolution, the Board found that the amended Plan and amended subdivision would not result in any new potential significant adverse environmental impacts that were not studied during the SEQR review in 2011 or that were not studied as part of the review for the amended applications, which included the EAF Part 3, Parking Study, and visual simulations. RA 1729. The Board did not require the preparation of a SEIS.

The 2015 determination did not address, let alone elaborate upon, any of the new information generated by the lead regulatory agencies. It did not address nor resolve whether or not the Angler's Club and Sewage Pumping Station sites were accepted into a DEC or EPA program, or whether the County took over the

remediation of those parcels. It did not discuss a Threshold determination and it did not elaborate upon the subdivision; the Board had no "comments on the minor adjustments to the property lines." RA 1722.

LEGAL ARGUMENTS

Standard of Review

SEQRA does not contain provisions for judicial review. *Matter of Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 417 [1986]. Courts are "guided by standards applicable to administrative proceedings generally: "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." *Id.* quoting CPLR 7803[3] (other citations omitted). The record may be reviewed 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 Matter of Riverkeeper, Inc. v. Planning Bd. of Town of Southeast* 9 N.Y.3d 219, 232, 851 N.Y.S.2d 76, 881 N.E.2d 172 (2007) quoting *Matter of Jackson,* 67 N.Y.2d at 417.

"Court review, while supervisory only, insures that the agencies will honor their mandate regarding environmental protection by complying strictly with prescribed procedures and giving reasoned consideration to all pertinent issues revealed in the process." *Matter of Jackson,* 67 N.Y.2d at 417.

Controlling SEQR Standards

SEQR was enacted to

> declare a state policy which will encourage productive and enjoyable harmony between a man and his environment; to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of the ecological systems, natural, human and community resources important to the people of the state.

ECL § 8-0101.

"As such, planning boards, as lead agencies under SEQR, must conduct their affairs with an awareness that they are stewards of the air, water, land and living resources [and have] an obligation to protect the environment for the use and enjoyment of this and all future generations." *Green Earth Farms Rockland LLC v. Town of Haverstraw Planning Bd.*, 45 Misc.3d 1209(A) at *10 (Sup. Ct., Rockland Co. 2014) quoting ECL § 8-0103(8) (internal quotations omitted).

In accordance with these principles, the "EIS is meant to be more than a mere disclosure device. Its purpose is, *inter alia*, to inform the public and other public agencies as early as possible about proposed actions that may significantly affect the quality of the environment, and to solicit comments which will assist the agency in the decision making process in determining the environmental consequences of the proposed action." *Rye Town/King Civic Association et al., v. Town of Rye*, 82 A.D.2d 474 (2d Dept. 1981) quoting ECL § 8-0109[4] (internal

quotation marks omitted).

6 NYCRR 617.9(a)(7) provides that a supplemental EIS may be required by the lead agency to address "specific significant adverse environmental impacts not addressed or inadequately addressed in the EIS that arise from: (a) changes proposed for the project; (b) newly discovered information; or (c) a change in circumstances related to the project." *See In the Matter of Develop Don't Destroy Brooklyn, Inc. et al.. v. Urban Development Corporation*, 2007 WL 4928253 (N.Y. Cty. 2007) quoting 6 NYCRR 617.9(a)(7)(ii); *see also* Gerrard, Ruzow & Weinberg, Environmental Impact Review in New York § 3.13(2)(b) (2006).

"The decision to require preparation of a supplemental EIS, in the case of newly discovered information, must be based upon . . . (a) the importance and relevance of the information; and (b) the present state of the information in the EIS." *Waldbaum, Inc. v. Incorporated Village of Great Neck*, 814 N.Y.S.2d 893 [Nassau Cty. S. Ct. 2006]; 617.9[a][7][ii].

"Failure to consider . . . importan[t] and relevan[t] pieces of information . . . omitted from the EIS in its 'present state' requires preparation of a SEIS." *Id*.

Finally and importantly, [l]iteral compliance with both the letter and spirit of SEQRA, and not mere substantial compliance, is required." *Baker v. Village of Elmsford*, 70 A.D.3d 181, 891 N.Y.S.2d 133 (2d Dept. 2009) (citations omitted).

POINT I

RESPONDENTS' FALSE STATEMENTS WARRANT INVOCATION OF EQUITABLE ESTOPPEL

"The doctrine of equitable estoppel will preclude a defendant from asserting the statute of limitations as a defense where it is the defendant's affirmative wrongdoing ... which produced the long delay between the accrual of the cause of action and the institution of the legal proceeding." *North Coast Outfitters, Ltd., v. Darling*, 134 A.D.3d 998, 999 (2d Dept. 2015) quoting *General Stencils, Inc. v. Chiappa*, 18 N.Y.2d 125, 128-29 (1966) (internal quotations omitted). "Deeply rooted in our jurisprudence, [this principle] . . . has frequently been employed to bar inequitable reliance on statutes of limitations" (*Glus v Brooklyn Eastern Term.*, 359 U.S. 231, 232-233 [1959]), as "a wrongdoer should not be able to take refuge behind the shield of his own wrong" (*General Stencils, Inc. v. Chiappa*, 18 N.Y.2d at 128-29).

Where a plaintiff reasonably relies upon deception, fraud or misrepresentations by a defendant, "equitable estoppel is appropriate" to bar imposition of the statute of limitations. *North Coast Outfitters, Ltd., v. Darling*, 134 A.D.3d at 999 quoting *Putter v. N. Shore Univ. Hosp.*, 7 N.Y.3d 548, 552 (2006). The elements of an equitable estoppel as related to the party estopped are:

> (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is

> calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; (3) knowledge, actual or constructive, of the real facts.

New York State Guernsey Breeders Co-op. v. Noyes, 260 A.D. 240 (3d Dept. 1940) quoting 19 Am.Jur.Estoppel § 42, p. 642 (internal quotations omitted); *Carey v. Dye*, 208 U.S. 515 (1908).

As related to the party claiming the estoppel, they are:

> (1) Lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially.

Id.

As to the elements relating to the party estopped: 1) Respondents admittedly made false representations and undeniably changed the deed on the properties; 2) with the intention of having the public, Petitioners herein, believe that the Angler's, Pumping Station, and Gladsky parcels were all on the same tax lot and thus were all admitted into the ERP; and 3) they had knowledge of the true facts – the DEC repeatedly told the Board that these parcels were not all admitted into the ERP.

In support of these claims, the record establishes Respondents' motive for changing the deed – they knew that the sites could receive a liability release from

the DEC shielding "them from the need for additional cleanup . . ." if included in the ERP (RA 1435). And, the record also establishes that in furtherance of this scheme, Respondents used this "correction" deed to buttress its false claim that the properties are all on the same tax lot and thus "the DEC has indicated" that all three sites could be included in the ERP. *See* RA 1435; (denied by the DEC at RA 3473, ¶ 7). Even more troubling, two years after the 2011 approval of this Project, Respondents filed a second "correction" deed, claiming that the 2010 deed contained "errors in the location of the [northern and southern property] lines" - Garvies Point Road and Glen Cove Creek. *See* RA 2184; *see also* RA 3250. And, significantly, this scheme continued through the 2015 review, as Respondents never addressed the remediation status of these sites even though the new design directly concerns them.[52]

So too with its 2015 subdivision approval, Respondents shielded the contamination issues from public scrutiny. In carving out Lower Parcel C from the Site with its dismissive claim of "final remediation" (RA 1722), it never mentioned the newly discovered contamination "in areas outside of those previously identified or investigated" (RA 820-821). And, in changing "the boundaries of the City's Garvie (sic) Point Road Project" (RA 3241), it did not discuss the remediation status of that contiguous piece of earth undergoing "environmental review pursuant

[52] Waterfront changes, i.e., relocation of Angler's Marina. *See* RA 1721; 1734.

to NEPA [National Environmental Policy Act] [53] and SEQRA" (RA 3300). This is especially troubling in light of the fact that the DEC specifically warned the Board, as far back as 2011, of "groundwater and soil vapor contamination that may be migrating" from other sites (RA3474).

As to Petitioners who are claiming estoppel:

1) They did not know, nor would they have the means to know, that the appointed officials lied when claiming that the DEC admitted all of the properties into the ERP; they did not know, nor would they have the means to know, that the appointed officials changed the deed on the properties so that they could state this lie; they did not know, nor would they have the means to know that the appointed officials would later claim that their "correction" deed needed to be "corrected" yet again, due to "errors" in the location of the property lines. *See* RA 1435; 2184; 3250.

The Board has persisted in changing the location of these property lines to evade regulatory oversight and public scrutiny of the contamination issues. It moved Lower Parcel C off of the Project map completely and for the third time, it changed the Garvies Point Road property lines.

[53] SEQRA follows and is modeled after the "National Environmental Policy Act, generally known as 'NEPA' adopted by the federal government . . . and since followed by the adoption of similar acts in some fifteen states including New York." *Glen Head-Glenwood Landing Civic Council v. Town of Oyster Bay*, 109 Misc.2d 376, 386 (Sup. Ct. Nassau County 1981) *aff'd* 88 A.D.2d 484.

Petitioners did not know, nor would they have the means to know any of these issues which are carefully masked as "simple line drawing[s]." RA 9314.

It was not until the EPA and the USACE issued their 2015 reports, that Petitioners were informed that the land was no longer "formerly contaminated." RA 3290.

2) Petitioners' relied upon the representations made in the 2011 SEQR Findings; and,

3) in reliance upon those misrepresentations they did not challenge the Board's 2011 Findings. *See* RA 9761; 9764; 9907; 9913; 9920; 9924; 9932; 9941.

Our "State ha[s] made protection of the environment one of its foremost policy concerns, and thus our statute, unlike many others, imposes substantive duties on the agencies of government to protect the quality of the environment for the benefit of all the people of the State." *Matter of King v. Saratoga County Bd. Of Supervisors*, 89 N.Y.2d 341, 653 N.Y.S.2d 233, 675 N.E.2d 1185 [1996] quoting *Matter of E.F.S. Ventures Corp. v. Foster*, 71 N.Y.2d at 359 (internal quotation omitted). Lead agencies are statutorily mandated stewards of the land and the sea, fiduciaries entrusted to uphold SEQR. The imposition of equitable estoppel is warranted when a defendant, who is acting as a fiduciary, fails to disclose facts underlying the claim as Respondents have done. *See North Coast*

Outfitters, Ltd., v. Darling, 134 A.D.3d at 999 citing *Zumpano v. Quinn*, 6 N.Y.3d 666, 674 (2006); *Gleason v. Spota*, 194 A.D.2d 764 (2d Dept. 1993).

Estoppel operates to foreclose "one from denying his own expressed or implied admission which has in good faith and in pursuance of its purpose been accepted and acted upon by another." *New York State Guernsey Breeders Co-op. v. Noyes,* 260 A.D. 240 (citations omitted). Respondents should not be permitted to use their admitted "innocuous misstatement," which Petitioners accepted as true, to impose a statute of limitations' defense.

Discovery in this case would have been the only means available for Petitioners to obtain the true facts. In opposition to Respondents' motion for summary judgment, Petitioners cross-moved and provided their affidavits, the correction deeds and the evidence in the record – the DEC comments – that specifically supported the imposition of estoppel. Respondents on the other hand, failed to provide the court with any documentary evidence to defeat the claims of misrepresentations and false statements – in fact, they agreed that they had misstated the facts.

Petitioners, and not Respondents, eliminated all triable issues of fact regarding the false statements in the 2011 SEQR findings and thus, the court below erred in granting summary judgment to Respondents and in denying summary judgment to Petitioners.

POINT II

RESPONDENTS' BAD FAITH ESTABLISHES THAT THE 2015 DETERMINATION WAS ARBITRARY AND CAPRICIOUS

In challenging an agency's decision, if it is shown that the determination was made in bad faith or is indicative of bad faith, then the determination must be set aside. *Matter of Cowan v. Kern*, 41 N.Y.2d 591, 599 (1977); *Zutt v. State*, 99 A.D.3d 85 (2d Dept. 2012); *Matter of Halperin v. City of New Rochelle*, 24 A.D.3d 768 (2d Dept. 2005).

The burden for establishing bad faith is one of a "clear showing." *See 265 Penn Realty Corp. v. City of New York*, 99 A.D.3d 1014 (2d Dept. 2012).

In 2010 the deed for sites within this Project was changed to allow for the claim to be made that the sites were all on the same tax lot. In 2013, that deed was once again changed citing "errors" as to the Project's northern and southern boundaries. RA 2184-2186. And, in 2015, the Board claimed that it was "slightly adjusting certain property lines" while failing to disclose the newly discovered information revealed in the EPA's 2015 report. RA 1722. In all instances, accommodations were made to circumnavigate the regulatory agencies' remediation requirements and to shield these issues from public scrutiny.

In a case that also involved concerns about the environmental impacts to Glen Cove Creek, the court found that the lead agency's failure to explain why it had completely ignored the DEC's comments demonstrated a lack of compliance

with SEQR that prevented the court from being able "to make judicial inquiry as to compliance therewith." *Glen Head-Glenwood Landing Civic Council,* 109 Misc.2d 376, 386. Of particular relevance, the court explained that, where comments from "responsible experts or sister agencies, [which] disclose new or conflicting data or opinions," are "simply" ignored, a court is unable "to ascertain whether the agency has made a good faith effort to take into account the values NEPA seeks to safeguard." *Id.* citing *Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973).

In *Glen Head* the town ignored the DEC's comments that were received 6 days prior to its' approval of the developer's application; here, the Board not only ignored the DEC's comments to the DEIS and FEIS, it ignored the EPA's Report issued 6 days prior to its 2015 approval and it ignored the USACE's Dredging Impact Statement issued the month before the approval. While the EPA report disclosed new data that revealed soil contamination "in areas outside of those previously identified or investigated" on parcel Lower C (RA 820-821), the Board reported that the subdivision for Lower C was necessary "to facilitate the final environmental remediation of that parcel" (RA 1722). The EPA did not refer to this as "final," it had not even assessed the new data to "determine how best to address" it. *See* RA 821.

Moreover, the USACE's Impact Statement specifically states that dredging

of the Creek is expected to produce "unsuitable material" that will have to be stored in specifically constructed CADs. RA 855. The Board completely ignored this even though the new amended Plan requires excavation, dredging of the Creek, the relocation of the Angler's Marina, and dredging and construction associated with 39 new boat slips.

In addition to the *Glen Head* case, two Second Circuit benches have evaluated specific claims of bad faith on the part of an agency. *See Sierra Club v. U.S. Army Corps of Engineers*, 701 F.2d 1011 (2d Cir. 1983); *County of Suffolk v. Secretary of Interior*, 562 F.2d 1368 (2d Cir. 1977). In *Sierra Club* the court found that where an EIS "sets forth statements that are materially false or inaccurate," it has "not been compiled in objective good faith." *Id*. (quotation marks omitted). The court recognized that "[a]lthough the FEIS purported to respond to [the sister agency's] comments, no new studies were performed, no additional information was collected, no further inquiry was made; and the FEIS essentially reiterated or adopted the statements in the DEIS." *Id*. at 1030. Here as well, the Respondent Planning Board's FEIS "purported" to address the DEC comments by delineating a set of procedures to follow "[i]f the DEC does not concur" with its assessment regarding all the parcels being on the same tax lot and hence collectively included in the ERP. RA 3331.

However, as demonstrated by the 2015 review, the Board was merely giving lip service to the DEC. When it should have been acting as lead agency, collecting and disclosing updated information about Angler's, Lower Parcel C's, and Garvies Point Road's remediation status, it was silent and never even mentioned the contamination issues revealed in the EPA's and USACE's reports.

The history of false statements made within the environmental findings and the continued disregard of the regulatory agencies' comments, findings and newly discovered information, establish the bad faith on the part of Respondents.

POINT III

NEWLY DISCOVERED INFORMATION REQUIRED A SEIS

An agency has a "continuing duty to evaluate new information relevant to the environmental impact of its actions so that important new information will not be ignored by the decision maker." *Glen Head-Glenwood Landing Civic Council* 88 A.D.2d at 494 (internal citations omitted).

Here, "[t]he new material was not only accurate and highly relevant, it was at the heart of the environmental objections to the project . . . . " *Id*. at 495.

The EPA reports, the USACE's report and the DEC's report all contain important and relevant information that was not in the EIS, was not in the EAF, and was not in the Respondents' supplemental submissions.

A supplemental EIS may be required by the lead agency to address "specific significant adverse environmental impacts not addressed or inadequately addressed in the EIS . . . . " 617.9(a)(7); *see also In the Matter of Develop Don't Destroy Brooklyn Inc., et al. v. Urban Development Corporation*, 2007 WL 4928253 (N.Y. City 2007) citing Gerrard, Ruzow & Weinberg, Environmental Impact Review in New York § 3.13(2)(b) (2006). By using the word "may" and not "shall," the drafters of SEQR allowed for some discretion as to whether a SEIS is required. Courts have, however, found that "[t]he decision as to whether a supplement should be required has been based on the probative value of the [new] information, its probable accuracy, and the present state of information contained in the impact statement." *See Glen Head v. Oyster Bay*, 88 A.D.2d at 484.

2015 Li Tungsten Five Year Review

The EPA's 2015 Li Tungsten review that revealed soil contamination in "areas outside of those previously identified or investigated," prompted the Developer to request a subdivision in 2015. RA 820. These newly revealed areas of contamination caused the EPA to perform additional excavation of those areas in 2016. *See* RA 10313.

However, the Developer's request for a subdivision for "final remediation" of Lower Parcel C (RA 1722) is simply glossed over as a "minor housekeeping"

matter (RA 3166) with the Board not having "any comments on the minor adjustments to the property lines" (RA 1722).

Additionally, the 2011 Findings' assertion that the "Brownfield remediation coordinated by the EPA and the DEC . . . is substantially completed" (RA 3300) is defied by the EPA's 2015 Report that states it had not yet determined "how best to address" these never "previously identified or investigated contaminants." *See* RA 821.

In cases where a property has been remediated "as part of the Brownfield process," the SEQR review process is not to be short-circuited. *See Bronx Committee for Toxic Free Schools v. New York City*, 20 N.Y.3d 148, 156 (2012). "The Brownfield Program and SEQR serve related but distinct purposes. SEQR is designed to assure that the main environmental concerns, and the measures taken to mitigate them, are described in a publicly filed document identified as an EIS, as to which the public has a statutorily-required period for review and comment." *Id*. at 148.

The case before this Court is the product of a SEQR review that failed to serve a distinct purpose separate and apart from the Brownfield process. Not only was the information in the SEQR statements regarding which properties were part of the "Brownfield Program" disputed by the DEC, the SEQR findings failed to describe the remediation steps for the Angler's and Pumping Station parcels.

Instead, it listed possible circumstances that may speculatively occur at some undetermined future time (RA 3331); thus completely failing to publicly identify and address the main environmental concerns.

After the breakdown of the SEQR review process in 2011, the Board continued to thwart its obligations when it failed to require the preparation of a SEIS; arguing, as City Respondents did in the court below, that it will describe its long-term maintenance and monitoring measures in a Site Management Plan (SMP), and thus a supplemental EIS was not required. R. 9439-9441. The *Bronx Committee* court rejected that argument, explaining that "mitigation measures of undisputed importance may [not] escape the SEQRA process . . . DEC regulations provide for the filing of a supplemental EIS to address subjects not addressed or inadequately addressed in the EIS, arising from changes proposed for the project, from newly discovered information or from changed circumstances." *Id*. at 156-157 quoting 6 NYCRR 617.9[a][7] (internal quotation marks omitted). Thus, "[w]here important decisions about mitigation can only be made after the initial remedial measures are complete, a supplemental EIS may be called for." *Id*.

Lower Parcel C Subdivision

The EPA's report indicated that the DEC was presently conducting pilot tests, at the time when the report was prepared, and that the DEC was determining the "parameters for soil vapor injection system and, upon its completion, [would]

bid the remedy projected for late 2016." *Id*.

The remedy, which was just being put out for bid in 2015, was a mitigation measure of undisputed importance that required the preparation of a SEIS. *See Glen Head-Glenwood Landing Civic Council*, 88 A.D.2d at 494.

USACE'S 2015 Report and DEC's 2014 Report

Evidencing the Board's failure to take the requisite "hard look" is the omission from the record of any discussion of, let alone reasoned elaboration, of the USACE's 2015 Report or the DEC's 2014 report. RA 855; 869-870; 9798 at ¶95.

The USACE's report regarding the "unsuitable material" expected to be produced from dredging the Creek and the construction of CADs was never contemplated by the Board, let alone discussed in its impact statements. *See* RA 855.

Furthermore, the EAF indicates that the Developer assumed that it would receive dredging permits. RA 1742-1775. The USACE's impact statement asserts that the polluted dredged sediment may not be able to be disposed of in a cost effective or practical manner. R. 9798 at ¶96. Thus, where an agency's familiarity with the permit process would ordinarily allow for a presumption of an adequate review, here the Board's incorrect assumptions regarding its ability to obtain the necessary permits proves that it did not examine the newly discovered information

or its impacts upon the amended Plan. *See Matter of Riverkeeper, Inc.* 9 N.Y.3d at 231-232.

Although a "lead agency need not await another agency's permitting decision before exercising its independent judgment on that issue" the lead agency is still required to "sufficiently consider[ ] the environmental concerns addressed by particular permits." *Matter of Riverkeeper, Inc.*, 9 N.Y.3d at 234. Here, there is no evidence that the Board considered the concerns associated with the permits or the information contained in the new Dredging Impact Statement.

Additionally, where studies are performed after the date of the FEIS that prove that the conclusions in the FEIS are invalid, preparation of a SEIS is warranted. *Action for Rational Tr. v. West Side Highway Project*, 536 F.Supp. 1225, *affd. in part revd. in part sub nom*. *Sierra Club v. United States Army Corps. Engrs*., 701 F.2d 1011. In *Action for Rational Tr.*, studies which were performed but withheld, demonstrated that the project area was a highly significant and productive area for fish, including striped bass. *Action for Rational Tr. v. West Side Highway Project*, 536 F.Supp. 1225, *affd. in part revd. in part sub nom*. *Sierra Club v. United States Army Corps. Engrs*., 701 F.2d 1011 (2d Cir. 1983). Because this information was not in the FEIS, the court required the preparation of a supplemental statement.

Here, the information regarding the harvesting of hard shell clams in Hempstead Harbor was clearly probative, accurate, and current information that was not contained in the 2011 FEIS.

Petitioners acknowledge that "the lead agency has the discretion to weigh and evaluate the credibility of the reports and comments submitted to it and must assess environmental concerns in conjunction with other economic and social planning goals." *Oyster Bay Associates Ltd partnership v. Town Bd of Town of Oyster Bay*, 58 A.d.3d 855, 860 (2d Dept. 2009) quoting *Matter of Riverkeeper, Inc*., 9 N.Y.3d at 231. Courts have, however, found that "[t]he decision as to whether a supplement should be required has been based on the probative value of the [new] information, its probable accuracy, and the present state of information contained in the impact statement." *See Glen Head v. Oyster Bay*, 88 A.D.2d at 484.

Here, the Board ignored the new Reports, which contained probative and accurate information that was not in the FEIS. At a minimum, its 2015 determination should be annulled and a supplemental review required.

POINT IV

BOARD IMPERMISSIBLY DEFERRED REVIEW TO REGULATORY AGENCIES

For good reason, in cases where resolution of remediation has been deferred and thus shielded from public review, courts have annulled a Board's determination. *See Penfield Panorama Area Community, Inc. v. Town of Penfield Planning Board*, 253 A.D.2d 342 [1999]; *Matter of Riverkeeper, Inc. v.* 9 N.Y.3d at 231-232 (distinguishing its holding and emphasizing that, in *Penfield*, the "Planning Board insulated itself from the hazardous waste remediation plan").

The Board deferred its lead agency consideration of the cleanup – stating that "at the conclusion of *any* future testing," the Developer would have to look to the DEC or EPA to get the properties admitted into a regulatory program (without specifying the requirements warranting "any" future testing and without acknowledging that the DEC had already refused to admit these properties into a cleanup Program). RA 3331.

In *Penfield*, the FEIS indicated that there were "primary areas of concern containing hazardous waste . . . requiring additional characterization" that would possibly require clean-up. *Id*. at 349. Upon that FEIS, the *Penfield* court found that, where the Board "conditioned its approval of the project upon the applicant's agreement to get approval of a site remediation plan from the DEC before any construction would begin," the Board had deferred resolution of the remediation

and shielded the remediation plan from public scrutiny warranting annulment of the Board's determination. *Id*.

Here too, the Board shielded the remediation plan from public scrutiny when it deferred resolution of the Angler's and Pumping Station's remediation with the list of multiple speculative steps set forth in its' 2011 Findings Statement (RA 3331); and again in 2015, when it failed to discuss the cleanup status of these parcels or their exclusion from a regulatory program (*see Penfield,* 253 A.D.2d at 342; *Riverkeeper, Inc.,* 9 N.Y.3d at 231-232).

Furthermore, the Board also impermissibly deferred its review to the regulatory agency when it failed to consider "the environmental issues requiring permits and [failed to make] . . . an independent judgment that they would not create significant environmental impact." *Matter of Riverkeeper, Inc.*, 9 N.Y.3d at 231-232 citing *Penfield Panorama Area Community, Inc.*, 253 A.D.2d at 342; *see also* RA 3325-3327.

POINT V

NEWLY PROPOSED PLAN REQUIRED A SEIS

A SEIS ensures that specific environmental impacts of an alternate project are fully assessed. *Matter of Bryn Mawr Props v. Fries*, 160 A.D.2d 1004, 1005 (2d Dept. 1990). Even where a Developer prepares "voluminous environmental impact statements concerning potential environmental effects" of its application

and those statements "address some of the consequences of an alternative . . . which is allegedly similar" to the approved Plan, an SEIS may be required. *Id*.

The Plan approved in 2011 provided for a large vessel marina and a Turn Basin, Alternative 3 swapped 250 hotel units for 250 residential units; the 2015 amended Plan calls for numerous waterfront changes as well as changes to the location, design, and massing of the buildings on the western portion of the site, an increase of over 200,000 square feet to the western-most building, relocation of the restaurant to the western-most point of the Project, the addition of retail space and eateries to the west side of the Project, the addition of a 22-space parking lot on the west side, and 63 new parking spaces on the west side of the Project. RA 1719, 1723; 1732; 1738; 3309-3310.

These drastic changes are not mere modifications to the approved Plan, they violate all Thresholds. *Beekman Delameter Properties, LLC, v. Village of Rhinebeck Zoning Board of Appeals,* 44 Misc. 3d 1227(A), 4, 998 N.Y.S.2d 305 (Sup. Ct. Dutchess Co. 2014) citing by comparison *Matter of Merson v. McNally*, 90 N.Y.2d 742 (1997).

Where there is a substantial change in a site plan after completion of the SEQR review, as occurred here, a supplemental EIS is warranted. *Green Earth Farms Rockland LLC v. Town of Haverstraw Planning Bd.*, 45 Misc.3d 1209(A) at *14 (Sup. Ct., Rockland Co. 2014).

POINT VI

2015 PLAN NOT GIVEN A "HARD LOOK"

The alternative purportedly approved in 2015, was not Alternative 3, nor was it an alternative that minimized or avoided "adverse environmental effects to the maximum extent practicable." *See* ECL 8-0109[1]; 6 NYCRR 617.9[c][2][i]. It deviated significantly from the Plan approved in 2011. It was incumbent upon the agency to give this alternative the requisite "hard look," however, it never did. *See Jackson,* 67 N.Y.2d at 400; *see also Aldrich v. Pattison*, 107 A.D.2d 258, 265, 486 N.Y.S.2d 23; *Coalition Against Lincoln W. v. City of New York*, 94 A.D.2d 483, 485, affd. 60 N.Y.2d 805, 469 N.Y.S.2d 689 (1st Dept. 1983).

Impact to Marine and Human Life Not Given the Requisite "Hard Look"

Respondents' consultants did not understand the science involved with the changes in the Plan and, therefore, a thorough assessment of the impacts of those changes never took place. Respondents failed to consult with wetland experts or with marine biologists. *See* RA 9779 at ¶¶24-25. Hence, an evaluation of the amended Plan's impacts upon this critical and fragile protective shore did not occur.

The multiple inaccuracies and incorrect responses by Respondents' consultants on the SWPPP establish the complete lack of disregard for the process, ignorance of the scientific principles involved, or negligence in the evaluation of

the associated impacts of the new amended Plan.[54] In either scenario, the requisite "hard look" was not given to the impacts associated with the new design which had never before been subjected to a SEQR review.

SEQR requires "a statement of the important environmental impacts of the proposed action" and "an identification and brief discussion of any adverse environmental effects which cannot be avoided if the proposed action is implemented" - this did not occur. *Jackson* quoting 6 NYCRR 617.14[f][3],[4].

The record that was before the lower court did not contain any discussion of the ecological impacts associated with the amended Plan; nor, is there any evidence that the lead agency identified the impacts as required. *Id*. The consultants merely assumed that reducing the size of the marina was a positive impact without ever evaluating the scientific factors involved. *See* R.1, pg. 16.

Visual Impact and Character to the Neighborhood Not Given the Requisite "Hard Look"

The Board failed to make a Threshold determination as it was required to do by its own self-imposed Findings in 2011 (RA 3321); and, according to its' members' own account, the new design "exceed[ed] the Threshold limits" (RA 3322): it was "three times bigger;"[55] has "everybody . . . worried about the

[54] RA 9789.
[55] RA 2768; see also RA 3320 (clearly exceeding the "threshold").

complete mass of the westerly building;"[56] is "overwhelming;"[57] and creates "the greatest amount of views for people living there, not the people who have to look at it."[58] One member in particular, went for a drive to look for himself and his reaction was, "holy cow that western building is going to be huge right on the Point."[59]

When modifications and additions to a plan and its' related impacts are not "given the attention" deserved, a supplemental impact statement should be prepared. *Green Earth Farms Rockland LLC.*, 45 Misc.3d 1209(A) at *14. This is so, even where "the square footage of an entire plan may not have significantly changed." *Id.*

The EAF contained one paragraph, entitled "Aesthetics," which deceptively attempts to convey that impacts were considered and mitigation was addressed. However, in actuality, the EAF asserts that the new design *is* the mitigation of the "impacts to the views" because of the elimination of the old design. RA 1742-1775. The EAF never addressed the impacts from *this design* nor did it consider mitigation for this new design.

The Expanded EAF as well as the Developer's two supplemental submissions should not be misconstrued as mitigation or as "a substitute for a

[56] RA 2766.
[57] RA 2766.
[58] RA 2769.
[59] RA 2965.

thorough assessment of the project for significance of impact" which never took place. *See* SEQR Handbook, pg. 81 citing *Shawangunk Mountain Environmental Association v. Planning Board of the Town of Gardiner*, 157 A.D.2d 273 (3d Dept. 1990).

Community Character Not Given the Requisite Hard Look

"The issue of 'community character' cannot necessarily be viewed in isolation and may include a myriad of diverse components." *In re Palumbo Block Co*., 2001 WL 651613 (NYSDEC Commissioner's Decision) ("rejecting applicant's argument that assessment of noise and visual impacts covered community's concerns about impacts to community character"); *see also* 2010 SEQR Handbook, at 85; *In re Crossroads Ventures. LLC*, 2005 WL 2178473 (N.Y.S.D.E.C. AI.J Decision) ("valid concerns relating to community character . . . must be assessed by the Lead Agency"). The record does not contain any evidence of the Board's consideration of the amended Plan's impact upon community character.

Traffic Impact Not Given the Requisite Hard Look

Respondents herein vehemently opposed the conclusions put forth by Petitioners' traffic expert who stated that the existing traffic volumes presented in the DEIS and FEIS are based on traffic counts performed between 2005 and 2008 (one intersection was counted in 2009), which are not likely to represent conditions

in 2011 and certainly not in 2015 when the amended PUD was approved. *See* RA 9983 at ¶16.

In representing the Villages of Old Brookville and Brookville, counsel to the Board commented that traffic studies that were performed during 2012-2015 should be supplemented to determine whether the LOS at intersections that are areas of concern for both projects "would experience an unacceptable increase in LOS." *See* RA 9967-9968. Thus, Respondent's counsel, whom the Board claims to have "heavily relied" upon, agrees that the information regarding critical intersections was stale, warranting an SEIS. *See Matter of Defend H2O v. Town Board of East Hampton*, 2015 WL 7721207 (E.D.N.Y. 2015); *see also* RA 3292.

POINT VII

BOARD'S DECISION WAS ARBITRARY AND CAPRICIOUS

For all of the reasons set forth above, the Board's determination was made in violation of lawful procedure, was affected by an error of law and/or was arbitrary and capricious; and, the Board failed to perform a duty enjoined upon it by law and/or proceeded without or in excess of jurisdiction. CPLR § 7803.

CONCLUSION

Based upon the arguments made herein, and in Petitioners'-Appellants' Petition-Complaint with supporting briefs and cross-motion for summary judgment made in the lower court, the Respondent-Respondent Planning Board's 2011 and 2015 determinations should be annulled. Or, at a minimum, a SEIS should be required; but truly, SEQR and the integrity of regulatory oversight, requires annulment of the Board's determinations.

Dated: Garden City, New York
July 19, 2017

_____

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Certificate of Compliance
Pursuant to 22 NYCRR 670.10.3(f)

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman

Point size: 14

Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules and regulations, etc. is 13,953 words.