SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF COLUMBIA

In the Matter of the Application of

SUMMIT LAKE CONSERVATION GROUP, LLC, PETER FENIELLO, ESTHER LUCIA ARIAS, JULIA SEDLOCK, SALLY BAKER, JOSEPH R. MIRANDA, EILEEN ORDU, KAREN SCHOEMER, CAROLYN STERN, KATE MARTINO, JOHN GOURLAY, and MARK FIELDING,

Petitioners,

For a Judgment Pursuant to Article 78 of the New York Civil Practice Law and Rules

-against-

VILLAGE OF PHILMONT, VILLAGE OF PHILMONT PLANNING BOARD, and CLOVER REACH PARTNERS LLC,

Respondents.

DECISION/ORDER

Index #: E012023020459

Richard Mott, J.S.C.

Petition Return Date: July 21, 2023

**APPEARANCES:**

**Petitioners:**
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Attorneys for Petitioners

**Respondents:**
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Village of Philmont and Village of Philmont Planning Board ("PB")

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Attorneys for Respondent,
Clover Reach Partners, LLC ("Developer")

Mott, J.

In this special proceeding pursuant to Article 78 of the CPLR, Petitioners seek judicial review of the Village of Philmont PB's Resolution granting preliminary subdivision approval for the Woods Subdivision ("Project"). Petitioners seek annulment of the Resolution or a remand for action consistent with SEQRA and the Philmont Village Code. They seek an award of counsel fees and costs. Respondents oppose.

**BACKGROUND**

This is Petitioner's second challenge to this Project. The first Article 78 petition[1] resulted in the matter being remitted to the PB for a hearing as Respondents had approved a preliminary plat which was incomplete when the challenged Resolution issued, as the SEQRA determination had not been finalized prior thereto. Thereafter, on February 7, 2023, Developer submitted revised subdivision plans. No new or amended environmental assessment form was submitted with the revised plans.

On February 21, 2023, the PB accepted this information and declared the preliminary plat complete and scheduled a public hearing on March 12, 2023. No new determination of significance, pursuant to SEQRA, was made. The PB approved a new Resolution, filed with the Village Clerk on April 26, 2023, approving the Project. Petitioners assert seven causes of action

[1]*Summit Lake Conservation Group, LLC, et al. v. Village of Philmont, et al.,* Index # E012022018817. ("*Summit Lake I*").

for review: (1) that the PB failed to comply with the Village Code and New York State Village Law; (2) that the PB failed to take a hard look at environmental concerns raised during the most recent approval process; (3) that waivers were granted which did not meet the standard established for such waivers; (4) that the PB failed to properly condition the approvals on the provision of a 50-foot right-of-way; (5) that the PB failed to take a hard look at fire safety access concerns; (6) that the PB failed to take a hard look at historic resources consistent with SEQRA; and (7) that, in light of the Project's effects upon the special visual character of the area, resulting from the project changes made after remittal, the approval of the Project and the negative SEQRA declaration are arbitrary and capricious. Respondents challenge Petitioners' standing and otherwise claim that the approval was properly made.

**DISCUSSION/STANDING**

In the context of zoning disputes, it is desirable that land use disputes be resolved on their own merits rather than by preclusive, restrictive standing rules. *Sun-Brite Car Wash, Inc., v Bd. Of Zoning Appeals*, 69 NY2d 406, 413 (1987). Proof of special damage or in-fact injury is not required in every instance to establish that the value or enjoyment of one's property is adversely affected. Id. Direct harm or injury may be presumed by a showing of close proximity to the property at issue. *Barnes Rd. Area Neighborhood Assn. v Planning Bd. Of the Town of Sand Lake*, 206 AD3d 1507 (App. Div. 3 Dept., 2022).

Nonetheless, a petitioner must also satisfy the second half of the test for standing to seek judicial review of an administrative action, that the interest asserted is arguably within the zone of interest to be protected by the statute. *Sun-Brite*, supra, at 414.

Petitioners assert standing based upon their proximity to the Project. Their zone of interest concerns include fire safety, loss of wildlife habitat and visual impacts. Fire safety impacts clearly satisfy the standing issue for Petitioners who reside near the Project. Additionally, such Petitioners have standing to raise wildlife habitat issues, as loss of wildlife habitat can result in loss of biodiversity and change the character of the area, affecting those neighbors' use and enjoyment of their land, and thereby devaluing neighboring properties greater than those of the public at large. Residents of neighboring properties have standing to challenge visual impacts as that may affect the value as well as their use and enjoyment of their properties. Accordingly, the individual Petitioners and Summit Lake Conservation Group, LLC all have standing to bring this Article 78 proceeding.

**DISCUSSION/FIRST CAUSE OF ACTION**

Petitioners claim that, after the initial Resolution was annulled and the Developer, on February 7, 2023, submitted a letter from its engineer together with revised subdivision plans, the PB was obligated to subject the revised plans to a new determination of significance under SEQRA. The revised plan includes revised grading for the road and driveways with different tree-clearing allowances. Under the revised plan, up to 50% of mature trees and up to 100% of immature trees may be cut down. The revised grading plan and additional tree-clearing allowances will have related visual impacts and wildlife impacts which have not been subjected to SEQRA review. Petitioners assert, therefore, the PB failed to perform the duties required of it pursuant to Village Law 7-728(5)(d)(i)(1). Respondents counter that this Court's prior Decision/Order upheld the SEQRA determination and no new determination is required. Further,

Developer contends that Petitioners are barred from re-litigating any SEQRA issues based upon *res judicata* and/or collateral estoppel.

The prior decision annulled "...the Resolution approving the preliminary plat and remand[ed] this matter back to the PB for a hearing on the complete preliminary plat, including the specific language of the restrictive covenants...". The prior decision also held that, "Consideration of driveway grades, FAAR [Fire Apparatus Access Road] width and subdivision road ROW is premature, given the determination, *infra,* that a hearing is required on the preliminary plat approval." Developer contends that the prior determination was not "overturned" within the meaning of 6 NYCRR 617.7(f)(1)(i), but was rather annulled, as if it was void *ab initio.* Therefore, no new determination of significance is required.

The Court finds that, to the extent the prior decision upheld the SEQRA determination, that holding was rendered moot by the inclusion of new tree-clearing allowances and road grading specifications among the changes subsequently made to the project. As these new features of the project have the potential for adverse visual, fire safety, wildlife and community character impacts, a new determination of significance is required. The doctrines of res judicata and collateral estoppel do not apply, as the issue is not identical to the prior proceeding after the Developer made changes to the project, nor could the Petitioners have raised SEQRA-related issues in the first proceeding relative to the changes made subsequent to this Court's prior Decision/Order.

Furthermore, pursuant to 6 NYCRR §617.7(f)(1)(i), a lead agency must rescind a negative declaration when substantive changes are proposed for the project. See generally, *Clean Air Action Network of Glens Falls, Inc. v. Town of Moreau Planning Bd.*, 2023 N.Y. Misc.

LEXIS 3136, at pg. 53 (Sup. Ct., Saratoga Co., 2023) (6 NYCRR 617.7[f] requires a lead agency to rescind a negative declaration when presented with significant new information, a project modification or other changes in circumstances). The PB failed to comply with Village Law §7-728(5)(d)(i)(1) by failing to complete the SEQRA process prior to holding a public hearing, as a public hearing is required to be held within 62 days after the issuance of a negative determination and before granting Preliminary Plat approval. Accordingly, the first cause of action is sustained.

**DISCUSSION/SECOND CAUSE OF ACTION-SEQRA REVIEW**

In light of the need for a new SEQRA determination of significance, it would be premature for the Court to review the PB's SEQRA determination at this time.

**DISCUSSION/THIRD, FOURTH and FIFTH CAUSES OF ACTION - WAIVERS**

Petitioners claim that the PB violated the provisions of Village of Philmont Subdivision Regulations §130-18(A)(3) and §130-18(B)(1)(c)(4)which require subdivisions to comply with Zoning Law §160-13(L) and with Chapter 127 Streets and Sidewalks of the Village Code. Section 160-13L(3) of the Village Code provides that the,

> "...maximum grade for any new driveway accessory to a single-family dwelling and connecting its off-street parking area to a street shall be 10%, except where it can be demonstrated to the satisfaction of the Planning Board that, because of practical difficulty or unreasonable hardship affecting a particular property, the construction of a driveway grade is the minimum increase required; provided, however, that in no case shall such driveway grade be permitted to exceed 15%."

Of the 16 proposed driveways, only one complies with the 10% grading requirement. Four of the lots are at 14.9% and one is at 14.8% grade. The one-way loop road will have a 10.2% uphill grade and an 11% downhill grade. In their third cause of action, Petitioners assert that the Developer failed to make the required showing of hardship and failed to adequately

detail how much more clearing and grading would be required were all of the lots to comply with the 10% grading requirement. Respondents assert that the project engineer addressed the need for the driveway grading waiver based upon the existing topography and the need to do more extensive clear-cutting and re-grading. The PB accepted that reason for the waiver request as "demonstrated to its satisfaction".

In their fifth cause of action, Petitioners contend that the Fire Chief has no authority to reduce the minimum width of a Fire Apparatus Access Road ("FAAR"). Section 503.2.1 of the 2020 Fire Code of the State of New York provides that a FAAR shall have an unobstructed width of not less than 20 feet. The Project currently calls for a FAAR loop which has only a 12-foot wide pavement width.

Petitioners' fourth cause of action claims that the Developer indicated it would comply with the Village of Philmont requirement that all roads have a 50-foot right-of-way.

Respondents point to the email exchange with Bryant Arms, Code Compliance Specialist from the NY Department of State, which indicates that Section 503.2.2 "enables the local authority having jurisdiction (AHJ) to modify the FNYS's (sic) minimum widths for FAARs". However, Section 503.2.2 actually states:

> " The *fire code official* shall have the authority to require or permit modifications to the required access widths **where they are inadequate** [emphasis added] for fire rescue operations or where necessary to meet the public safety objectives of the jurisdiction".

The Court finds that the PB's granting of the driveway grading waivers was within its discretion to grant and doing so was reasonable and fact-based. The Court may not substitute its judgment for that of the Planning Board. However, the Court agrees with Petitioners that,

according to the plain language of Fire Code Section 503.2.2the AHJ (or fire code official) only has discretion under the 2020 NYS Fire Code to increase the width of a FAAR when such width is inadequate. There is no discretion to reduce the width of a FAAR under the 2020 Fire Code. Additionally, the Philmont Fire Chief wrote his letter stating that "The Woods Road one way loop illustrated on plan page C-101.1 shows good accessibility for fire apparatus and presents no known issues for emergency vehicle operations", on February 14, 2022 relative to the February 1, 2022 submission to the PB which, at that time, called for a 22-foot access road. The preliminary subdivision application approved by the PB on August 3, 2022 provided for a 16-foot road, with a 12-foot road with a two-foot shoulder on each side. Thus, it appears that the Fire Chief was opining about the 22-foot proposed access road, not the narrower, 12-foot road.

The Court finds that the 12-foot FAAR is unauthorized by law and the minimum width must be 20-feet as prescribed by the 2020 New York Fire Safety Code.

Accordingly, the third cause of action is denied and the fifth cause of action is sustained.

As to the fourth cause of action, to the extent that a minimum 20-foot wide FAAR can be created within a 33-foot right-of-way, the 33-foot right-of-way may remain. However, if a larger right-of-way is necessary, then a larger right-of-way must be required to accommodate a minimum 20-foot FAAR.

**DISCUSSION/SIXTH CAUSE OF ACTION - SEQRA REVIEW OF HISTORIC RESOURCES**

In light of the Court's decision on the first cause of action, it would be premature to review the SEQRA process at this time.

**DISCUSSION/SEVENTH CAUSE OF ACTION - BROWNFIELD OPPORTUNITY AREA**

Petitioners' seventh cause of action involves the PB's SEQRA consideration relative to the BOA. Again, the court finds it would be premature to opine on this at this time.

In the circumstances, the Court declines to award attorney's fees.

Accordingly, it is hereby

ORDERED, that the Petitioners' first and fifth causes of action are sustained, the third is denied and the remainder are not ripe, and it is further

ORDERED, that the Resolution dated April 18, 2023 granting preliminary subdivision approval is annulled and the matter is remitted to the Planning Board for further action not inconsistent with this Decision/Order.

ENTER

Dated: October 13, 2023
Hudson, NY

Richard Mott, J.S.C.

Papers considered:

1. Notice of Petition dated May 24, 2023, Petition with Exhibits A-L.
2. Affirmation in Opposition of Robert J. Fitzsimmons, dated July 11, 2023 with Exhibits A-F, Affidavit in Opposition of Robert MacFarlane dated July 11, 2023.
3. Answer in Special Proceeding of Respondent, Clover Reach Partners, LLC, dated July 17, 2023, Affidavit of Brandee K. Nelson, dated July 17, 2023 with Exhibits A-B, Memorandum of Law in Opposition.
4. Verified Answer of Respondents, Village of Philmont and Village of Philmont Planning Board, dated July 17, 2023.
5. Memorandum of Law in Further Support, Affirmation of Thomas A. Shepardson dated July 24, 2023 with Exhibits A-G.