SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF COLUMBIA
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In the Matter of the Application of

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

Petitioners,

DECISION/ORDER

Index No. E012022018817
Richard Mott, J.S.C.

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

Respondents.
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Motion Return Date: November 21, 2022

APPEARANCES:

Petitioners:
Anthony R. Bjelke, Esq.
White Osterman & Hanna LLP
One Commerce Plaza
Albany, NY 12260

Respondents:
Robert J. Fitzsimmons, Esq.
Law Office of Robert J. Fitzsimmons, PLLC
8 McNary Avenue
Kinderhook, NY 12106
For: Village of Philmont, Village of Philmont Planning Board (PB) and Village of Philmont Board of Trustees (Village)

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441 East Allen Street
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For: Clover Reach Partners, LLC (Developer)

Mott, J.

Petitioners in this Article 78 proceeding seek to annul the PB's negative State Environmental Quality Review (SEQR) declaration and the resolution approving a preliminary plat (Resolution) for the Developer's proposed major subdivision (Project) as arbitrary, capricious and/or contrary to law, and to enjoin Respondents from seeking further review, approvals or permits for the Project. The Village and Developer oppose.

Background

In January 2022, the PB declared itself lead agency for a coordinated SEQR Project review as an unlisted action. The Project involves a 16-single family residential development disturbing approximately 3 of 22 acres on a hillside overlooking Summit Lake, abutting Village-owned recreational land. On May 17, 2022 and June 21, 2022 public hearings were held on the subdivision application. on August 3, 2022, Part III of the Full Environmental Assessment Form (FEAF) was signed by the PB chairperson and approved at a public meeting. On September 1, 2022, the PB approved the Resolution granting preliminary plat approval. It states, *inter alia*, that the PB finds no significant negative environmental impacts from the Project and that "any potential small impacts were properly mitigated by the [Developer's] proposed development process, plans and submissions." Further, it refers to "a unanimous motion to issue a negative declaration for purposes of SEQRA" and notes that final restrictive covenants "being send [sic] by email… dated August 3, 2022, to include a tree inventory and removal restrictions and to prohibit parking upon the roadway at all times…".

Parties' Contentions

Petitioners allege, in 5 causes of action, respectively, that (1) the Resolution violates the Village Code requirement for a 50' right of way (ROW) for roads and the limitation on driveway grades in excess of 10% without a showing of practical difficulty or undue hardship meriting same which, they aver, is unaddressed in the Resolution; (2) that the Resolution approved the preliminary plat, in violation of NYS Village Law § 7-728; (3) that the subdivision fire apparatus access road (FAAR) does not meet the 2020 Fire Code 20' width requirement and the Philmont Fire Chief, Mark Beaumont (Chief Beaumont) lacks authority to vary same; (4) that the determination to move a portion of the Joshua Essig Trail (Trail) access to Summit Lake is illegal as lacking the legislative approval required for parkland alienation; and, (5) that the PB failed to take a hard look at the Project's effects on the viewshed or community character given its location in the Brownfield Operations Area (BOA), whose mandate, endorsed by the Village, is tantamount to a comprehensive plan; that it failed to classify its SEQR action or properly issue a conditioned negative declaration to include the restrictive covenants.

Petitioners claim, principally, that a hearing is required on the preliminary plat, which was incomplete when the Resolution issued, as the SEQR determination had not been finalized prior thereto. They insist that the PB chair's signature on Parts II and III of the FEAF does not suffice to establish a hard look under SEQR, as the subdivision's restrictive covenants were not submitted until August 3, 2022, preventing consideration of public comment thereon. Further, they aver that the PB's clear intent to condition the project on the inclusion of such covenants is ineffective because they are not stated in the Resolution or the FEAF.

The Village avers that it complied with all the applicable requirements of the Village Code, NYS Law, including the Environmental Conservation Act/SEQR. It cites the PB's exhaustive environmental review which includes public hearings, studies, data, photographs, detailed engineering plans, the opinions of the Village engineer, George Schmitt, (Schmitt, of Chief Beaumont regarding FAAR-width, of Bryant Arms from the NYS Department of State Codes Division as to a fire chief's authority to vary same, and no-adverse impact letters from the NYS Office of Parks Recreation and Historic Preservation. In addition, it notes that 2 earlier proposals for the same Project lands were approved involving substantially more residences than here. Finally, it maintains that Petitioners' opposition is insufficient to overcome the deference to which the PB's determinations are entitled.

The Developer reiterates the Village's arguments and asserts that Petitioners fail to state a cause of action. It notes that the PB is free to waive and/or modify roadway width or driveway grades pursuant to Village Code § 130-24, given the Project's unique topographical conditions. Further, it notes that the steeper grades will minimize the need for tree clearing and maximizes the capture of stormwater runoff, rather than cutting into the hillside to create a lesser grade.

The Developer notes that the FAAR 16' wide road and 2' shoulders are on a one-way loop and cites the approval of Chief Beaumont, Schmitt and the highway superintendent of same. In addition, the Developer proffers the affidavit of consulting engineer Brandee K. Nelson's (Nelson) who states that the Project is within the BOA study area, but not on its priority redevelopment sites. Moreover, the Developer notes that even if this Court were to find that no hearing on the subdivision plat took place post-SEQR, its application should be

granted because Petitioners have failed to identify any harm or prejudice, citing the lack of significant changes to the plat thereafter, and because the covenants are made obligatory by the Resolution. Finally, it contends that Petitioners have failed to meet their burden of showing that the portion of the Trail on Project-owned property proposed to be relocated has ever been designated public parkland and proffers title documents establishing the absence of an easement to the Village or Petitioners.

Discussion/Judicial Review of Administrative Action

The arbitrary and capricious standard "relates to whether a particular action should have been taken or is justified…and whether the administrative action is without foundation in fact." *Pell v Bd. of Ed. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]. Judicial review is restricted to the administrative record and limited to determining whether the action is illegal, arbitrary, capricious or, alternatively, rationally based, *Sea Cliff Equities, LLC v Bd. of Zoning Appeals of Inc. Vil. of Sea Cliff,* 106 AD3d at 924; *Featherstone v Franco*, 95 NY2d 550, 554 [2000]. Further, a reviewing court is precluded from substituting its judgment for that of the administrative actor. *Mallick v New York State Div. of Homeland Sec. and Emergency Services*, 43 NYS3d 183 [3d Dept 2016]; *MLB, LLC v Schmidt*, 50 AD3d 1433 [3d Dept 2008] (standard of review of planning board action); *Fildon, LLC v Planning Bd. of Inc. Vil. of Hempstead*, 164 AD3d 501, 503 [2d Dept. 2018] (planning board has considerable discretion); *Sasso v Osgood*, 86 NY2d 374, 385 [1995]. However, the administrative authority must state the basis of its findings with sufficient clarity to permit judicial review. *Rochdale Mall Wines & Liquors, Inc. v State Liq. Auth.*, 29 AD2d 647, 648 [2d Dept 1968], affd, 27 NY2d 995 [1970].

1st and 3rd Causes of Action

Consideration of driveway grades, FAAR width and subdivision road ROW is premature, given the determination, *infra*, that a hearing is required on the preliminary plat approval. In addition, the record is unclear as to whether the PB interpreted the Village Code ROW as being inapplicable because the looped portion of the road is one-way, or whether it waived that requirement. *Carr v Vil. of Lake George Vil. Bd.*, 64 Misc. 3d 542, 556 [Sup Ct 2019] ("planning boards are without power to interpret the local zoning law, as that power is vested exclusively in local code enforcement officials and the zoning board of appeals"); *Rochdale Mall Wines & Liquors, Inc. v State Liq. Auth.*, 29 AD2d at 648.

2nd Cause of Action

Village Law § 7-728(5)(c) provides that a "preliminary plat shall not be considered complete until a negative declaration has been filed…". Further, Village Law § 7-728(5)(d)(i)(1) states that if the lead agency determines that,

> "an environmental impact statement on the preliminary plat is not required, the public hearing [thereon] shall be held within [62] days after the receipt of a complete preliminary plat by the clerk of the planning board."

Here, the PB conflated its SEQR determination with the preliminary plat approval, failing to first ensure a complete preliminary plat. Indeed, Part III of the FEAF, instead of elaborating on the reasons supporting its SEQR determination, states "See Resolution of Approved Subdivision" which had not yet issued, and "See Project submissions as submitted in PB file and Record." Further, Despite the PB's stated intent to oblige compliance with covenant restrictions, there is no writing incorporating the specific language of the covenants in either the Resolution or the FEAF. Consequently, remittal for

a hearing on the complete preliminary plat is required. *Matter of Ctr. of Deposit, Inc. v Vil. of Deposit*, 108 AD3d 851, 852-53 [3d Dept 2013].

4th Cause of Action

Here, Petitioners' claim that the portion of the pre-existing Trail on Project land constitutes previously dedicated public parkland is unsubstantiated, as it includes no reference to prior owners' declarations and is further refuted by the Developer's submissions demonstrating that the Village does not own and has not been granted an easement over same. *Matter of Glick v Harvey,* 25 NY3d 1175 [2015] ("owner's acts and declarations should be deliberate, unequivocal and decisive, manifesting a positive and unmistakable intention to permanently abandon his property to the specific public use."). Petitioners' reliance upon *Matter of Avella v City of New York,* 29 NY3d 425, 431 [2017] and *Lake George Steamboat Co. v Blais*, 30 NY2d 48, 49 [1972] is inapposite as the proposed developments in those cases were undisputedly on municipally-owned land.

5th Cause of Action

A court reviews a SEQR determination on the administrative record to determine whether relevant areas of environmental concern have been identified, the agency has taken a hard look at them and made a reasoned elaboration to support its determination. ECL § 8–0101 et seq.; *Jackson v New York State Urban Dev. Corp.,* 67 NY2d 400 [1986]. It is not the court's role "to weigh the desirability of any action or choose among alternatives." Id. at 416; *Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, 9 NY3d 219 [2007]. SEQR seeks "a balance between social and economic goals and concerns about the environment by requiring an agency to engage in a systematic balancing analysis." *Matter of WEOK Broadcasting Corp. v Planning Bd. of Town of Lloyd,* 79 NY2d 373, 380-81 [1992]. Such

determinations are assessed in light of the rule of reason and an agency's determination may be annulled "only if arbitrary, capricious or unsupported by substantial evidence." *Jackson v New York State Urban Dev. Corp.,* 67 NY2d 400.

Here, contrary to Petitioners' contention, the PB classified its SEQR action as unlisted in its January 19, 2022 Notice of Intent to Serve as Lead Agency. Further, the PB's determination is rationally based, as the record demonstrates it identified, investigated and discussed the Project's impacts identified by involved agencies, engineering reviews and public comment, addressed them prior to its final determination and concluded that there were no potentially significant impacts identified. It considered viewshed as evidenced by a line-of-sight study with a conceptual rendering and generally referenced the covenants restricting/conditioning development on the subdivision.

Accordingly, the petition is granted to the extent of annulling the Resolution approving the preliminary plat and remanding this matter to the PB for a hearing on the complete preliminary plat, including the specific language of the restrictive covenants, thereby rendering determination of the 1st and 3rd causes of action premature. The 4th and 5th causes of action are dismissed as lacking merit. Any further contentions have been considered and found to be unavailing or are rendered academic.

This constitutes the Decision and Order of this Court. The Court is E-filing this Decision and Order, but that does not relieve Petitioners from compliance with the provisions of CPLR §2220 with regard to notice of entry thereof.

Dated: Hudson, New York
January 13, 2023

RICHARD MOTT, J.S.C.

Papers Considered:

1. Notice of Petition and Verified Petition of Thomas A. Shepardson, Esq., and Affirmation of Anthony R. Bjelke, Esq., dated September 9, 2022 with Exhibits A-M;
2. Opposition Affirmation of Robert L. Fitzsimmons, Esq., with Exhibits A-T and Affidavits of Affidavits of Robert MacFarlane and of George Schmitt, dated October 24, 2022;
3. Answer, Affirmation and Memorandum of Law of Paul L. Freedman, Esq., dated November 10, 2022 and Affidavits of Brandee K. Nelson, PE and Andrew Personette, dated November 9, 2022;
4. Reply Affirmation of Anthony R. Bejelke, Esq., dated November 18, 2022 with Exhibit A.