SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
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In the Matter of the Application of the GENERAL MOTORS CORPORATION,

Petitioner,

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

-against-

THE VILLAGE OF SLEEPY HOLLOW; THE BOARD OF TRUSTEES OF THE VILLAGE OF SLEEPY HOLLOW; MAYOR PHILIP E. ZEGARELLI, MARIA R. DeMILIA-POWERS, MARIO DiFELICE, KAY BROWN GRALA, SANDRA MORALES, ANDREW MURRAY and KENNEITH G. WRAY, as and constituting THE BOARD OF TRUSTEES OF THE VILLAGE OF SLEEPY HOLLOW,

Respondents.

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**DECISION, ORDER AND JUDGMENT**

Index No. 23984/07

Hubert, J.

This is an Article 78 proceeding filed by Petitioner General Motors Corporation ("GM") seeking a judgment setting aside various conditions imposed by the Board of Trustees of the Village of Sleepy Hollow ("the Board") in a Findings Statement it adopted pursuant to the New York State Environmental Quality Review Act ("SEQRA"). The Findings Statement arose from GM's efforts to develop a 94.5 acre parcel of property it owns along the Hudson River

waterfront in Sleepy Hollow, New York ("the Site").[1] The property is the site of a former GM automotive assembly plant which played a significant role in the local economy for over seventy years. After closing the plant in1996, GM embarked on the long process of dismantling the industrial plant, cleaning up the Site, and securing a developer to redevelop the property.

In February 2003, GM and its developer submitted an application to the Board for approval to build a large scale waterfront development project named Lighthouse Landing ("the Project"), consisting of residential apartments, condominium units, townhouses, retail space, office space, and open space and parks. Pursuant to the SEQRA environmental review process,[2] the Board conducted a thorough and comprehensive review of the Project and its environmental impacts, holding over 50 public meetings and hearings, and receiving input from dozens of local and state agencies, consultants, environmental organizations, and the public. During the review period, GM agreed to make design changes to the Project, contribute financial resources to various aspects of the Project, increase the size of parkland and open space, and reduce the density of the residential component of the Project.

After more than four years of careful study and analysis, the Board issued a Findings Statement on July 24, 2007. The 129-page document contains detailed review of the potential impacts of the Project on land use, zoning and public policy, ecological resources, economic conditions, cultural and archeological resources, open space, utilities, traffic and mass transit, and parking conditions, among other matters.

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[1]GM is the beneficial owner of the Site; GM conveyed the property to the Town of Mount Pleasant Development Agency in 1985 pursuant to an industrial revenue bond financing transaction.

[2]Article 8 of the Environmental Conservation Law of the State of New York ("ECL") and 6 NYCRR Part 617.

GM does not contest the environmental review process, or whether the lead agency took the requisite "hard look" at the environmental impacts of the Project. Instead, GM contends that many of the conditions set forth in the Findings Statement are arbitrary and capricious because they are either disproportionate to the impacts caused by the Project, or will not mitigate any environmental impacts at all. For the reasons explained more fully below, the Court agrees that a number of the conditions imposed by the Board will not serve to mitigate any environmental impacts, or alternatively were not agreed to by GM as a result of the SEQRA review process. Thus, GM's petition seeking to annul various requirements is granted in part, and denied in part.

## LEGAL AND FACTUAL BACKGROUND

In order to permit redevelopment of GM's site, the Village of Sleepy Hollow ("the Village" or "Sleepy Hollow") adopted a Local Waterfront Revitalization Program in 1996. The Board also adopted several amendments to Sleepy Hollow's zoning ordinance in order to create a new zoning district, the RF-Riverfront Development Zoning District (the "RF District"). Among the stated purposes of the RF District were to "promote . . . the revitalization of the waterfront area, while ensuring that such revitalization takes place in a manner which is sensitive to the Village's coastal and community resources [. . ]." The text of the RF District includes general parameters for development of the land, including permitted uses, design criteria, and maximum building height and density, all of which were based on a broad, "generic" SEQRA review that had been conducted previously by the Village. *See* 6 NYCRR § 617.10 (a)(4).

In or about 2002, GM entered into a contract with a subsidiary of Roseland Property Company, a developer experienced in urban waterfront projects, to redevelop the Site. The subsidiary, Roseland/Sleepy Hollow LLC ("Roseland"), was a co-applicant of the Project. Both

companies are listed on all relevant documents in connection with the SEQRA review process.[3] On February 11, 2003, Roseland and GM (collectively, "the Applicants") submitted a "Concept Plan" and application for a Special Permit in order to develop the Site.[4] The design plans contemplated a mixed-use development consisting of 1,562 rental and ownership units, 185,000 square feet of retail space, 95,000 square feet of office space, a hotel, a waterfront park, open space, and many other amenities.

After declaring its intent to serve as Lead Agency, the Board issued a positive declaration for the Project under 6 NYCRR § 617.2, thereby requiring a full environmental review process. On April 14, 2004, the Applicants submitted a preliminary Draft Environmental Impact Statement ("DEIS") to the Board. The Applicants submitted a revised preliminary DEIS to the Board on November 19, 2004, and subsequently a third DEIS, all in response to comments that the Board made on each draft. Finally, by resolution dated January 11, 2005, the Board declared the DEIS to be complete with respect to its scope, content and adequacy under SEQRA.

On October 4, 2005, the Applicants submitted their preliminary Final Environmental Impact Statement ("FEIS"). The document included an "Alternative Plan" that reduced the number of residential units from 1,562 to 1,250; reduced the retail space from 180,000 square feet to 132,000 square feet; reduced the size of the hotel; increased the open space provided for along the Hudson river and within the interior of the Site; and created a landscaped buffer area between Kingsland Point Park (an existing park) and the Project. In response to requests made by

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[3]Roseland and General Motors have since terminated their development agreement. GM is in the process of seeking a new developer for the Site.

[4]The Sleepy Hollow Code provides that two land use approvals are required before development of property in the RF District is permitted: (1) a developer must submit a "Concept Plan" for approval; and (2) a developer must apply for a Special Permit. The approval of a Concept Plan and Special Permit is considered to be an "action" under SEQRA.

the Board, the Applicants then submitted four subsequent versions of the preliminary FEIS. Over one year later, on December 19, 2006, the Applicants submitted their final FEIS to the Board, advising that they would use the Alternative Plan as their final Concept Plan.

Simultaneously, GM requested an amendment to the zoning code. The Project was designed to include rental and condominium ownership units in three, four, and five-story buildings, but existing zoning restrictions precluded a fifth floor on four such buildings.[5] The proposed zoning amendment was not approved, but on July 24, 2007, the Board adopted the Findings Statement at issue here.

**DISCUSSION**

Judicial review of a lead agency's SEQRA determination is limited to whether the determination was made in accordance with lawful procedure and whether the determination was affected by an error of law, lacked a rational basis, or was an abuse of discretion. *Jackson v. New York State Urban Development Corp.*, 67 N.Y.2d 400, 503 N.Y.S.2d 298 (1986). A lead agency's determination will be annulled only where the court finds it was arbitrary and capricious or unsupported by the record. Thus, judicial review of an agency determination under SEQRA is limited to "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." *Id.* at 417; *Chase Partners LLC v. Incorporated Village of Rockville Centre*, 43 A.D.3d 1053, 843 N.Y.S.2d 114 (2d Dep't 2007).

[5] Pursuant to Section 62-5.1.X(2)(e) of the Village Zoning Code, the height of four buildings included in GM's Alternative Plan cannot exceed 42 feet in height, thereby precluding a fifth floor. GM requested that the Code be amended in order to increase the building height to a maximum of 60 feet.

GM does not contest the environmental process or whether the Board took the requisite "hard look" at the environmental impact of the Project. GM argues that nine of the conditions imposed on GM in the Findings Statement are arbitrary and capricious because they are either disproportionate to the impacts caused by the Project, or will not mitigate any environmental impacts at all. GM claims that the Board imposed these conditions in some cases to appease community groups, and in others to shift municipal costs onto GM. The principal conditions that GM challenges are:

1. The requirement that GM reduce the density of the Project from 1,250 to 1,177 residential units;

2. The requirement that GM contribute land and money for a new Village Department of Public Works facility and fire/ambulance station;

3. The requirement that GM expand a buffer area between the Project and Kingsland Point Park;

4. The requirement that GM "reserve" open space for a potential future extension or estuary of the Pocantico River;

5. The requirement that GM provide an additional 150 to 160 parking spaces in designated locations;

6. The requirement that GM make changes to its construction schedule;

7. The requirement that GM potentially grant an environmental easement in favor of the Village;

8. The requirement that GM hold the Village harmless from any injury or damage to persons or property arising out of the presence of any residual soil contamination below the public roads and public spaces; and

9. The requirement that GM grant easements to the Village over public roads, public parks and public open spaces that it intends to dedicate to the Village.

In the context of planning board approval, municipalities may impose restrictions and conditions on developers, but any such conditions must have a "sufficient nexus to and [be]

reasonably expected to alleviate the identified adverse environmental problem[s]." *Ginsburg Dev. Corp. v. Town Bd. of Cortlandt*, 150 Misc.2d 24, 32, 565 N.Y.S.2d 371 (Sup. Ct. Westchester Co. 1990); *Castle Properties Co. v. Ackerson*, 163 A.D.2d 785, 558 N.Y.S.2d 334 (3d Dep't 1990)(planning boards can impose reasonable conditions, but do not have unlimited authority to impose conditions that are not reasonably designed to mitigate any demonstrable defects); *Clinton v. Sommers Ill*, 144 A.D.2d 145,147, 534 N.Y.S.2d 473 (3d Dep't 1988)(planning boards do not have unlimited authority to impose conditions that are not reasonably designed to mitigate any demonstrable impacts); *also see Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994)(government cannot, without just compensation, condition approval of building permit on the grant of a public easement when the condition had no essential nexus to government's interest in the development); *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987)(land use condition must bear an "essential nexus" between the legitimate state interest sought to be advanced by the condition and the impacts of the proposed project).

Similarly, zoning boards may only impose restrictions that are "reasonable" and directly related to the proposed use of the property. *St. Onge v. Donovan*, 71 N.Y.2d 507, 527 N.Y.S.2d 721 (1988)(restrictions are permissible only if they relate directly to the use of the land in question, and are corrective measures designed to protect neighboring properties against the possible adverse effects of that use). Conditions must be invalidated where they do not seek to ameliorate the effects of the land use at issue. *Id.* at 517.

This Court finds that several of the requirements that GM contests in the instant case are reasonably designed to mitigate environmental impacts, or were otherwise agreed to by GM,

including the reduction in density, certain contributions of land and money, the expansion of the buffer area, various changes to the construction schedule, and the requirement to grant an environmental easement. However, the Court finds that other conditions, including the requirement that GM set aside land for a potential estuary, provide additional parking spaces, grant easements to the Village (as opposed to fee title transfer), and indemnify the Village for damages will not mitigate any environmental impacts, or alternatively were not agreed to by the parties during the SEQRA process.

Reduction in Residential Units

With respect to the density reduction, GM contends that the Board impermissibly reduced the number of residential units permitted on the Site from 1,250 (as set forth in the FEIS Alternative Plan) to 1,177. GM argues that this reduction is simply the result of community pressure and is inconsistent with the density calculations set forth in the RF District, which GM contends permit construction of up to approximately 1,870 units on the Site. Respondents counter that GM effectively agreed to reduce the residential component of the Project to 1,177 units as a result of design modifications.

The Court is not persuaded that GM either expressly or implicitly agreed to reduce the number of residential units to 1,177. Nonetheless, evidence in the record supports the conclusion that a combination of factors, including the Village's decision not to approve the zoning amendment proposed by the Applicants (seeking an increase in building height) effectively resulted in the loss of the 73 units.[6]

[6]According to the record, an increase in the size of a buffer adjacent to Kingsland Point Park resulted in the loss of 8 townhouses; the Board's directive to extend restaurant/retail space to a riverfront building resulted in the loss of 12 townhouses; and 54 additional residential units were added to the building plans. The net loss was therefore 73 units.

GM alleges it was told by the Board that GM "had" to reduce the number of residential units due to community pressure, and that GM needed to create a "design justification" for reducing the number to 1,177. However, GM fails to cite to any specific evidence in the record tending to show that the Board bowed to community pressure to reduce the number of residential units to 1,177, and it is not the Court's responsibility to sift through the testimony and exhibits to find support for this argument. Moreover, since the zoning amendment was not approved, and GM cannot build a fifth floor on four of its proposed buildings, there is, per force, a resulting loss of residential units.

GM argues that the density calculations in the RF District that permit up to 1,870 residential units on the Site is tantamount to a legislative finding that such density "is in harmony with the general zoning plan and will not adversely affect the local community." *WEOK Broadcasting Corp. v. Planning Bd. of the Town of Lloyd*, 79 N.Y.2d 373, 583 N.Y.S.2d 170 (1992)(existing zoning provisions are relevant and "tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the local community"). The fact that a specific *use* is permitted within a zoning district strongly suggests that a legislative determination has already been made that such use will not be detrimental to the surrounding area. *Taylor y. Foley*, 122 A.D.2d 205, 207, 505 N.Y.S.2d 166 (2d Dep't 1986); *RPM Motors. Inc. v. Gulotta*, 88 A.D.2d 658, 450 N.Y.S.2d 525 (2d Dep't 1982). However, the fact that the zoning district permits a maximum of 1,870 units does not mean that the maximum number of units is per se permissible. *Ernalex Constr. Realty Corp. v. Bellissimo*, 256 A.D.2d 338, 681 N.Y.S.2d 298 (2d Dep't 1998). The number of residential units that may be accommodated on a particular lot necessarily depends on the layout of the buildings, existing

zoning restrictions, and specific design and environmental factors. A generic environmental review process, like the one conducted by the Village that led to the maximum density in the RF District, is broader and more general than project-specific environmental review. *See* 6 NYCRR § 617.10 (a). For all of these reasons, the Board's determination to permit construction of only 1,177 residential units is neither arbitrary nor capricious.

Contributions to Fire, Ambulance, and Public Works Facilities

GM next challenges the requirement that it contribute up to $1.5 million toward the construction of a new fire and ambulance station. The Findings Statement provides that "Roseland shall be required to contribute towards the construction of, or shall construct at its expense, a firehouse/ambulance station at the location identified on the conceptual site plan. . . provided that in no event shall Roseland's cost to construct the facility exceed $1,500,000." The Findings Statement also requires GM to contribute up to $3.05 million toward construction of a Department of Public Works ("DPW") facility. GM contends that the Village has long had an inadequate DPW facility, a problem unrelated to the Project, and that the cost of creating an adequate facility should not be borne by GM. GM also argues that the monetary contributions are unreasonable in light of the fact that the Project is anticipated to produce an annual net fiscal surplus to the Village of approximately $630,000 at full build out.[7]

The record demonstrates that there is a significant relationship between the Project's impact on the population of Sleepy Hollow, and the provision of municipal resources required to service Lighthouse Landing. According to the Findings Statement, the Project will increase the

[7]The Environmental Impact Statements included an extensive fiscal impact analysis, which examined potential costs to the municipality to provide additional services. After considering the additional municipal services that would be required to meet the needs created by the Project, it was estimated that the Project would produce a net fiscal surplus to the Village.

number of residents in the Village of Sleepy Hollow by approximately twenty-seven percent, which will increase the demand for public services, including fire and police protection, ambulance service, public works, and refuse collection.[8]

In support of GM's contention, an April 4, 2004, memorandum from the Village confirms that the existing DPW facility in Sleepy Hollow is inadequate, that a new DPW facility is an "absolute necessity," and that such a facility is already planned for construction on land owned by GM "to service the *existing* and future Lighthouse Landing development" (emphasis added). However, the record also indicates that GM specifically committed to construct a new DPW facility, and to contribute up to $1.5 million towards the construction of a new fire/ambulation station. In responses to DEIS comments (which are incorporated into, and part of, the FEIS), GM specifically states that:

> The Village Fire Chief has indicated that. . . it would be desirable to locate a new firehouse on the Project site [. . . ]. [U]nder the FEIS Alternative Plan, the Applicant proposes to donate land on the South Parcel at the corner of Beekman Avenue and Hudson Street, and contribute $1.5 million to the Village for the Village to construct a new Fire/Ambulance station to serve the western portion of the inner-village and Lighthouse Landing [. . .]. The new station will provide the fire department and ambulance corps with modern facilities to meet their existing and future operational needs. Further, the Applicant will construct a new Village DPW facility on the East Parcel, the design of which will be jointly developed between the Applicant and the Village. [. . . ]

GM further states that"[i]t is particularly important to note that the 8 acres of vacant land to be donated to the Village on the East Parcel for the proposed DPW facility is especially beneficial to the Village since an alternate site of suitable size does not exist anywhere else within the

[8]The record indicates that construction of a new DPW facility was originally estimated to cost $5 million, an estimate later increased to $11 million. Respondents argue that GM's share is approximately 27 percent of the cost, which is proportional to the anticipated increase in population that the Project is expected to generate.

Village," and that its specific commitment is to "construct a 6,000 square foot DPW building for office and garage space in addition to a 6,000 square foot salt storage shed."

Because GM committed in the FEIS to contribute $1.5 million to the Village towards the cost of a new fire/ambulance station, and such requirement is reasonably expected to alleviate impacts caused by the Project, this condition is neither arbitrary or capricious, or contrary to law. The requirement that GM contribute up to approximately $3 million toward construction of a DPW facility is similarly reasonable. The Findings Statement simply caps GM's financial contribution, specifically providing that "in no event shall [the developer's] cost to construct the facility exceed $3,050,000." Since GM committed to construct a DPW office and storage shed, and there is a sufficient nexus between the impacts of the Project and the facility, imposing a cap on GM's financial contribution towards the DPW facility is not arbitrary or capricious, or otherwise contrary to law.

Expansion of the Buffer Area

GM contends that the Findings Statement improperly requires it to increase the width of a buffer adjacent to Kingsland Point Park, arguing that there is no study or evidence in the record to justify the expansion. However, in several different sections of the FEIS, GM states that it has expanded both the waterfront and interior open space areas available for public and resident use, and that its plan includes "[a] newly proposed landscaped buffer area between Kingsland Point Park and the Project, generally ranging from 75 to 175 feet in width, and extending over 1,000 feet from the expanded beach to the proposed Kingsland Point Park parking area." The Findings Statement indicates that the proposed buffer area will serve to mitigate the visual and "noise" impacts upon Kingsland Point Park that will be created by the Project. Thus, the record supports

the conclusion that expansion of the buffer area adjacent to Kingsland Point Park was agreed to by GM, and that the condition is neither excessive or disproportionate to the potential visual and audible impacts that may be caused by the Project.

Hudson River Estuary/Pocantico River Outlet

The Findings Statement requires GM to "reserve" certain space for any potential future creation of a Hudson River estuary or Pocantico River outlet. GM claims that this requirement should be stricken because it would not serve to mitigate any potentially adverse environmental impacts caused by the Project. This Court agrees.

Petitioner's FEIS states that:

> In the Applicant's opinion as reflected in the DEIS, the creation of this estuary (which is similar in many respects to proposals to relocate the Pocantico River) is not an alternative to the Lighthouse Landing Project, as it is not a measure necessary to mitigate any adverse impacts of the project. Nevertheless, the Applicant recognizes that . . . the new watercourse would provide several benefits for the Village. [. . . ] It would add an additional aesthetically-pleasing element to the waterfront, enhancing the waterfront esplanade and related improvements associated with Lighthouse Landing and substituting a water rather than land buffer between the development and Kingsland Point Park. It could provide ecological benefits providing additional habitat for aquatic and terrestrial species and thus increasing biological diversity. It would also offer additional interpretive educational opportunities.

By this statement, GM did generally acknowledge the concept of an estuary. However, by letter dated April 18, 2007, from Roseland to the Mayor of Sleepy Hollow, the developer states:

> We have spent countless hours "convincing GM" to consent to reserve lands for a future estuary. GM will attach certain conditions to that future use of its land and will not provide any warranties or contribute to the remediation. It will require indemnification for such use if and when an estuary is constructed. As you well know this has always been a major issue to GM.

Under the specific facts and circumstances present here, it cannot be said that GM expressly agreed to set aside land for the creation of a future estuary. Because it is an aesthetic element and not a measure necessary to mitigate an adverse impact, the Board cannot *ipso facto* make it a binding, unilateral requirement that is properly included in the Findings Statement. As set forth, *supra*, "a condition may be imposed upon property so long as there is a reasonable relationship between the problem sought to be alleviated and the application concerning the property." *Matter of Mackall v. White*, 85 A.D.2d 696, 445 N.Y.S.2d 486 (1981); *see Holmes v Planning Bd. of Town of New Castle*, 78 A.D.2d 1, 19, 433 N.Y.S.2d 587 (1980). Here, the creation of a future estuary is not a measure necessary to mitigate an adverse impact caused by the Project. To the extent that GM discussed an agreement in principal to set aside land in order to create a future estuary, that agreement was never memorialized in a separate contract signed by both parties. While the Findings Statements lays out broad principles that may function as a framework for a final agreement, they are not conditions that may be unilaterally imposed upon GM. Accordingly, this requirement is stricken from the Findings Statement.

Increase in Parking Spaces

GM next contends that the Findings Statement improperly requires it to provide for 150-160 more parking spaces than it provided for in the FEIS. GM's design plans provide for approximately 4,000 parking spaces, including 816 off-street spaces adjacent to Beekman Place[9] and 245 on-street spaces within one bock of Beekman Place, which GM contends meets the peak parking demand and complies with existing zoning regulations.

[9]Beekman Avenue is an existing street that connects the Site to the rest of the Village of Sleepy Hollow. As far as this Court can determine, Beekman Place is a proposed street that will run along the commercial corridor of Lighthouse Landing.

The DEIS included a detailed parking analysis showing that there would be "shared" parking based on the mixed residential and commercial uses of the Project. The concept of shared parking in the commercial corridor of the Project is recognized in the text of the RF District, when "the cumulative parking demand is less than the sum of the peak demand values for each individual land use." The concept of "shared" parking avoids a large surplus of parking (and impervious surface) in the waterfront area. Sleepy Hollow Zoning Code § 62-5.1 V(12)(g).

The Findings Statement indicates that the peak commercial parking demand is estimated to be approximately 972 parking spaces, although accounting for the differing peak parking times, "the actual highest single peak parking demand is projected to be 759 spaces." Although 816 parking spaces were provided for in the FEIS, the Findings Statement concludes that "[w]hile this may be a sufficient number of parking spaces to meet the projected highest single peak demand of a given day by utilizing shared parking, the location of the 816 parking spaces on the FEIS Alternative Plan did not provide an adequate number of off-street parking spaces in sufficient proximity to the commercial components of the project." The Board gave no specific reason for its determination that there was an inadequate number of parking spaces within the Project's commercial corridor, other than its desire to "take a conservative approach."

Contrary to Respondent's contention, GM's statement that it would "consider" providing additional spaces is not the equivalent of a binding commitment to do so. In view of the uncontested fact that the actual highest single peak parking demand is projected to be 759 spaces, and the FEIS provided for 816 parking spaces, it was unreasonable for the Board to require GM to provide additional spaces.

Construction Sequencing

GM claims that the construction sequencing contained in the Findings Statement turned its proposed schedule "upside down," and requires the construction of various amenities at unreasonably premature stages of the construction process. Specifically, GM complains about the timing of the repair of a viaduct, the early construction of recreation facilities, including soccer fields and tennis courts, and the timing of the construction of the DWP facility.

With respect to repairing the viaduct, Respondents argue that because reconstruction of the Beekman Avenue Bridge must take place at an early phase of the overall project schedule (so that construction vehicles do not have to travel through a congested area of the Village to access the site), and because this work and repair of the viaduct both require coordination with MTA Metro-North Railroad, it would be costly and unreasonable to perform this work in two separate phases. Respondents further contend that early repair of the viaduct was motivated by safety concerns, including the existence of structural problems. Accordingly, Respondents reasonably changed the viaduct repair to the first year of the Project. With respect to the construction of the DPW facility, the FEIS provides that "[c]onstruction of the public works facility could be started in the first phase of construction, but the timing of the work will be as directed by the Village of Sleepy Hollow." Thus, the Court finds that the modified construction phasing in the Findings Statement with respect to these specific tasks bears a reasonable relationship to the impacts associated with the Project.

With respect to the recreational facilities, however, the Court finds that the construction schedule imposed by the Board is not rational. Respondents contend that "it is only logical that these facilities be developed in tandem with the repair of the viaduct and the reconstruction of the Beekman Avenue Bridge, given their proximity." The Findings Statement further indicates that:

> The burden and inconvenience Village residents will suffer over the course of the construction of the new "Village within a Village," including impacts related to noise and truck traffic, will be mitigated by the residents' ability to enjoy new recreational facilities. Additionally, the timely construction of the new DPW facility will allow for the provision of adequate maintenance of the public roads and additional public spaces to be subsequently constructed.

While GM stated, in response to comments made on the DEIS, that it "will provide public access to the waterfront as early as practicable once construction begins" and that "[e]fforts will be made to provide some pedestrian access to the waterfront as soon as may be practicable," Respondents point to no evidence in the record showing that recreational facilities may also be safely open to the public in the midst of a long term construction project. In any event, the public's early access to recreational facilities on the Site is not a measure that will mitigate impacts related to traffic or noise. Thus, this requirement is stricken from the Findings Statement.

Environmental Easement

With respect to the issue of existing and residual contamination on the Site, the Findings Statement imposes upon GM an obligation to execute an environmental easement in favor of the Village. An environmental easement is an enforcement mechanism used for property where there is residual contamination that makes the property suitable for some, but not all uses, and/or where the residual contamination requires ongoing management. Environmental easements, specifically provided for in Article 71, Title 36 of New York's Environmental Conservation Law (adopted as part of the New York Brownfields Law of 2003), are therefore used to restrict the use of a property to specified categories (e.g., commercial, industrial) or to require the long-term operation, maintenance, and monitoring of "engineering controls" such as pavement, covers,

subsurface barriers, building ventilation systems, fences, and water filtration devices, and "institutional controls," which are non-physical controls.

The purpose of an environmental easement is to ensure that use restrictions or engineering controls remain in place in order to protect public health and the environment. In creating environmental easements, the legislature declared in ECL § 71-3601 that:

> [. . .] contaminated site remedial programs are an important and necessary component of the state's policy of restoring and revitalizing real property located throughout New York state. The legislature further finds that when an environmental remediation project leaves residual contamination at levels that have been determined to be safe for a specific use, but not all uses, or includes engineered structures that must be maintained or protected against damage to be effective, it is necessary to provide an effective and enforceable means of ensuring the performance of maintenance, monitoring or operation requirements, and of ensuring the potential restriction of future uses of the land, including restrictions on drilling for or pumping groundwater for as long as any residual contamination remains hazardous. The legislature declares, therefore, that it is in the public interest to create environmental easements because such easements are necessary for the protection of human health and the environment and to achieve the requirements for remediation established at contaminated sites.

The statute further provides that an environmental easement may be enforced in perpetuity against the grantor, subsequent owners of the property, lessees, and any person using the property by its grantor, by the State, or by the government of the municipality where the property is located. *See* Environmental Conservation Law Article 71, Title 36.

Here, the Findings Statement provides that:

> An environmental easement will be filed with the Land Records Division of the Westchester County Clerk's Office and will be binding upon all future owners of the site or any portions thereof. The Easement will be enforceable by NYSDEC and by the Board of Trustees of the Village of Sleepy Hollow, and, if required by

> NYSDEC, will specify the requisite obligations for securing the public health and environmental protection. The Easement will reference and require implementation of the [site management plan] and the engineering and institutional controls imposed on the Site [. . . ]. The institutional controls will prohibit the use of Site groundwater for potable water purposes and restrict use to classifications which includes open space and parkland use. Should the NYSDEC file a brownfields easement without providing that the obligations run in such a way as to permit enforcement by the Village of Sleepy Hollow, then the Village Trustees shall require the Applicant to execute a separate environmental easement running in favor of the Village.

GM contends that this requirement violates a 2002 agreement between the Village and GM in which the Village agreed that GM's compliance with all New York State Department of Environmental Conservation remediation obligations would fully satisfy all of its soil remediation obligations, and that the Village would require no additional remediation measures.

Respondents counter that GM previously agreed to provide an easement and retain liability for environmental contamination on the Site, and that the Findings Statement does not require GM to do more than was required of it under prior agreements. The record does not support the conclusion that GM necessarily agreed to grant an environmental easement such as the one required by the Findings Statement, nor must this Court decide whether the Findings Statement is inconsistent with any prior agreements between the parties. The requirement that GM grant an environmental easement is reasonably related to the impacts of the Project, and appears to be a requirement under the ECL in any event.

As set forth in the Findings Statement and the parties' submissions, the GM Site was created through successive filling operations with "urban fill material." After the plant closed in 1996, GM conducted environmental tests on the soil, groundwater, and Hudson River sediments in order to determine the extent of potential contamination. In 1996, the Village and GM entered

into an agreement in order to ensure that "the Site is cleaned up in accordance with federal and New York State environmental laws and regulations to protect the public's health, safety and welfare." The agreement was, in part, the result of a federal lawsuit challenging the application of various environmental protection laws. GM agreed, *inter alia,* that it would design and carry out remediation of the site for the future use or reuse of the Site. The 1996 Agreement also contemplated a temporary easement for a public "walkway" over a specific part of the Site in order to facilitate public access to the Hudson River.

On August 29, 2002, GM and the Village entered into an agreement to settle additional claims with respect to the remediation and development of the Site. The Agreement acknowledges that GM was about to enter into a Voluntary Cleanup Agreement ("VCA") with the Department of Environmental Conservation. The Village agreed that "[i]n the event DEC determines, in the course of the investigation carried out pursuant to the VCA, that further remediation of the Site is required, then, with respect to the obligations of GM [concerning environmental assessment and remediation] of the 1996 Agreement, the Village agrees that the satisfactory completion of any such remediation required by DEC will completely satisfy and fulfill the same."

In 2003, GM and Roseland entered into a Voluntary Cleanup Agreement with the DEC, and in 2005 those parties entered into two Brownfield Cleanup Agreements under the State's Brownfield Cleanup Program.[10]

[10]The Brownfield Cleanup Program Act, ECL § 27-1401 (2008) *et. seq.*, was enacted in 2003 to encourage voluntary remediation of Brownfield sites for reuse and redevelopment. ECL § 27-1403. A Brownfield site, with certain exceptions, is defined as any real property, the redevelopment or reuse of which may be complicated by the presence or potential presence of a contaminant. ECL § 27-1405(2). The benefits of admission to the BCP include tax credits and a release from liability to the State of New

It is not entirely clear what GM's substantive objection is to the requirement that it provide an environmental easement. The Findings Statement provides that GM shall provide an environmental easement in favor of the Village only in the event the DEC files a Brownfield easement without permitting enforcement of such an easement by the Village of Sleepy Hollow. However, subdivision 10 of Section 71-3605 of the ECL specifically provides that an environmental easement "may be enforced in law or equity by its grantor, by the state, or any affected local government," which in turn is defined as "every municipality in which land subject to an environmental easement is located." ECL § 71-3603 (1). Thus, the Village is statutory empowered to enforce such an easement; this right is restated in the Findings Statement. Moreover, the FEIS itself recognizes that "due to the Applicant's continuing obligations under the Brownfield Cleanup Program, future uses on the Site must be consistent with the use identified in the Brownfield Cleanup Agreement for the site and with the environmental easement that will be filed [. . .]." Thus, the requirement in the Findings Statement that GM provide an environmental easement is harmonious with the intent of state environmental conservation law, and can hardly be said to be arbitrary or capricious, or not reasonably related to the impacts of the Project.

Indemnification Obligation

GM also argues that the requirement in the Findings Statement that GM hold the Village harmless from injury arising out of any residual soil contamination below the public roads and public spaces on the Site "goes far beyond" the 2002 Agreement and is therefore arbitrary and

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York "arising out of the presence of any contamination in, on or emanating from the Brownfield site." *See* 6 NYCRR § 375-3.9 (e); ECL § 27-1421 (1).

capricious. As discussed above, the 2002 Agreement relates to the clean-up of GM's Site, and states that the satisfactory completion of any remediation required by DEC will satisfy all of GM's remediation obligations. It does not address the separate issues of indemnification, liability, environmental insurance requirements or any other issues pertaining to the allocation of risk and liability for residual contamination. In this Court's view, GM is mixing apples and oranges when it discusses remediation and indemnification as if they were synonymous; they are not. Moreover, whether the hold harmless requirement is inconsistent with the parties' 2002 Agreement is not the issue. The question is whether the Respondents can impose indemnification on GM as a condition of approving the Project. As discussed above, Respondents can impose reasonable conditions on GM that are designed to mitigate environmental impacts caused by the Project. However, indemnification is not a measure designed to mitigate an impact caused by the Project. It is a means to allocate liability in the event that there is future litigation, or future clean-up costs, with respect to the residual soil contamination that will remain on the Site after remediation measure have been undertaken. Indemnification will not reduce the level of this contamination, but serves to allocate responsibility for future, undetermined environmental damages. In the absence of an indemnification agreement between the parties, this Court finds that the Board may not unilaterally impose such an obligation on GM in the Findings Statement. This condition is therefore stricken.[11]

[11]Many, if not most of the litigated cases regarding the contractual allocation of environmental liability arise under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 94 Stat. 2767, as amended, 42 U.S.C. §§ 9601-9675, enacted by Congress in 1980. The Act was designed to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination. CERCLA § 107(e) specifically addresses the

Dedication of Land in Fee Simple

Finally, GM challenges the Board's determination not to accept fee simple title to any of the land beneath public roads, public parks and open public spaces that GM intends to grant to the Village. Petitioner contends this is contrary to Section 62-5.1(E)(1) of the RF District. That section essentially provides that the public will always have access to the Hudson River waterfront in the RF District, and a landowner must provide waterfront access to the public either by means of granting an easement to the Village or by granting fee ownership to the Village. The statute defines public access as "safe and unobstructed access to and along the dry, nontidal or submerged shore areas of the Hudson River for all members of the public" and further provides that:

> Access may be regulated by reasonable conditions in a management plan submitted by the applicant and approved by the Mayor and Board of Trustees as part of the final site plan approval. *The access shall be at least 15 feet wide from a street to the shoreline and at least 20 feet wide along the shoreline for the entire width of the property in the RF - Riverfront Development District* (emphasis added).

Section 62-5.1(E)(1) also provides that such access " shall be, *at the option of the applicant*, in the form of a permanent easement or the granting of fee title to the Village of Sleepy Hollow" (emphasis added). Thus, the RF District recognizes that since the property owner must grant access to the public, it has the option to decide how it chooses to convey that property.

Neither Petitioner nor Respondents contest the meaning of Section 62-5.1(E)(1). Nor do they state what portions of land within the GM Site fall within the definition of this Section. The

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transfer of, and indemnification for, such liability. This Court does not make any determination with respect to which party may be responsible for future clean-up costs or other damages.

Findings Statement simply states:

> After the remediation of the West Parcel is completed to the satisfaction of the NYSDEC, there will remain residual soil contamination at low levels. The Village does not wish to assume any potential future liability to third parties as a result of this contamination. As part of the FEIS Alternative Plan certain areas of the West Parcel are proposed to be public roads, public parks and public open space both along the riverfront and within the interior of the site. In order to protect itself from any potential future liability, the Village will not take title to the land within any of these public areas or under any roads. Rather, the Village will take title to the physical improvements in those areas and the road bed and Roseland will grant easements in perpetuity to the Village which would obligate the village to repair and maintain the pubic roads, public parks and public open space areas [. . .].

Respondents concede that the import of Section 62-5.1(E)(1) is that a developer within the RF District must provide waterfront access to the public either by means of granting an easement of access to the Village or, by granting fee ownership of certain lands which would provide access to the waterfront. However, the plain text of this section gives the developer (not the Village) the option as to whether to provide access to the riverfront by either an easement to the Village or by fee ownership to the Village.

Respondents argue GM already agreed in the 1996 Agreement to grant an easement to the Village in order to facilitate public access to the Hudson River. However, the provision for an easement in that Agreement relates exclusively to an easement to construct, as part of a project undertaken by the Village, a public "walkway" on a specified part of the GM Site, referred to only as "over the rocks."

To the extent that certain portions of the GM Site fall within Section 62-5.1(E)(1), Respondents may not void the Petitioner's statutory option. While the Village may have a legitimate public purpose in avoiding title in fee simple to such property, there is simply no authority to do so either within the zoning statute or SEQRA.

**CONCLUSION**

For all of these reasons, GM's petition is granted in part, and denied in part, to the extent specifically discussed above.[12] The Court has considered all of the remaining arguments raised by the parties, and to the extent not specifically addressed above, finds them to be without merit. No further proceedings are warranted. *See St. Onge v. Donovan*, 71 N.Y.S.2d 507, 527 N.Y.S.2d 721 (1988)(lower courts properly excised invalid conditions without the need to remand for further proceedings); *Richter v. Delmond*, 33 A.D.3d 1008, 824 N.Y.S.2d 327 (2d Dep't 2006)(striking conditions without further proceedings); *Clinton v. Sommers, III*, 144 A.D.2d 145, 148, 534 N.Y.S.2d 473 (3d Dep't 1988)(annulling only the portion of the Planning Board's site plan approval that imposed improper conditions without further proceedings).

The foregoing constitutes the opinion, decision, order and judgment of this Court.

[12]Respondents' affirmative defenses either fail to state a claim, are wholly conclusory, or barred by this Court's prior ruling denying Respondents' motion to dismiss. The Court further finds that Respondents' argument that Roseland and/or the Town of Mount Pleasant Industrial Development Agency ("TMPIDA") are necessary parties to this proceeding pursuant to CPLR § 1001 to be without merit. Since Roseland is no longer an applicant, it has no interest in the Project or the Site and will not be inequitably affected by the judgment in this action. Moreover, the fact that the TMPIDA has legal title by virtue of the industrial bond financing transaction does not change the fact that GM is the party that will be affected by the judgment in this action.

Dated: White Plains, New York
December 31, 2009

James W. Hubert
Acting Supreme Court Justice

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