SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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MAYOR AND BOARD OF TRUSTEES OF THE VILLAGE OF TARRYTOWN and the VILLAGE OF TARRYTOWN,

Petitioners,

-against-

MAYOR AND BOARD OF TRUSTEES OF THE VILLAGE OF SLEEPY HOLLOW and GENERAL MOTORS LLC a/k/a GENERAL MOTORS COMPANY, LLC,

Respondents.

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DECISION, ORDER AND JUDGMENT

Index No. 11630/11

Hubert, J.

Before the Court is a CPLR Article 78 Proceeding filed by Petitioners challenging (1) a findings statement issued in 2007 by Respondent Board of Trustees of the Village of Sleepy Hollow ("Sleepy Hollow") under the State Environmental Quality Review Act ("SEQRA"); (2) a resolution dated January 25, 2011 ("the Resolution"), which adopted the 2007 findings statement and amendments thereto (collectively, "the Findings Statement"); and (3) a special permit issued by Sleepy Hollow in June, 2011 to Respondent General Motors in connection with the large scale waterfront development project known as Lighthouse Landing ("the Project"). Petitioners

argue that these actions and approvals by Sleepy Hollow should be set aside because Sleepy Hollow, as lead agency, failed to take the requisite "hard look" under SEQRA at the impact that the Project would have on traffic in neighboring Tarrytown. Petitioners also assert that the Findings Statement failed to adequately mitigate traffic impacts in Tarrytown or, alternatively, "whittled away," the traffic mitigation measures as first proposed in 2007. Finally, Petitioners argue that Sleepy Hollow failed to undertake and complete a supplemental environmental impact statement ("SEIS") which they allege was procedurally required under the circumstances.

Background

The Findings Statement and approvals at issue arose from General Motors' ("GM") efforts to develop a 96 acre parcel of property it owns in Sleepy Hollow, New York, along the Hudson River waterfront ("the Site").[1] The property is what remains of a former GM automotive assembly plant that played a significant role in the local economy for over seventy years. After closing the plant in 1996, GM embarked on the long process of dismantling the industrial plant, cleaning up the Site, and securing a developer to turn the property into a large scale waterfront development project in Sleepy Hollow.

General Motors and its developer submitted an application to Sleepy Hollow for approval to build the Project in February 2003. The Project consisted of residential apartments, condominium units, townhouses, retail and office space, as well as parkland. Pursuant to the SEQRA environmental review process, Sleepy Hollow conducted a review of the Project and its environmental impacts. Over 50 public meetings and hearings were convened, and Sleepy

[1] General Motors, the beneficial owner of the site, conveyed the property to the Town of Mount Pleasant Development Agency in 1985 pursuant to an industrial revenue bond financing transaction.

Hollow received input from dozens of local and state agencies, consultants, environmental organizations, and the public. Over the course of the review period, General Motors 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 and commercial components of the Project.

During this process, Sleepy Hollow identified Tarrytown as an "involved agency" under SEQRA. (The Villages of Tarrytown and Sleepy Hollow lie adjacent to one another in Westchester County, the former lying immediately south of the latter. The principal roadway connecting the villages is Route 9, a New York State owned two-lane thorough-fare.) Accordingly, officials from Tarrytown participated in the underlying review process, expressing their concern over the size of the Project and its potential impact on traffic and parking within Tarrytown. As early as February 22, 2005, members of Tarrytown's Board of Trustees and the Village's planning consultant testified at the Draft Environmental Impact Statement (DEIS) public hearings. They later submitted a report which concluded that reducing the residential and commercial density of the Project by approximately fifty percent would be the only means to adequately mitigate traffic impacts along Route 9. The fifty-percent density reduction would also decrease the potential impacts on local schools and preserve Tarrytown's existing downtown businesses.

In June 2007, Tarrytown submitted comments on Sleepy Hollow's proposed findings statement, declaring that the statement failed to take a "hard look" at Tarrytown's recommendation to reduce the density of the Project by fifty percent. Tarrytown further submitted a report by an economics and urban planning expert which concluded that the

developer could maintain its rate of return even if density was reduced by fifty percent. By letter dated July 17, 2007, Tarrytown's traffic consultant advised Respondents that the traffic analysis upon which the Final Environmental Impact Statement (FEIS) was based was "neither sufficiently accurate nor complete to make a truly definitive findings statement."

Sleepy Hollow issued its SEQRA findings statement on July 24, 2007. The 129-page document contained a detailed review of the potential environmental impacts of the Project, as well as impacts on land use, zoning and public policy, ecological resources, economic conditions, cultural and archeological resources, open space, utilities, traffic, mass transit, and parking conditions, among other matters.

As initially proposed by General Motors, and prior to the issuance of the FEIS, the Project consisted of approximately 1,562 residential units, 50,200 square feet of office space, 180,000 square feet of commercial space, and a 147-room hotel, including a conference center and restaurant. The Project ultimately approved by Sleepy Hollow in the 2007 findings statement consisted of 1,177 residential units (a 25 % reduction), 35,000 square feet of office space (a 30% reduction), 135,000 square feet of commercial space (a 25% reduction), and a 140-room hotel including a restaurant, without a conference center.

One month later, on August 29, 2007, Tarrytown issued its own SEQRA findings. Tarrytown noted that the traffic mitigation measures proposed by Sleepy Hollow on Route 9 eliminated on-street parking at certain intersections in Tarrytown. Tarrytown officials asserted that this was unacceptable because (1) it would eliminate short term parking that served retail stores in the Village of Tarrytown, exacerbating an already existing parking shortage; and (2) it would change the character of Route 9 from a two-lane arterial to a four-lane arterial in certain

areas that would be out of character with Tarrytown's "Main Street," which runs perpendicular to Route 9. Tarrytown's finding statement further concluded that eliminating on-street parking would result in the loss of overnight parking for apartment residents, and would affect pedestrian safety on Route 9.

The planning approval process was lengthy and contentious. Following issuance of the July 24, 2007 SEQRA findings statement, General Motors filed two CPLR Article 78 proceedings against Sleepy Hollow. The first, filed in 2007 under Index No. 23984/07, sought to set aside various conditions imposed on General Motors by Sleepy Hollow in its 2007 SEQRA findings statement, including significant reductions in project density beyond what was contained in the concept plan drafted by General Motors. The second (Index No. 20497/08) sought to compel Sleepy Hollow, by mandamus, to either approve or deny the Concept Plan for the Project, as proposed and drafted by General Motors, and to issue or deny a Special Permit

The principal conditions that General Motors challenged in its first action were: (1) the requirement to further reduce the density of the Project from 1,250 to 1,177 residential units (General Motors original plan proposed 1,562 units); (2) the requirement to contribute land and money for a new Village Department of Public Works facility and fire/ambulance station; (3) the requirement to expand a buffer area between the Project and Kingsland Point Park; (4) the requirement to "reserve" open space for a potential future extension or estuary of the Pocantico River; (5) the requirement to provide an additional 150 to 160 parking spaces in designated locations; (6) the requirement to make changes to its construction schedule; (7) the requirement to grant an environmental easement in favor of the Village; (8) the requirement to hold the Village of Sleepy Hollow 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 General Motors grant easements to Sleepy Hollow over public roads, public parks and public open spaces that it intended to dedicate to the Village.

By decision and order dated December 31, 2009, this Court set aside some of the conditions imposed by Sleepy Hollow, but upheld others, including Sleepy Hollow's determination that the residential density of the Project be further reduced from 1,250 residential units to 1,177 units.

The second Article 78 proceeding filed by General Motors (Index No. 20497/08), which sought to compel Sleepy Hollow to either approve or deny issuance of a Special Permit, was denied. By decision and order dated May 28, 2010, the Court found, *inter alia*, that General Motors was not entitled to relief in the form of mandamus because the act complained of was discretionary.

The July 24, 2007 findings statement also prompted Tarrytown to file its own Article 78 Petition against Sleepy Hollow and GM (Index No. 21358/07). This was ultimately resolved by stipulation and order on November 13, 2007.[2]

As a result of the Court's decisions in the General Motors/Sleepy Hollow litigation, the Project was revised, both to comply with this Court's order and to meet Sleepy Hollow zoning requirements. GM and Sleepy Hollow also negotiated other changes designed to better implement the goals of the Project.

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[2] The stipulation placed Tarrytown's claims on hold pending resolution of the litigation between Sleepy Hollow and General Motors and issuance of a site plan and/or Special Permit. It further allowed Tarrytown to renew its claims via Amended Petition, which was accomplished by the filing of the instant action.

In December 2010, General Motors presented a revised Riverfront Development Concept Plan (RDCP) to Sleepy Hollow. General Motors also prepared an Environmental Assessment Narrative ("EAN"). The EAN compared the environmental impacts of the RDCP, with those identified and discussed in the 2007 findings statement. Interested and involved agencies submitted written comments on the EAN and RDCP. Public hearings were also held in January of 2011.

With respect to traffic, the EAN concluded that the RDCP would have the same, or fewer, potential environmental impacts than those identified in 2007 (and amended by Court order in 2009). The EAN specifically stated:

> The change in the Applicant's obligations from providing or contributing towards certain infrastructure, mitigation measures and amenities identified in the FEIS or 2007 Findings, to making a series of payments to the Village to be applied by the Village towards these mitigation measures and amenities as and when needed as the Project progresses, does not itself significantly change the extent and nature of the public features to be provided at the developer's expense. As this change will provide the Village with more direct control over and flexibility in the design and timing of such features, the corresponding mitigation measures described in the 2007 Findings will be enhanced, and the environmental impacts from the Project will not be significantly different from or greater than those previously considered.

After reviewing General Motors' RDCP, the EAN, receiving comments from involved agencies, and conducting hearings, Sleepy Hollow determined that the revised Riverfront Development Concept Plan did not present any environmental impacts that had not already been identified in prior SEQRA proceedings. Sleepy Hollow therefore determined that a Supplemental Environmental Impact Statement ("SEIS") was not warranted.

In due course, on January 25, 2011, Sleepy Hollow adopted (and published) a

"Resolution on Environmental Determination and Findings, Revised Riverfront Development Concept Plan" ("the Resolution"), which incorporated the July 24, 2007, 129-page findings statement, the amendments thereto necessitated by Court Order, and the negotiated amendments, all as required under 6 NYCRR §§ 617.7 and 617.11. On May 17, 2011, Tarrytown adopted its own "Supplemental Findings" under SEQRA, determining that the Project should not move forward because it lacked sufficient mitigation measures to address traffic and parking in Tarrytown.

Further public hearings were held in February, March and April, 2011 to discuss aspects of the RDCP and EAN with a view toward issuing a Special Permit. Additional written comments were taken. A public hearing on the issuance of a Special Permit and related items was held in June 2011. At the conclusion of the hearing, Sleepy Hollow unanimously approved the RDCP, issued Consistency Findings, and granted a Special Permit to General Motors.

DISCUSSION

The allegations in the instant litigation are predicated on arguments, both substantive and procedural in nature. Substantively, Petitioners contend that Sleepy Hollow's Findings Statement and approvals should be annulled because the Sleepy Hollow Board (1) failed to take a "hard look" at the environmental impacts of the Project as they relate to traffic and parking; (2) did not complete a thorough review of reasonable alternatives to the Project; and (3) failed to adequately mitigate traffic and parking impacts.

Procedurally, Petitioners contend that Sleepy Hollow was required to prepare an SEIS based on certain revisions to the Findings Statement and because Sleepy Hollow obtained

"substantial additional information" that required preparation and publication of an SEIS[3]. Finally, Petitioners seek to enjoin Sleepy Hollow from proceeding with the Project on the grounds that the conflicting determinations in each Village's Finding Statements must first be reconciled.

With respect to Petitioners' argument that Sleepy Hollow failed to take a "hard look" at the environmental impacts of the Project, the complaint by Petitioners is simply that Sleepy Hollow should have adopted the conclusions reached by Tarrytown's traffic and economics experts. In other words, the only way to adequately mitigate traffic generated by the Project was to reduce the Project's density by approximately fifty percent.

The Court of Appeals has provided the legal framework for analysis of environmental impacts by a lead agency, giving a thorough summary of both the procedural and substantive considerations governing SEQRA, in *Akpan v. Koch*, 75 N.Y.2d 561, 569-70 555 N.Y.S.2d 16 (1990).

> The primary purpose of SEQRA is "to inject environmental considerations directly into governmental decision making" (*Matter of Coca-Cola Bottling Co. v Board of Estimate*, 72 NY2d 674, 679). [. . .] Where two or more agencies are involved in the environmental review process, it is the "lead" agency which must assess the environmental impact of a proposed action (ECL 8-0109 [4]; *Matter of Coca-Cola Bottling Co. v Board of Estimate*, 72 NY2d, at 680, supra). [. . .] SEQRA also imposes substantive requirements, delineating the content of the EIS . . . and requiring the lead agency to "act and choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects" (ECL 8-0109 [1]; *see generally, Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417).

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[3] Petitioners do elaborate or identify what "substantial information" was obtained.

> Judicial review of a lead agency's SEQRA determination is limited to whether the determination was made in accordance with lawful procedure and whether, substantively, the determination "was affected by an error of law or was arbitrary and capricious or an abuse of discretion (CPLR 7803 [3]; *Chinese Staff & Workers Assn. v City of New York*, 68 N.Y.2d 359, 353; Matter of Jackson v New York State Urban Dev. Corp., 67 NY2d, at 416, supra) . . . [T]he courts must "review the record 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" (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d, at 417; *see also, Chinese Staff & Workers Assn. v City of New York*, 68 NY2d, at 363-364, *supra; Aldrich v Pattison*, 107 AD2d 258, 265; *H.O.M.E.S. v New York State Urban Dev. Corp.*, 69 AD2d 222, 232). [. . .] [C]ompliance. . . is governed by a rule of reason and the extent to which particular environmental factors are to be considered varies in accordance with the circumstances and nature of particular proposals (Matter of Jackson v New York State Urban Dev. Corp., 67 NY2d, at 417, supra). [. . .] [C]ourts may not substitute their judgment for that of the agency for it is not their role to "weigh the desirability of any action or [to] choose among alternatives."

This Court will not detail all of the voluminous reports, exhibits, affirmations and affidavits of the parties; they are part of the record before the Court. The traffic study commissioned by Respondents during the SEQRA review examined present and projected traffic impacts at no fewer than thirty-seven intersections in both municipalities. Fifty-nine percent of these (twenty-two of thirty-seven) were within Tarrytown's boarders. The review of the environmental impacts on the streets of both Tarrytown and Sleepy Hollow was nothing short of comprehensive.

The assertion that Respondents failed to adequately consider, recommend and adopt appropriate traffic mitigation, not only for Route 9, but for all conceivably impacted tributary roads and access routes, also lacks merit. Respondents began with the 1998 Tarrytown traffic

study that was commissioned, proposed and approved by Petitioners as part of Petitioners' own FEIS for a prior waterfront development project in Tarrytown known as Ferry Landings. The mitigation measures approved by Tarrytown for Ferry Landings were, with respect to Route 9, wholly incorporated (and reasonably and proportionately funded in "fair share") by Sleepy Hollow in its FEIS, Findings Statement and subsequent documents in the instant action. It is worth noting that this Court can find no evidence in the record that any of the Route 9 mitigation approved by Tarrytown for Ferry Landings was ever implemented by Tarrytown. Accordingly, this is not a situation where Tarrytown's actual experience with Ferry Landings has informed what now appears to be a contrary conclusion by Petitioners as to the instant Project. It is unreasonable for Petitioners to assert that those measures deemed acceptable by Tarrytown for Ferry Landings, are now unacceptable or ineffective when proposed by Respondents for Lighthouse Landing.

Additional mitigation proposals are contained in the Findings Statement adopted in the 2011 Resolution and the Special Permit. Sleepy Hollow considered alternatives to further mitigate traffic, such as using existing rail tracks for light rail or similar access between the Philipse Manor and Tarrytown train stations (although Metro-North indicated it would not approve use of its tracks for this purpose). The Special Permit requires the developer to provide shuttle service from Lighthouse Landing to the Tarrytown train station. It also mandates that the developer contribute its fair share toward traffic calming measures, such as speed bumps or curb extensions in the Miller Park neighborhood of Tarrytown, which has become a pass-through for motorists seeking to avoid traffic along Route 9.

Furthermore, nothing in the record suggests that Sleepy Hollow was unwilling to

consider reducing the density of the Project (which presumably would reduce traffic impact). Sleepy Hollow considered Tarrytown's suggested degree of density reduction, but concluded that "there would be no material improvement in traffic conditions" if Tarrytown's proposal was adopted. The FEIS specifically stated:

> Reductions of the magnitude suggested by the commentators (i.e., to 750 or 900 residential units) are not feasible alternatives to the Proposed Action, given the objectives and capabilities of the Applicant and the extent of the infrastructure, open space and other Village improvements that are part of the project. Further potential significant adverse impacts of the Proposed Action will, in the Applicant's opinion, be mitigated to the maximum extent practicable; according, the further reduction in density suggested by the comment would not achieve any material environmental benefit, but would result in a loss of revenues and benefits.

It is well settled that alternatives must be considered in light of the developer's objectives. *Save Open Space v. Planning Board of Town of Newburgh*, 74 A.D.3d 1350, 904 N.Y.S.2d 188 (2d Dep't 2010), *lv. den.* 15 N.Y.3d 711, 910 N.Y.S.2d 36 (2010). Here, reducing the Project's density was not only considered, it was implemented in Sleepy Hollow's Findings Statement, albeit to a lesser degree than urged by Petitioners. As previously stated, the Project, as initially proposed, called for 1,562 residential units to be constructed. Eventually this was "whittled down" to 1,177 units, a 25% reduction. Similar reductions in office space (30%), commercial space (25%) and hotel space (10%) were adopted. While Petitioners insist that only reductions of the magnitude recommended by their own experts will sufficiently mitigate traffic,[4]

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[4]Specifically, Tarrytown's planning consultant concluded that the 1,250 residential units (proposed in the FEIS) be reduced to 781 units; the retail component be reduced from the proposed 132,000 square feet to no more than 90,000 square feet (so as not to unduly compete with Tarrytown's downtown); the proposed office space be reduced rom 35,000 square feet to 25,000 square feet, and the size of the hotel be reduced from 140 rooms to 70 rooms.

Sleepy Hollow's decision not to adopt Tarrytown's proposal does not mean that Respondents failed to consider or implement Project density reduction in mitigation of traffic impacts.

It cannot be said that the alternatives adopted by Sleepy Hollow were unreasonable, illegal, or arbitrary and capricious. As previously stated, the lead agency has considerable latitude in evaluating environmental effects and choosing between alternative measures. *Matter of Jackson, supra.* After weighing alternatives in the instant matter, Sleepy Hollow determined that reduction in residential and commercial density, as proposed by Tarrytown, would jeopardize both the environmental and fiscal benefits of the Project to all taxing jurisdictions (including Tarrytown's own School District). In concluding that the Project, as approved, outweighed any additional traffic benefits potentially yielded by Tarrytown's suggested density proposal, Sleepy Hollow reasonably considered the following factors.

First, forty-five of the ninety-six acres encompassing the Project (46%) would become open space developed for public use and recreation, creating public access to the Hudson River (in Sleepy Hollow) for the first time in over 100 years. Second, the defunct General Motors plant site, a state designated brown field, would be cleaned up by General Motors to State DEC standards, substantially mitigating, if not reversing, 100 years of soil contamination throughout the ninety-six acres. Additionally, affordable and work-force housing would be constructed and integrated in the residential equation. Finally, a projected net fiscal surplus between $630,000 and $1.5 million dollars would be realized by the Sleepy Hollow and Tarrytown school districts, respectively. Accordingly, Sleepy Hollow's finding that Tarrytown's proposal was not a feasible alternative to the proposed action, in vew of the objectives and capabilities of the developer, was neither arbitrary nor capricious.

Other issues raised by Tarrytown are economic in nature. Petitioners, for example, allege that the loss of some on-street parking in Tarrytown (assuming Tarrytown were to agree to undertake such mitigation) will adversely impact merchants because fewer shoppers will be able to park on Route 9. They further allege that the Project's retail component would unduly compete with Tarrytown's downtown unless reduced from the proposed 132,000 square feet to no more than 90,000 square feet. Those are economic harm issues, and court precedent is clear; standing to review SEQRA compliance is limited to asserting environmental injury as opposed to economic harm. *Society of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 570 N.Y.S.2d 778 (1991).

Inasmuch as the record establishes that Sleepy Hollow's review comports with the substantive and procedural requirements of SEQRA, the fact that Tarrytown desired additional mitigation measures is not a basis for invalidating those findings. *Matter of City of Rye v. Korff, et al.*, 249 A.D.2d 470, 472, 671 N.Y.S.2d 526 (2d Dep't 1998), *lv. den.*, 92 N.Y.2d 808, 678 N.Y.S.2d 593 (1998). In this Court's view, Respondents took the requisite "hard look" at the environmental impacts of the Project as they relate to traffic and parking, completed a thorough review of reasonable alternatives to the Project, and adequately mitigated impacts to a degree reasonable in light of the alternatives.

Petitioners next argue that the Project cannot proceed until Sleepy Hollow and Tarrytown reconcile their respective findings statements with respect to traffic and parking. This argument seems to find its genesis in Sleepy Hollow's identification of Tarrytown as an "involved agency" for SEQRA purposes. See ECL §8-0109 (8), 6 NYCRR § 617.11 (d).

In support of their argument, Petitioners cite a SEQRA Handbook (the "Handbook")

issued by New York's Department of Environmental Conservation, which provides, in relevant part:

> Agencies involved in the same action may have entirely different findings. This can result from agencies differing balancing of environmental with social and economic factors, as well as from fundamental differences among agencies' underlying jurisdictions. An involved agency is not obligated to make the same findings as the lead agency or any other involved agency. [. . .] If one agency prepares positive findings, and another prepares negative findings, the action cannot go forward unless the conflict is resolved.

Petitioners thus contend that the Project cannot proceed until the conflicting determinations in each Village's Findings Statements are reconciled, and that the other approvals, including the Special Permit, Consistency Findings and Design Guidelines must be set aside pending such reconciliation. Respondents, not surprisingly, argue that although the Village of Tarrytown was identified by Sleepy Hollow as an "involved agency" for SEQRA purposes, Tarrytown's legal status was really that of an "interested agency" and therefore Tarrytown's Findings Statements are a legal nullity.

Neither side cites any statutory authority or case law for the proposition that "...[i]f one [involved] agency prepares positive findings, and another prepares negative findings, the action cannot go forward unless the conflict is resolved." There may well be instances where two lead agencies conflict, or two agencies lay competing claims to lead agency designation. Neither is the case here. Sleepy Hollow is the lead agency[5].

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[5] Under 6 NYCRR § 617.6 (b) (2) lead agency status, among multiple agencies in a Type I action, must be determined at the outset. There is no contention that this wasn't done. Typically such determination occurs by consent among the involved agencies. Disagreement as to who shall be the lead agency requires designation of same by the Commissioner. *See* 6 NYCRR § 617.6 (b)(5), *et. seq*. On the record before the Court, it does not appear that Sleepy

As to the language in the quoted section of the Handbook, the terms "positive finding" and "negative finding" are not found in any sections of ECL Article 8 that pertain to findings statements.[6] Thus, they cannot even be addressed as specific legal terms with known definitions and applications.

Quotations from the Handbook, for the reasons set forth, and for reasons plainly evident, certainly do not qualify as legal authority. As a practical matter, if all that was required under SEQRA was a contrary finding statement by an involved municipality, then any involved municipality could block development by a lead agency simply by reaching a different conclusion about an environmental impact. There is no case law this Court is aware of that supports this proposition.

Section 6 NYCRR § 617.2(s) defines "involved agency" as "an agency that has jurisdiction by law to fund, approve or directly undertake an action." The term "interested agency," by contrast, is defined as "an agency that lacks the jurisdiction to fund, approve or directly undertake an action but wishes to participate in the review process because of its specific expertise or concern about the proposed action." *See* 6 NYCRR § 617.2 (t). Tarrytown argues

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Hollow's declaration of lead agency status was ever disputed by any "involved agency," including Petitioners.

[6] Under ECL Art. 8 there are so-called *positive declarations* and *negative declarations* that involved agencies make, as a threshold matter, about a proposed project. Depending on which declaration is made, an environmental impact study may be triggered. Disputes regarding whether a negative declaration or a positive declaration should have been made are well represented in the case law. See, e.g., *Village of Tarrytown v. Planning Board of Village of Sleepy Hollow, et al.*, 292 A.D.2d 617, 741 N.Y.S.2d 44 (2d Dep't 2002). In this case a positive declaration was made, which triggered environmental review. The terms "positive" and "negative," as used in the quoted Handbook section, do not otherwise appear in the statutes or case law.

that it was properly identified as an involved agency because traffic in Tarrytown along Route 9 would be impacted.

The traffic mitigation measures recommended in the FEIS include the removal of some on-street parking (and the attendant parking meters) near certain intersections along Route 9 in Tarrytown. The proposed mitigation would purportedly widen the roadway at these intersections in order to accommodate left turn traffic and simultaneously facilitate through-traffic at the intersections. Tarrytown would have to approve aspects of the traffic mitigation measures (principally meter removal, since Route 9 itself is owned by the State) and would suffer the loss of meter revenue and shopper convenience if implemented. Respondents counter that Tarrytown has no approval authority over traffic improvements on Route 9, a State road under the jurisdiction of the New York State Department of Transportation.

It is undisputed that no part of the Project will lie within the borders of Tarrytown. All land, excavation, soil contamination removal/mitigation, residential/office construction, parking area construction, external/internal access construction of roadways and walkways, storm water run-off mitigation, etc. is located and/or occurs within the geographical confines of the Village of Sleepy Hollow. The construction itself does not impact Tarrytown; and Tarrytown does not allege differently. Tarrytown's sole issue, of an environmental nature, is what impact the completed project will have on traffic, including congestion, noise, and pollution within its jurisdictional borders.

In *Matter of Incorporated Vil. of Poquott v. Cahill*, 11 A.D.3d 536, 539, 782 N.Y.S.2d 823 (2d Dep't 2004) these same considerations led the Second Department to reject petitioner Village of Poquott's claims, predicated as they were, on its alleged status as an involved agency.

The court determined that in lacking "... jurisdiction by law to fund, approve or directly undertake any portion of the Project . . . [the Village] was not an involved agency within the meaning of 6 NYCRR 617.2(s) . . . [and] at best was an 'interested agency'. . . [with] no greater right to participate in the review process than any member of the public would have." *Id.*

Thus, it would appear that Tarrytown is not an involved agency, but an interested agency, notwithstanding Sleepy Hollow's designation to the contrary. There is no legal authority which vests a concomitant right in Tarrytown to mandate resolution of a contrary findings statement before the Project can proceed. Indeed, interested agencies are not vested with any statutory authority to issue findings statements at all.

As stated previously, there is no dispute that Sleepy Hollow is the lead agency, and properly identified traffic congestion in Tarrytown as an environmental impact to be addressed in the course of SEQRA review of the action. Thus, delving into the finer points of the meaning of the terms "involved agency" versus "interested agency," "positive findings" versus "negative findings," yields little in the way of finality on the issue of traffic impacts of the Project on Tarrytown. Because traffic impact is an environmental issue, Respondents were obligated to take (and did), under SEQRA, the requisite hard look at it as it applied to Tarrytown, regardless of whether Tarrytown was "involved' or merely "interested." This Court has already concluded that Sleepy Hollow, indeed, took the requisite "hard look."

Procedurally, Petitioners contend that Sleepy Hollow was required to prepare a Supplemental Environmental Impact Statement, but failed to do so. Petitioner argues that based upon "substantial additional information obtained by the Sleepy Hollow Board," it should have prepared an SEIS before issuing its Findings Statement and other approvals. This Court

disagrees.

An SEIS serves to supplement or amend a previously prepared environmental impact statement. The purpose of an SEIS is to provide involved agencies and the public with information about potentially significant environmental impacts that arise from (1) changes proposed to a project; (2) newly discovered information; or (3) a change in circumstances related to the project.

There is no support in the record for Petitioners' claim that there is newly discovered information, or a change in circumstances related to the Project that would mandate an SEIS. In the four years that elapsed between the issuance of the finding statement by Sleepy Hollow in July of 2007 and the Finding Statement adopted in the January 25, 2011 Resolution, the only "newly discovered" information was this Court's decision resolving the dispute between Sleepy Hollow and General Motors. As to any change in circumstances, the record before this Court is devoid of any, except that the stalled Project is now poised to move forward.

However, assuming, arguendo, that the project has been changed, this would not necessarily give rise to the need to prepare an SEIS. *Matter of C/S 12th Ave. LLC v. City of New York*, 32 A.D.3d 1, 815 N.Y.S.2d 516 , 522 (1st Dep't 2006). Indeed, "[n]othing in SEQRA or its regulations expressly calls for issuance of a SEIS." *Matter of Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 503 N.Y.S.2d 298 (1986); *Matter of Riverkeeper, Inc. v. Planning Bd. of Town of Southeast*, 9 N.Y.3d 219, 231, 851 N.Y.S.2d 76, 80 (2007)(lead agency's determination whether to require a SEIS is discretionary). Where there are proposed changes to a project or newly discovered information, an SEIS is required only when the change in circumstance involves a *significant* adverse environmental effect which, if known about earlier,

should have been included and addressed in the prior environmental impact statement (emphasis added). *Id.* at 429-30; 6 NYCRR § 617.9(a)(7)(i)(a)-(c); *see also Vill. of Pelham v. Mt. Vernon Indus. Dev. Agency*, 302 A.D.2d 399, 755 N.Y.S.2d 91 (2d Dep't 2003). Whether or not a proposed modification is "significant" is for the agency to decide, after identifying the relevant areas of concern, again taking a "hard look" at the potential impacts, and making a reasoned elaboration for the basis of its determination. *Matter of Jackson, supra,* at 400.

Some of the "changes," such as they may be, are summarized as follows: First, the residential unit number of 1,177, proposed in the 2007 Final Statement, was affirmed by the Court, although it was later amended by General Motors and Sleepy Hollow to designate 40 of these units as "affordable senior," and 21 as "affordable Village workforce." The total of 1,177 was unaffected. Second, approximately sixteen acres of open space in four sections of the Project would be dedicated outright to the Sleepy Hollow rather than the granting of an easement to the Village. Third, some twenty-nine acres of open space in two other sections of the Project would be dedicated to the Village (again, as opposed to an easement). In both instances the total acreage was unaffected. Fourth, interior roads and utilities under the roads would be dedicated to the Village (rather than granting of an easement). Finally the existing Beekman Avenue Bridge would be upgraded to the required engineering standards given the nature and scope of the Project.

It is debatable whether these items represent changes at all. It is beyond debate that these "changes" involve no significant adverse environmental effects.

Other changes, delineated in the revised Findings Statement, which were the product of negotiation, were as follows:

1. Beekman Avenue and its Intersection with River Street and the proposed Beekman Place have been changed to "accommodate a roundabout, an associated green space, and a slight reconfiguration of Building H to provide more building frontage along the aforementioned green space."
   a. Building H has been reconfigured to remove the driveway opposite the "Village Green"
   b. Street trees have been added along Beekman Avenue to "visually connect the upgraded Beekman Avenue bridge with the Beekman Avenue/Beekman Place Intersection and the Hudson River beyond."
2. Building M has been reconfigured to include an extension of approximately 3,000 square feet of commercial space, with the possibility of an additional 6,000 square feet of commercial space fronting onto Road A and the waterfront open space.
3. The alignment of Road One has been adjusted to accommodate an increase in the minimum building setback to 150 feet and an increase in the width of the Kingsland Point Park buffer area to a minimum of 100 feet.
4. The townhomes along Road One include more of a mix of three - and four-story building heights.
5. Buildings along the Metro-North railroad tracks will have a maximum height of 42 feet.
6. The total public open space and public use areas have been increased from ±39 to ±44.6 acres, inclusive of an 11.1-acre waterfront open space.
7. The plan has been revised to show the elimination of Building N and the reconfiguration of the site layout along the tracks. This proposed modification has increased the length of Building I. In coordination with these revisions, and to comply with the reduction of 73 residential units required by the 2007 Findings, the heights, layouts, and/or unit counts have been revised In Buildings E and K.

These changes would occur entirely within the Site. No obvious environmental impacts, much less significant impacts, are implicated. The overall size and scope of the project is unchanged. The "changes" represent re-configurations and apportionments in order to accommodate the Court's order, practical considerations, and Project aims, such as water front public access. As reflected in the Findings Statement, most of these revisions are technical in nature and/or more fully address environmental and aesthetic concerns within the boundaries of the Project. Indeed, Petitioners do not argue that any of these modifications were significant or otherwise required

the preparation of an SEIS.

The only modifications for which Petitioners claim the necessity of an SEIS involve traffic, and a requirement by Sleepy Hollow that General Motors (or its designated developer) make an $11.5 million payment to Sleepy Hollow ". . . to finance infrastructure, mitigation measures and amenities identified in the FEIS or Findings," in lieu of directly carrying out the improvements/mitigation measures set forth in the 2007 Findings Statement.

With respect to traffic, the modifications to Respondents' Findings Statement and the Special Permit were confined to (1) the requirement that the developer contribute financially to an Inter-municipal Transportation Study; and (2) the requirement that the intersection of Beekman Avenue and Pocantico Street (in Tarrytown) be signalized if signalization is warranted.

Regarding the $11.5 million payment, the text of the Findings Statement indicates that the payment is designed to "provide the Board of Trustees with maximum control and flexibility in the expenditure of resources" and that General Motors will provide payment in lieu of carrying out the improvements/mitigation measures set forth in the Findings Statement itself. The fact that General Motors is now required to make a lump sum payment to Sleepy Hollow to pay for improvements and mitigation measures, instead of carrying out the measures itself, is of no environmental consequence.

While Tarrytown argues that the Findings Statement eliminated or "whittled away" the traffic mitigation measures proposed for Tarrytown in the 2007 findings statement, the language of the Findings Statement adopted by resolution on January 25, 2011 does not support this contention. To the contrary, the record supports Sleepy Hollow's contention that ". . . the traffic mitigation measures which addressed Tarrytown's alleged traffic concerns as set forth by

Respondent Sleepy Hollow in the 2007 Findings Statement were incorporated into the January 25, 2011 Supplemental Findings Statement." While Petitioner argues that there is no corresponding obligation in the Findings Statement that requires the use by Sleepy Hollow of any part of the $11.5 million for any traffic mitigation measure, the argument has no merit. The same mitigation measures proposed in 2007 are contained within the Findings Statement as adopted in 2011. Shifting the obligation from General Motors to Sleepy Hollow does not eliminate the obligation.

In any event, Sleepy Hollow's determination that the changes did not present significant adverse environmental impacts so as to warrant the preparation of an SEIS was fully explained and addressed in the 2011 Resolution. That determination was neither arbitrary nor capricious.

The decision to prepare an SEIS as a result 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. In making this fact-intensive determination, 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. *Matter of Riverkeeper, Inc. v. Planning Bd. of Town of Southeast*, 9 N.Y.3d 219,231, 851 N.Y.S.2d 76, 80 (2007).

Here, there simply does not appear to be any newly discovered information, change or reduction in the mitigation measures recommended for Tarrytown. Moreover, the "state of the information" at the time of the Resolution in 2011 was current in all material respects when compared to 2007.

The Court has considered all of the remaining contentions raised by the parties, including Petitioners' allegations that Respondents failed to challenge Tarrytown's Findings Statements

within four months, and/or failed to comply with notice provisions with respect to the EAN. Having considered the merits of Petitioners' arguments on these issues the Court declines to grant the relief requested.

Accordingly, the Petition is dismissed.

Dated: White Plains, New York
September 7, 2012

James W. Hubert
Acting Supreme Court Justice

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