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December 5, 2016

Village of New Paltz Planning Board
Mr. Michael Zieler, Chairman
c/o Ms. Christina Carp, Administrative Assistant
25 Plattekill Avenue
New Paltz, New York 12561

VIA E-MAIL AND REGULAR MAIL

RE: Memorandum in Address of Parking and Associated Building Scale of the Zero Place Project With Respect to the Draft Expanded EAF Scoping Document

Dear Chairman Zieler and Board Members:

This Memorandum is made in consideration of the Draft Scoping Document of Issues to be Addressed in Zero Place Full EAF Expanded Part 3 [hereinafter "Scope"], same in connection with the issues raised with respect to parking and building scale at the November 15, 2016 Village of New Paltz Planning Board meeting.

The Planning Board Chairman has offered that further provisions for mitigating parking effects associated with project scale, including an examination of a reduction in the size of the building and/or off-site parking accommodations, be analyzed as part of the Scope.

From a legal perspective in consideration of the Scope, your writer takes issue with this suggestion for the following reasons.

Throughout the pendency of administrative review, it has been noted that the Zero Place Project is the first of its kind within the NBR Zoning District. This statement is certainly true. However, the context of the project itself should be viewed with an acknowledgement of all of the work, study and analysis which preceded the enactment of the NBR Zoning District.

Professional consultants, the Village Board of Trustees, the Village Planning Board, the Ulster County Planning Board and the public expended years studying the NBR Zoning District Regulations prior to legislative enactment. The attendant parking requirements were specifically part of the enacted NBR Zoning District and it is further true that no significant NBR development can be said to have impacted the NBR Zoning District since the zoning was enacted.

Therefore, it is only fair that the Scope should acknowledge that the planned project parking and building scale is not only wholly consistent with the Zoning Law, but that the same is also consonant with the unchanged status of the physical development of the NBR Zoning District, as originally analyzed.

As to the legal effect of the NBR Zoning District and the associated parking requirements, it is submitted that the statute of limitations applicable to the NBR Zoning District enactment has long since expired and the parking regulations embodied within the Zoning Law are inviolate to collateral attack [CPLR 217].

I am aware of nothing within the Village of New Paltz Zoning Law [hereinafter "Zoning Law"] which requires my client to travel beyond the plain meaning set forth therein with respect to meeting the parking requirements. Offshore Restaurant Corp. v. Linden, 30 NY2d 160 (1972). In fact, as has been exhaustively detailed, the entire project fully complies with the requirements set forth within the Zoning Law which govern the NBR Zoning District.

With respect to SEQRA, parking is rarely, if ever, associated with moderate to large impacts and is most appropriately analyzed under Site Plan and/or Special Use Permit review. This is especially the case in the instant application, as generalized environmental speculations cannot overcome the New York State Court of Appeals maxim that "SEQRA review may not serve as a vehicle for adjudicating legal issues concerning compliance with local government zoning". WEOK v. Town of Lloyd Planning Board, 79 NY2d 373 (1992).

In the instant application, my client has offered consultant expertise, numerous mitigation measures and the use of technological innovations to demonstrate that the scale of the Zero Place Project provides for adequate numbers of parking spaces, safe access/circulation and no deleterious effects upon Huguenot Street; all while complying with the Zoning Law. [A copy of the WEOK case is annexed hereto for Planning Board review; see *, at page 5.]

In consideration of Site Plan and/or Special Permit conditions (ie; the reduction in planned scale of the building when zoning regulations are being wholly complied with), said conditions cannot take the form of improper exactions. In this regard, the United States Supreme Court has held that it is essential that an exaction demanded as a condition of a permit or approval must be directly related to the objective of a governmental regulation, substantially advance a legitimate state interest, and have an essential and close nexus to anticipated public burdens which will be generated by the proposed project or development. In order to impose an exaction, the burden has to be so severe that the municipality would have been justified in denying project approval altogether. Nollan v. California Coastal Commission, 107 S. Ct. 3141 (1987).

In the subsequent case of Dollan v. City of Tigard, 114 S. Ct. 2039 (1994), the Supreme Court also imposed a standard of "rough proportionality" between the detriment caused by the private development and the exaction. This analysis requires the government to render an individualized determination that any reduction in scale of a completely zoning compliant building, owing to parking concerns, is related both in nature and extent to the impact of proposed development and the burden rests on the government to justify its reasons for moving beyond project compliant zoning in terms of the Applicant's time, expense and feasibility.

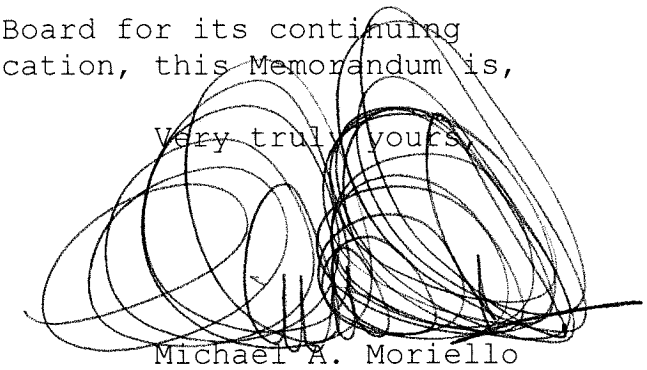
Recently, the U.S. Supreme Court in Koontz v. St. John's River Water Management District, 133 S. Ct. 2595 (2013) ruled that the foregoing balancing tests apply equally to situations where the government denies a permit as well as where the government grants a permit with conditions. The Court also ruled that monetary exactions are subject to the same analysis as land exactions and it makes no difference if the government demands that the land owner secure additional lands, give up real property or in the alternative, pays money as a condition to obtaining a permit.

A Special Use Permit, or for that matter, Site Plan Approval, cannot be denied by a Planning Board because they interpret the Zoning Law standards as being inadequate with respect to parking or scale. As an administrative body, a Planning Board cannot interpret a Zoning Law, as this is the province of the Building Inspector and/or the Zoning Board of Appeals. Moriarty v. Planning Board of the Village of East Sloatsburg, 119 Ad2d 188 (3rd Dept, 1986).

Based upon all of the foregoing, it is submitted that the Chairman's introduction of parking, with respect to building scale, as a potential Scope item should be resisted. Parking and any relationship to building scale, is clearly a Site Plan and Special Use Permit issue under the facts of this application, as well as, pursuant to applicable law [See also, Zoning Law Sections 212-23 and 212-410].

Thanking the Planning Board for its continuing consideration of this Application, this Memorandum is,

Very truly yours,



Michael A. Moriello

MAM:def
Enclosures
cc: Mr. David Shepler
Mr. Anthony Aebi
Mr. Keith Libolt
Barry Medenbach, PE
Philip Grealy, PE
David Toder, RA
David Gilmour, AICP
Richard Golden, Esq.
[all via e-mail]

IN THE MATTER OF WEOK BROADCASTING CORP., RESPONDENT, *v.* THE PLANNING BOARD OF THE TOWN OF LLOYD, ULSTER COUNTY, NEW YORK, APPELLANT.

79 N.Y.2d 373, 592 N.E.2d 778, 583 N.Y.S.2d 170 (1992).

April 3, 1992

3 No. 32

Decided April 3, 1992

This opinion is uncorrected and subject to revision before publication in the New York Reports.

Thomas P. Halley, for Appellant.
David D. Hagstrom, for Respondent.
. Scenic Hudson, Inc., *amicus curiae*.

ALEXANDER, J.:

The respondent Planning Board of the Town of Lloyd denied petitioner WEOK Broadcasting Corporation's application for site plan approval to construct a radio transmitter facility. After a review of the application pursuant to SEQRA, the Planning Board determined that petitioner "failed to adequately minimize or avoid adverse environmental effects to the maximum extent practicable" and that "the environmental effects identified in the Environmental Impact Statement cannot be adequately minimized or avoided by mitigation measures identified as practical." The Planning Board now appeals pursuant to CPLR 5601(a) from an order of the Appellate Division which affirmed Supreme Court's order annulling the Board's determination as not supported by substantial evidence. We agree with the Appellate Division's determination and therefore, for the reasons that follow, the order appealed from should be affirmed.

I

In July 1988, WEOK Broadcasting Corporation (WEOK) submitted an application to the Planning Board of the Town of Lloyd (Board) for site plan approval to build an AM radio transmitter facility consisting of five radio towers in Ulster County. The site is located in a Designed Business zone which allows radio and television towers as a permitted use, subject only to site plan approval by the Planning Board (Town of Lloyd Zoning Ordinance, § 100-21 [A][3]).

Nine months later in April of 1989, the Board issued a positive declaration that the project "may have a significant effect on the environment" (ECL 8-0109[2]). Thus, concerned that the project threatened potential aesthetic impairment of the environment, the Board directed petitioner to file an Environmental Impact Statement (EIS) which would consider, among other things, the towers' visual impact from nine locations, one of which was the Franklin D. Roosevelt residence, a national historic landmark in Dutchess county. Petitioner prepared and submitted a comprehensive Draft Environmental Impact Statement (DEIS) which included an analysis, prepared by landscape architects, of the visual impact of the proposed towers from these viewpoints. The analysis concluded there would be minor visual impact from six of the identified viewpoints, moderate visual impact from one, and no visual impact from the remaining two viewpoints, the Franklin D. Roosevelt (FDR) home and the Mid- Hudson Bridge. The visual impact analysis from the FDR viewpoint was conducted in the Spring of 1989 when the trees surrounding the proposed site were leafless.

Comment regarding the DEIS was sought and obtained by the Board from various other agencies, including the United States Department of the Interior, the Dutchess County Department of Planning, and the Ulster County Planning Board. Comment was also sought from a variety of environmental conservation and historical preservation organizations. Negative comments received from the agencies, organizations and local residents focused on the potential visual impact of the towers from the FDR viewpoint.

The Board also retained an independent consultant to critique the DEIS. This consultant noted that petitioner had "prepared an in depth analysis which utilized a professional and thorough methodology to objectively assess the visual impact of [the proposed project])." The consultant cautioned, however, that "subjective judgments are inextricably involved in any visual assessment."

A Final EIS (FEIS) was prepared by petitioner addressing the comments and specific concerns identified by respondent's consultant as well as other negative public comments made in response to the Draft EIS. The FEIS indicated that in an effort to mitigate the effect of the towers and their lighting, petitioner, with the approval of the Federal Communications Commission (FCC), substantially reduced the height of the tallest tower from an optimum height of 445 feet to 245 feet, the minimum height that would meet FCC minimum efficiency standards. In commenting upon this effort, the consultant noted that petitioner was "obviously compromising by reducing tower heights to such an extent." In further mitigation of the objections articulated in the comments on the DEIS, petitioner noted that a variance from the Federal Aviation Administration (FAA) had been obtained, permitting a reduction in the number of towers required to be lighted from five to two, and allowing petitioner to paint three of the towers gray to minimize their visibility. Additionally, the lighting on the towers was changed from a white strobe to a less visible red and in order to minimize the visual effect of the towers and to blend them in with the surroundings, they were designed as guyed towers with an eighteen-inch open face lattice instead of self-supporting towers tapering from an eighteen to twenty-foot base to two to three feet at the top.

The Board denied site plan approval in December 1989. It cited, inter alia, the following reasons for the denial: the Visual Impact Statement was unpersuasive in its analysis and was subject to conflicting interpretations and conclusions; there was a possibility that the towers would be visible from the FDR homestead; there was no direct financial benefit to be derived by the Town of Lloyd from the construction of the towers; the proposed action would be in "sharp contrast with the orderly development of the area and district in which the proposed towers will be located, and thus, would violate section 100-8.2 of Zoning Ordinance"; because local property owners found the lighting

objectionable, the towers would be incompatible with section 100-13 of the Zoning Ordinance; the height of the towers, in excess of 200 feet, could not be mitigated further without limiting or eliminating the towers' functions; and, approval of petitioner's application might create a precedent for future development of this type, threatening the ability of the area to develop as envisioned by the existing Master Plan.

This CPLR article 78 proceeding challenging the Board's determination followed. Petitioner alleged that the Board's determination was not supported by substantial evidence and was in fact contrary to a determination made by the Town of Lloyd Zoning Board of Appeals earlier that year in a SEQRA review in which the Planning Board concurred, approving another transmission tower project known as the Walker Tower. The Walker Tower project involved the construction of a 400 foot high FM radio transmission tower and accessory building at the southerly end of Illinois mountain in the Town of Lloyd which tower could be seen from both the FDR home and the Hudson River and in respect to which a special use permit was required.

Supreme Court annulled respondent's determination and granted petitioner's application for site plan approval. That court found "nothing in the record other than generalized complaints voiced at the public hearings * * * contradicted [the report of the Town's consultant] or WEOK's visual impact study." The Appellate Division, with two justices dissenting, affirmed. That court noted that both parties acknowledged that respondent's denial of petitioner's application was based on aesthetic reasons alone and concluded, inter alia, that "[w]hile petitioner's EISes demonstrated that it minimized negative visual impacts to the greatest extent practical, respondent failed to furnish any rationale for completely disregarding petitioner's comprehensive and extensive visual impact analysis" and that "as the only apparent grounds for denying petitioner's application consisted of generalized community objections, which are contrary to the data provided, respondent's determination lacks a substantial evidence basis in the record" (165 AD2d 578, 581-582).

The dissenting justices would have dismissed the petition, noting that "aesthetic impact is a proper and valid basis for environmental review" and finding that respondent "expresse[d] cogent reasons for not giving conclusive weight to the study, reasons which were not overcome by petitioner's responses to comments in the study in the final environmental impact statement." Thus, the dissenters would find the determination supported by substantial evidence. Although the majority at the Appellate Division did not reach the issue of the prior approval of the Walker Tower project, the dissenters concluded that "the facts and circumstances of the earlier project were so completely dissimilar to the instant application as to not constitute a prior precedent requiring either approval of petitioner's application by respondent or an explanation of its reasons for reaching a different result" (id. at 585). This appeal ensued.

II

The Legislature's stated purpose in enacting SEQRA was to "declare a state policy which will encourage productive and enjoyable harmony between [people and their] environment; to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of the ecological systems, natural, human and community resources important to the people of the state" (Environmental Control Law 8-0101). Thus, the primary purpose of SEQRA "is to inject environmental considerations directly into governmental decision-making (*Matter of Coca Cola Bottling Co. of New York, Inc. v Board of Estimate of the City of New York*, 72 NY2d 674, 679; see also, *Akpan v Koch*, 75 NY2d 561, 569). In furtherance of that purpose, the information obtained by lead agencies

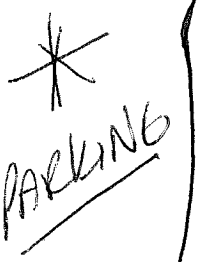
through the SEQRA process enables state and local officials to intelligently "assess and weigh the environmental factors, along with social, economic and other relevant considerations in determining whether or not a project or activity should be approved or undertaken in the best over-all interest of the people of the State" (*Matter of Town of Henrietta v Department of Environmental Conservation*, 76 AD2d 215, 222; NY Legis Ann, 1975, pp 438-439). SEQRA seeks to "strike a balance between social and economic goals and concerns about the environment" (*Matter of Jackson v New York State Urban Development Corporation*, 67 NY2d 400, 414), by requiring an agency to engage in a systematic balancing analysis in every instance (*Matter of Town of Henrietta*, supra at 223). Aesthetic considerations are a proper area of concern in this balancing analysis inasmuch as the legislature has declared that the "maintenance of a quality environment * * * that all times is healthful and pleasing to the senses" is a matter of statewide concern (ECL 8-0103 [1] [emphasis added]; see also, ECL 8- 0105[6]).

To achieve these purposes and goals, SEQRA imposes procedural and substantive requirements upon the agency charged with decision making in respect to proposed "actions".[n 1] Whenever it is determined that a proposed "action" may have a significant effect on the environment, a draft EIS (DEIS) is required to be prepared and various other procedural steps are to be taken including soliciting comments on the DEIS, holding public hearings when appropriate (ECL 8-0109; 8-0105[7]; 6 NYCRR 617.8) and preparing and filing FEIS in respect to which comments are solicited and any further appropriate public hearing held (6 NYCRR 617.10[g]). In addition to the procedural requirements,[n 2] SEQRA imposes substantive requirements which include listing the various types of information that must be included in the EIS, a description of the proposed action with an assessment of its environmental impact and any unavoidable adverse environmental effects (ECL 8-0109[2][a]-[c]) and mitigation measures proposed to minimize the environmental impact (ECL 8-0109[2][f]).

If an agency proposes to approve a project, it must consider the FEIS and prepare written findings that the requirements of SEQRA have been met (ECL 8-0109[8]). It must also prepare a written statement of the facts and conclusions in the FEIS and comments relied upon and the social, economic and other factors and standards which form the basis of its decision (6 NYCRR 617.9 [c]). Put differently, the agency must take a sufficiently "hard look" at the proposal before making its final determination and must set forth a reasoned elaboration for its determination (see, *Akpan v Koch*, 75 NY2d 561, 570; *Matter of Jackson v New York State Urban Development Corporation*, 67 NY2d 400, 415-416). Where an agency determines to reject a proposed project, it must likewise take a sufficiently "hard look" and set forth a reasoned elaboration for its determination (see, Matter of Jackson, supra at 416). As we have only recently observed, "[a]n agency's compliance with its substantive SEQRA obligations 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" (*Akpan v Koch*, 75 NY2d 561, 570; see also, *Matter of Jackson v New York State Urban Development Corporation*, 67 NY2d 400, supra).

The Board stated that it rejected petitioner's site plan because the plan "failed to adequately minimize or avoid adverse environmental effects to the maximum extent practicable" and because the "environmental effects revealed in the Environmental Impact Statement process can not be adequately minimized or avoided by the mitigation measures identified as practical." The Board based its determination primarily upon the project's failure to comply with various zoning

requirements and the fact that the towers "may be visible [from the FDR homestead]" and that local property owners found the lighting objectionable.



To the extent the Board's determination is based upon the alleged failure of the plan to conform with various zoning regulations, we note, as did the Appellate Division, that except where the purported action is a zoning amendment, SEQRA review may not serve as a vehicle for adjudicating "legal issues concerning compliance with local government zoning" (*Town of Poughkeepsie v Flacke*, 84 AD2d 1, 5 lv denied 57 NY2d 602). Indeed, ECL 8-0103(6) specifically provides in pertinent part that "the provisions of this article do not change the jurisdiction between or among state agencies and public corporations" (see also, *Town of Poughkeepsie v Flacke*, supra; Gerrard, Ruzow, Weinberg, Environmental Impact Review in New York, § 8.14 at 8-55). We assume, as did the Appellate Division, that the proposed WEOK project was a conforming use and conclude that alleged violations of the Lloyd Zoning Code were not a valid basis for denying site plan approval pursuant to SEQRA.

That is not to say that local zoning laws are irrelevant to determinations made pursuant to SEQRA. They are indeed relevant. For example, the inclusion of a permitted use in a local zoning ordinance is 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 (*RPM Motors v Gullotta*, 88 AD2d 658). Thus, here, although by no means determinative, it should not be overlooked that the aesthetic visual impact of the towers, was, we presume, considered at the time that radio and television towers were included as permitted uses in the Designed Business Zone (see, *North Shore Steak House v Thomaston*, 30 NY2d 238, 243; *RPM Motors v Gullotta*, supra).

Compliance with the zoning law aside, the question remains, however, whether the Board otherwise has made a reasoned elaboration resulting from its "hard look" pursuant to SEQRA review such that it can be concluded that its findings and determination are supported by substantial evidence.

The often stated rule regarding our role in reviewing SEQRA determinations needs no extended discussion; it is not to weigh the desirability of any proposed action or to choose among alternatives and procedural requirements of SEQRA and the regulations implementing it (*Matter of Village of Westbury v Department of Transportation*, 75 NY2d 62, 66), but to determine whether the agency took a "hard look" at the proposed project and made a "reasoned elaboration" of the basis for its determination (*Matter of Jackson v New State Urban Development Corporation*, 67 NY2d 400, supra). Where an agency fails to take the requisite hard look and make a reasoned elaboration, or its determination is affected by an error of law, or its decision was not rational, or is arbitrary and capricious or not supported by substantial evidence, the agency's determination may be annulled (see, CPLR 7803[3]; *Chinese Staff and Workers Assn v City of New York*, 68 NY2d 359, 363; *Matter of Jackson*, supra; see generally, Environmental Rights 55 NY Jur 2d § 65). Here, we conclude that the Board's determination should be annulled because it is not supported by substantial evidence--substantial evidence being "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*300 Grammatan Ave Associates v State Division of Human Rights*, 45 NY2d 176, 180) or "the kind of evidence on which responsible persons are accustomed to rely in serious affairs" (*People v ex rel Vega v Smith*, 66 NY2d 130, 139).

Notwithstanding petitioner's detailed Visual Impact Analysis which concluded that there would be no visual impact from the FDR site, the Planning Board determined that the towers might be visible from the FDR site. In so concluding, the Board relied on statements from some community members,

agencies and other organizations, some of whom stated there might be a visual impact and others who stated that there definitely would be a visual impact. Critical to those views regarding visual impact from the FDR site was the supposition that the visual impact study was conducted under optimal conditions which impacted positively on the results of the study. Thus, the study was viewed as ambiguous and not establishing that under all conditions and at other times of the year, the condition of the foliage between the FDR site and the radio towers would be the same and would block the view from the FDR site; if the conditions and density of the foliage were less, there would be greater visibility of the towers. This reasoning is flawed, however, because the record demonstrates that at the time the visual impact study was conducted, there were no leaves on the trees. Thus, petitioner's evidence of the visual impact from the FDR site was based on observations made under the least desirable conditions --- when visibility of a tower radio transmitting facility would be greatest. Moreover, the comments and statements from community members and agencies do not appear to be supported by any factual data and at best are mere conjecture. Respondent's finding that there may be a visual impact from the FDR homestead is unsupported by any factual data, scientific authority or any explanatory information such as would constitute substantial evidence. Thus, respondent's conclusory finding that there would be an unacceptable negative aesthetic impact from the FDR viewpoint cannot be deemed a "reasoned elaboration" of its determination (see, *Matter of Tehan v Scrivani*, 97 AD2d 769, 771).

Although a particular kind or quantum of "expert" evidence is not necessary in every case to support an agency's SEQRA determination, here, the record contains no factual evidence, expert or otherwise, to counter the extensive factual evidence submitted by petitioner. To permit SEQRA determinations to be based on no more than generalized, speculative comments and opinions of local residents and other agencies, would authorize agencies conducting SEQRA reviews to exercise unbridled discretion in making their determinations and would not fulfill SEQRA's mandate that a balance be struck between social and economic goals and concerns about the environment (see, *Matter of Jackson*, supra). Nor could it be said that such a determination accords with "a rule of reason" (see, *Akpan v Koch*, supra). As one commentator has noted, "decision makers must not be given the freedom to either ignore or disregard the information that the environmental review process was designed to elicit if the process is to have any meaning" (Gitlen, The Substantive Impact of SEQRA 46 Alb Law Rev 1241, 1253).

We do not intend to diminish in any way the importance of public comment with respect to any proposed site plan; SEQRA is designed to encourage public participation in the review process (ECL 8-0109[4]-[6]). However, generalized community objections such as those offered here in response to the comprehensive data provided by petitioner, cannot, alone, constitute substantial evidence, especially in circumstances where there was ample opportunity for Respondent.

to have produced reliable, contrary evidence (see, *North Shore Steak House v Thomaston*, 30 NY2d 238, supra at 245; *Matter of Veysey v Zoning Board of Appeals of the City of Glens Falls*, 154 AD2d 819, lv denied 75 NY2d 708; *Syracuse Brothers, Inc. v Darcy*, 127 AD2d 588).

We reject petitioner's contention that negative aesthetic impact factors may not constitute a sufficient basis upon which SEQRA determinations may be made. Indeed, as we noted earlier, aesthetic impact considerations may constitute an important factor in SEQRA review. Negative aesthetic impact considerations, alone, however, unsupported by substantial evidence, may not serve as a basis for denying approval of a proposed "action" pursuant to SEQRA review.

In view of our holding that respondent's determination was not supported by substantial evidence, we find no need to address petitioner's remaining arguments, including its contention regarding the Walker Tower. Accordingly, the order of the Appellate Division should be affirmed, with costs.