To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
HON. PAUL I. MARX, J.S.C.

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Application of HILDA KOGUT, ROBERT E. ASSELBERGS and MAGALI DUPUY,

Petitioners-Plaintiffs,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules and a Declaratory Judgment Pursuant to Section 3001 of the Civil Practice Law and Rules,

-against-

THE VILLAGE OF CHESTNUT RIDGE, THE BOARD OF TRUSTEES OF THE VILLAGE OF CHESTNUT RIDGE, ROSARIO PRESTI, JR. in his capacity as the Mayor and Trustee of and for the Village of Chestnut Ridge, GRANT VALENTINE in his capacity as the Deputy Mayor and Trustee of and for the Village of Chestnut Ridge, and HOWARD COHEN, RICHARD MILLER, and PAUL VAN ALSTYNE, in their capacities as Trustees of and for the Village of Chestnut Ridge,

Respondents-Defendants.

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Index No.: 031506/2019

DECISION AND ORDER

Motion Sequence ## 2-3
Motion Date: May 22, 2019

The following papers numbered 1 through 13 were read on: (1) the motion to dismiss brought by Respondents Village of Chestnut Ridge, the Board of Trustees of the Village of Chestnut Ridge, Rosario Presti, Jr. in his capacity as Mayor and Trustee of the Village of Chestnut Ridge, Grant Valentine in his capacity as Deputy Mayor and Trustee of the Village of Chestnut Ridge, and Howard Cohen, Richard Miller and Paul Van Alstyne in their capacities as Trustees of the Village of Chestnut Ridge pursuant to CPLR §§3211(a)(1) and (a)(7) and §7804(f), and (2) the

motion to intervene by Congregation Birchas Yitzchok and the Orthodox Jewish Coalition of Chestnut Ridge:

Respondents' Motion to Dismiss (Sequence No. 2):

Notice of Motion to Dismiss by Town Respondents/Affirmation of Walter R. Sevastian, Esq./Exhibits A-B 1-2
Memorandum of Law in Support of Town Respondents' Motion to Dismiss 3
Affidavit of Jonathan Lockman, AICP/Exhibits C-D 4
Affidavit of Florence Mandel/Exhibits E-G 5
Affidavit of Rosario Presti, Jr./Exhibit H 6
Affidavit of Lise Chanin 7
Certified Record/Exhibits I-II 8
Affirmation of Steven N. Mogel, Esq. in Opposition to Motion to Dismiss and Motion to Intervene/Exhibits 1-2 9

Motion to Intervene (Sequence No. 3):

Notice of Motion for Leave to Intervene/Affirmation of Joseph A. Churgin, Esq./Exhibits A-B 10
Affirmation of Abraham Willner in Support 11
Affirmation of Avrohom Fromovitz in Support 12
Affirmation of Walter R. Sevastian, Esq. in Partial Opposition/Exhibits JJ-MM 13

Upon reading the foregoing papers, it is ORDERED that the motions are disposed as follows.

BACKGROUND

On February 21, 2019, the Board of the Village of Chestnut Ridge ("Village Board") approved Resolution No. 12 of 2019, authorizing an amendment to its Zoning Code regarding the regulation of Places of Assembly and Houses of Worship. Under the pre-amendment law, a house of worship could only be located on a five-acre lot and was subject only to bulk requirements and the general Special Permit requirements in the Zoning Code. The amendment, codified as Local Law No. 1 of 2019 ("HOW Law"), created a three-tiered framework for houses of worship within the Village, consisting of "Residential Gathering Place", "Neighborhood Place of Worship" and "Community Place of Worship", with each successive category providing for more intensive use. The HOW Law maintained the five-acre lot requirement for a Community Place of Worship and

imposed certain special use requirements that were not previously applicable to houses of worship under the prior law.

More significantly and forming the crux of the dispute in these proceedings, the HOW Law authorized two new categories of houses of worship -- "Residential Gathering Place" and "Neighborhood Place of Worship" – to be located in a "one-family, detached residence" on a single-family lot.[1] In effect, the HOW Law allows single family houses within the Village to be used as gathering places or converted to houses of worship, subject to specific Conditional Use or Special Use Permit standards applicable to each category of use, which are set out in the law.

Under the HOW Law, a single-family, detached residence may by special permit be used on a regular basis as a Residential Gathering Place ("RGP") for religious or other purposes, in addition to its primary use as a single-family residence. The HOW Law restricts the size of groups that gather in an RGP to a maximum of 49 people. The space used for the gatherings is limited to two rooms covering a maximum of 50% of the gross floor area of the residence. Accessory uses, other than those typically allowed to a one-family, detached residence is prohibited. The number of parking spaces are to be determined by Column F of the Table of General Use Requirements, with up to 50% allowed to be located off-site on adjoining property within 1500 feet walking distance of the edge of the subject lot.

The HOW Law allows a Neighborhood Place of Worship ("NPW") to be established in a "one-family, detached residence" having a maximum square footage of 10,000 square feet. An NPW may include a residential component for the religious leader and family, but it is to be used principally as a place of worship with regularly scheduled religious services. The HOW Law designates that the maximum number of persons who may utilize the area dedicated to religious assembly is to be determined by applicable New York State and Village building and fire prevention codes.[2] NPW's may include accessory facilities and functions, such as classrooms, social halls, administrative offices, bath and shower facilities, gymnasiums and indoor recreation

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[1] In fact, the FEAF stated that "the proposed action [, *i.e.*, the amendments] only increases opportunities for additional residential gatherings and neighborhood places of worship – increased opportunities for "community" places of worship are not included in the proposed action." FEAF Part 3 at p 8.

[2] Petitioner estimates up to 500 persons.

facilities, so long as none of the facilities or functions, individually, exceed 20% of the structure's gross floor area or aggregate to more than 50% of the building's gross floor area. A minimum of 75% of parking is required to be located on-site.

Respondents acknowledge that "several places of worship [may] already exist within existing homes throughout the Village without land use authorization." FEAF Part I Section F at 2. Through the HOW Law, Respondents legalized such uses and created an avenue for formally permitting gathering places and places of worship to be established in residential districts, while seeking to maintain the quality and character of the community. The community's need for such places of worship and assembly within walking distance of residents' homes was not being met by the prior law which limited places of worship to five-acre parcels.

Pursuant to the State Environmental Quality Review Act ("SEQRA"), the Village Board, as lead agency, classified the proposed amendment as a Type I action. Part 1 of the Full Environmental Assessment Form ("FEAF") identified the issues presented by Residential Gathering Places and Neighborhood Places of Worship to include "frequent and excessive on-street parking, assembly at hours disruptive to restful sleep, noise or lighting impacts to neighboring properties, and changes to the visual appearance of homes that may degrade the quality of the neighborhood." Certified Record, Exhibit K, FEAF Part 1 Section F at 3. The FEAF also noted that "residents and congregants may engage in more intensive religious-related practices (such as but not limited to post-weddings celebrations) that are not suited to small lots in residential neighborhoods. Facilities that are more intensively used, may also require different construction or limitations on occupancy to insure the public health, safety and welfare." *Id.* Part 1 concluded: "All future proposals for the aforementioned public assembly uses will be subject to site-specific SEQRA analysis. Since the regulations do not commit the Village to any specific course of action with respect to specific projects, the proposed amendments would themselves not pose any potential for significant adverse environmental impacts." *Id.*

Part 2 of the FEAF identified the following areas of environmental impact: "Transportation", "Consistency with Community Plans" and "Consistency with Community Character". *Id.*, FEAF Part 2 at pp 8 and 10. Within the category of Transportation, Respondents identified that moderate to large impacts may occur from a change to "the present pattern of movement of people or goods" and identified an additional "other impact": "[i]ncrease in

pedestrian movements and on-street parking at gathering places and places of worship may create hazards for pedestrians and motorists." *Id.* at 8. Within the category of Consistency with Community Plans, Respondents identified that moderate to large impacts may occur because "[t]he proposed action's land use components may be different from, or in sharp contrast to, current surrounding land use pattern(s)." *Id.* at 10. Within the category of Consistency with Community Character, Respondents identified that moderate to large impacts may occur because of an "other impact" they identified as "[n]onresidential assembly and place of worship uses may be established within existing homogeneously developed residential neighborhoods." *Id.* at 10.

Four public hearings were held on June 28, 2018, July 24, 2018, November 20, 2018 and January 15, 2019. On February 21, 2019, the Village Board adopted its findings in Resolution No. 12 of 2019, entered a negative declaration, and enacted Local Law No. 1–2019.

On March 21, 2019, Petitioners, residents of the Village, brought the instant hybrid Article 78 proceeding and declaratory judgment action seeking an order and judgment vacating and annulling the Negative Declaration under SEQRA and the HOW Law. Petitioners alleged six causes of action: (1) the Village failed to comply with SEQRA because it did not identify the likely significant adverse environmental impacts, such as issues of erosion and degradation of receiving water bodies, construction continuing for more than one year or in multiple phases, and construction of paved parking areas for 500 or more vehicles, and subject them to a "hard look"; (2) the Village's improper reliance on subsequent 'site-specific SEQRA analysis' constitutes improper segmentation under SEQRA; (3) the decision to issue the Neg Dec should be deemed arbitrary and capricious, as it failed to take a 'hard look' at the relevant areas of environmental concern and provide a 'reasoned elaboration' of the basis for its determination; (4) the Law failed to comply with GML 239; (5) the Law was not passed in accordance with Local Law Article XVII: Amendments §§1 and 2; and (6) the Law is null and void because it was passed based upon a Resolution containing materially false and derogatory information.

The Village Respondents moved to dismiss the petition/complaint pursuant to CPLR §§3211 and 7804(f) on the grounds that Petitioners/plaintiffs lack standing, the Certified Record supports the Village Board's issuance of a Negative Declaration under SEQRA, the Petition fails to state a claim for relief and Petitioners failed to file a notice of claim for the causes of action which seek declaratory relief.

Non parties, the Orthodox Jewish Coalition of Chestnut Ridge ("OJC") and Congregation Birchos Yitzchok, jointly moved for permission to intervene in the proceeding. OJC is an unincorporated association of seven Orthodox Jewish congregations located in the Village and Birchos Yitzchok is a religious corporation which owns property within the Village.

DISCUSSION

Motion to Dismiss

On a motion to dismiss pursuant to CPLR §§3211 and 7804(f), the petition/complaint alone must be considered, and all of its allegations are to be deemed as true and afforded the benefit of every favorable inference. *Bloodgood v Town of Huntington*, 58 AD3d 619, 621 [2nd Dept 2009] (citing *Matter of Long Is. Contractors' Assn. v Town of Riverhead*, 17 AD3d 590, 594; *Matter of 10 E. Realty, LLC v Incorporated Vil. of Val. Stream*, 17 AD3d 474, 476).

Standing

The Village Respondents move to dismiss the hybrid Article 78 Petition and Complaint on the ground that Petitioners lack standing. Respondents contend that Petitioners failed to allege that they reside or own property in a zoning district affected by the amendments to the Zoning Code. Respondents argue that the "Petition is completely devoid of any claim of a single individualized harm, economic, environmental, or otherwise, that any of them will suffer." Respondents' Memorandum of Law at 16-17.

Standing is a threshold issue which must be established by a litigant seeking judicial review. *Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 769 [1991]. Standing generally involves a two-part test which requires the litigant to first show an injury in fact, *i.e.*, actual harm to the litigant from the administrative action being challenged. The second prong of the test requires the litigant to show that the alleged injury "falls within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted". *NY State Ass'n of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2002]; *Matter of Colella v Board of Assessors*, 95 NY2d 401, 409–410 [2000].

This general inquiry gives way, however, "where the challenge is to the SEQRA review undertaken as part of a zoning enactment [and] the owner of property that is the subject of the rezoning ..." seeks judicial review of the enactment. *Matter of Gernatt Asphalt Prods. v Town of*

Sardinia, 87 NY2d 668, 687[1996] (citing *Matter of Har Enterprises v Town of Brookhaven*, 74 NY2d 524 [1989]). In that instance, the litigant "need not allege the likelihood of environmental harm". *Id.*; *Bloodgood v Town of Huntington*, 58 AD3d at 621–22; *Patterson Materials Corp. v Town of Pawling*, 221 AD2d 608, 609 [2nd Dept 1995]. The Court of Appeals has held that "[i]n those circumstances, the 'property owner has a legally cognizable interest in being assured that the [municipality] satisfied SEQRA before taking action to rezone its land'." *Gernatt*, 87 NY2d at 687.

Here, Petitioners contend that the HOW Law affects almost every residential district in the Village. In their opposition to the motion, each Petitioner identifies the district where they live, all of which are residential districts to which the HOW Law applies. As a result, the zoning scheme for their property has been changed. "Where a party owns property that falls within an area affected by the regulation in question, it is presumed to have been adversely affected by the change in the zoning law and have standing to contest it." *Rossi v Town Board of Town of Ballston*, 49 AD3d 1138, 1142 [3rd Dept 2008] (citing *Matter of Sun–Brite Car Wash v Board of Zoning & Appeals of Town of N. Hempstead*, 69 NY2d 406, 414 [1987]). Petitioners have standing not only to challenge the process used by the Village Board that led to the enactment of Local Law No. 1, but also the manner in which the Village Board employed SEQRA to change its zoning ordinance.

Accordingly, the branch of Respondents' motion to dismiss based upon Petitioners' lack of standing is denied.

First Cause of Action

Petitioners allege that the Village failed to comply with SEQRA because it did not identify the likely significant adverse environmental impacts, such as issues of erosion and degradation of receiving water bodies, construction continuing for more than one year or in multiple phases, and construction of paved parking areas for 500 or more vehicles, and subject them to a "hard look".

Respondents contend that they did not address these issues because the Proposed Action they reviewed did not involve any construction: "there were no projects proposed in connection with the Zoning Amendments, and the only action under consideration was the Zoning Amendments themselves." Respondents' Memorandum of Law at 14-15; Affidavit of Village Planner at ¶¶ 27 and 32; Certified Record, Exhibit K, Part 2 EAF at 1 of 10. Jonathan Lockman, Respondents' Planner, explained that "[w]ithout any site-specific, documented construction plans,

such projections of construction impacts would be purely speculative (such as, for example, [Petitioners' Planner's] purely speculative aggregation of multiple potential construction projects at different locations, done to allege that SEQR thresholds would therefore be triggered) (internal citation omitted)." *Id.* at ¶ 32. Mr. Lockman further stated that "[s]uch potential individual construction projects would be evaluated individually against SEQR thresholds when, or if, such approvals are applied for." *Id.*

Respondents asserted that in a "no action" situation where a specific project is not involved, "an appropriate SEQRA analysis is to consider the reasonable worst case scenario that could result under the Zoning Amendments as compared to the development that would otherwise have occurred without the Amendments." MOL at p 29 (citing *Fischer v Giuliani*, 280 AD2d 13, 17 [1st Dept 2001]; *Matter of Collier Realty LLC v Bloomberg*, 24 Misc 3d 1071, 1077 [Sup Ct, New York County 2009];[3] *N.Y. City Coalition to End Lead Poisoning, Inc. v Vallone*, 293 AD2d 85, 95 [1st Dept. 2002];[4] and *Eggert v Town Board of Westfield*, 217 AD2d 975, 976 [4th Dept. 1995]).[5]

Having advanced that contention, Respondents then failed to project a reasonable worst case scenario and analyze the resulting environmental impacts. If one was undertaken, Respondents have not pointed to it. Instead, Respondents compared the process for establishing a house of worship on a smaller lot size under the prior law, which required a variance and was an uncertain process with little guidance as to what conditions or restrictions might be imposed, to

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[3] Although Respondents cited *Collier Realty* for the approach the City used to conduct its SEQRA review, Respondents seemingly failed to consider its ruling on the issue of standing. The court held that the petitioners, who resided on lots "located within the area subject to the rezoning", had standing to challenge the City's amendments to the zoning map and zoning text covering their neighborhoods. 24 Misc 3d at 1073-1074.

[4] The order of the Appellate Division was reversed by *New York City Coal. to End Lead Poisoning, Inc. v Vallone*, 100 NY2d 337, 351 [2003], on the substantive issue whether the NY City Council complied with SEQRA, finding that it did not.

[5] *Fischer and Collier Realty* involved SEQRA review of area wide zoning amendments. In both cases, the reviewing agency employed a SEQRA analysis predicated upon comparing the reasonable worst-case scenario that could occur as a result of the zoning amendments to development that would have occurred in the absence of the amendments. *N.Y. City Coalition to End Lead Poisoning, Inc.* involved amendments to New York City's lead paint laws and *Eggert* involved amendments to a zoning ordinance which added limited retail businesses and building/construction contractor businesses as specially permitted uses in a residential/agricultural district.

the conditions and restrictions imposed under the HOW Law. Respondents then proceeded with the underlying assumption that the LOW Law, *ipso facto*, presented no significant environmental impacts. Instead of articulating a worst case scenario analysis, Respondents devoted a significant portion of their review to criticism of the opinion and report of Alan Sorenson, Petitioners' professional Planning consultant. The obvious flaw in that approach is that Respondents, not Petitioners, were obligated to undertake a thorough review of the areas likely to pose environmental impacts.[6]

Respondents' contention that construction impacts did not need to be considered is belied by their own projection that 13 houses of worship are likely to be established in the Village. Respondents "conducted a GIS mapping analysis of the availability of lots in the Village, analyzed and projected development of projected places of worship per population based on an analysis of nearby Villages of Airmont and Wesley Hills, and set forth a reasoned elaboration for the basis of [the Village's] determination that the impact of the new law on the future pattern of places of worship constructed in the community would have only a small environmental impact." *Id.* at ¶ 34. Respondents explained that they selected Airmont and Wesley Hills because those villages have similar populations, are of similar size to the Village and have had similar laws in effect for many years. The Village Planner reviewed the Planning Board records in those villages to examine the patterns of approvals and supplemented their review with interviews of the Mayor of Wesley Hills and the Building and Fire Inspectors in Airmont. Respondents. FEAF Part 3, Full Attachment at p 8. Respondents state that "[b]ased on average values, there are about 640 residents or 200 house lots per place of worship in these two Villages, and about 3 per every square mile." *Id.* Extrapolating from that, Respondents concluded that 13 houses of worship (RGPs and NPWs) were likely to be established in the Village. *Id.* Yet, Respondents declined to address the environmental impacts from the construction activity that will likely ensue.[7] Instead, they deferred

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[6] Respondents explain their extensive critique as supplying their rationale for rejecting Mr. Sorenson's analysis in favor of the Village Planner's analysis. While there is some value in that, it should not be utilized as the expense of setting forth how Respondents' analysis satisfies the "hard look" required by SEQRA.

[7] Arguably, establishing an RGP would require little to no construction to accommodate the new use as a gathering place, since it would continue to function principally as a single-family residence. In the case of NPW's, however, construction would be needed to convert the structure from a single-family residence

considering such impacts to the SEQRA review that will accompany future individual permit applications. Respondents repeatedly assert that the zoning amendments impose special conditions and use restrictions that did not exist under the prior law, as if that alone satisfies SEQRA.

As the Appellate Division stated in *Fisher*, because it is the goal of SEQRA "'to incorporate environmental considerations into the decisionmaking process at the earliest opportunity' (*Matter of Neville v Koch*, 79 NY2d 416, 426) ... the mere fact that environmental review may be required at the time an applicant seeks a special permit does not, by itself, obviate the ... obligation to consider possible environmental impact at the time it enacts the zoning changes, at least on a conceptual basis." *Fisher*, 280 AD2d at 22 (citing *Matter of Eggert v Town Bd. of Town of Westfield*, 217 AD2d 975, *lv denied* 86 NY2d 710; *Matter of Brew v Hess*, 124 AD2d 962; *Matter of Kirk-Astor Drive Neighborhood Assn. v Town Bd. of Town of Pittsford*, 106 AD2d 868, *appeal dismissed* 66 NY2d 896; *cf., Matter of People for Westpride v Board of Estimate of City of N.Y.*, 165 AD2d 555, *lv denied* 78 NY2d 855).

Moreover, categorizing an action in the "Type 1" category "carries with it the presumption that it is likely to have a significant adverse impact on the environment" (6 NYCRR 617.4[a][1]). As a result, "there is a relatively low threshold that must be met to require the issuance of a positive declaration under SEQRA". *Scenic Hudson, Inc. v Town of Fishkill*, 258 AD2d 654, 655 [2nd Dept 1999]. A court "reviewing the issuance of a negative declaration by an agency, ... is obliged to decide whether the agency 'made a thorough investigation of the problems involved and reasonably exercised [its] discretion' ". *Collier Realty LLC v Bloomberg*, 24 Misc 3d 1071, 1076 [Sup. Ct., New York County 2009] (citing *Chinese Staff & Workers Assn. v City of New York*, 68 NY2d 359, 364 [1986]).

Applying these standards, Petitioners have stated a cause of action based upon Respondents' decision not to consider construction related environmental impacts. Accordingly, Respondents' motion to dismiss the first cause of action is denied.

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to a structure principally functioning as a place of worship with accessory uses. Although NPW's may have a residential component, unlike RGP's, they would not function primarily as a residence. In addition, NPW's must provide 75% of their parking spaces on-site, requiring construction of parking areas to accommodate the intensive use of the space.

Second Cause of Action

In their second cause of action, Petitioners allege that the Village's improper reliance on subsequent "site-specific SEQRA analysis" constitutes improper segmentation under SEQRA.

Respondents move to dismiss the second cause of action, arguing that segmentation does not apply here because "there are no other known projects proposed in connection with the Action." MOL at 37. They argue that "[s]peculative future site development under the Zoning Amendments, conducted in unknown locations, by unknown persons, at unknown times, are purely speculative, and are not required to be the subject of an area-wide SEQRA review simply because they don't exist and cannot reasonably be projected to occur." *Id.*

The regulation which defines "segmentation" states that it "means the division of the environmental review of an action such that various activities or stages are addressed under this Part as though they were independent, unrelated activities, needing individual determinations of significance." 6 NYCRR 617.2[ah]. As the Appellate Division explained in *Maidman v Inc. Vill. of Sands Point*, 291 AD2d 499, 501 [2nd Dept 2002], "[t]he regulations which prohibit segmentation are 'designed to guard against a distortion of the approval process by preventing a project with potentially significant environmental effects from being split into two or more smaller projects, each falling below the threshold requiring full-blown review'." (quoting *Matter of Teich v Buchheit*, 221 AD2d 452, 453 [2nd Dept 1995]).

Segmentation is most easily understood with regard to environmental review of a construction project which might be broken down into smaller stages or activities in order to circumvent the required review of the environmental impacts of the overall project. Segmentation can also occur when certain activities are excluded from the definition of a project or action in order to minimize its environmentally harmful consequence. *See Schultz v Jorling*, 164 AD2d 252, 255 [3rd Dept 1990]. The prohibition against segmentation is meant to avoid circumvention of the detailed review required by SEQRA. *Maidman*, 291 AD2d 501 (citing *Matter of Long Is. Pine Barrens Socy. v Planning Bd.*, 204 AD2d 548, 550–551; *Schultz v Jorling*, 164 AD2d at 255–256).

Petitioners seek to apply the concept here, claiming that Respondents have not considered the cumulative effects of the construction of "new on-site parking areas, and the construction of larger structures upon single-family residential lots, [thereby increasing] impervious surfaces …

and creat[ing] additional stormwater discharge."[8] Petition at ¶ 151. Moreover, Petitioners postulate that "[t]he real danger is the individual impacts of such developments will likely fall under the 1-acre threshold for triggering a Stormwater Pollution Prevention Plan (SWPPP) – while the cumulative impacts over time would affect tens, if not hundreds, of acres of new land disturbance with no post development stormwater management." *Id.* at ¶ 152 (quoting 1/14/19 Planit Report at Part 3. Impacts on Surface Water §3.h). Petitioners cite *Riverhead Business Improvement District Management Ass'n v Stark*, 253 AD2d 752 [2nd Dept 1998], for the general proposition espoused in the decision that SEQRA requires environmental review at the time zoning amendments are enacted.

Respondents' assertion that future site development under the HOW Law is purely speculative and that the locations of such development are unknown and cannot reasonably be projected to occur is not credible. Respondents conceded that non-conforming houses of worship already exist in the Village. Moreover, Respondents have projected a total of 13 houses of worship, three per square mile, to be established in the Village under the HOW Law.

Respondents were required to consider the environmental concerns that are reasonably likely to result from, or are dependent upon, the amendments at the time the amendments were proposed. *Eggert*, 217 AD2d at 976. Rezoning the majority of residential districts in the Village to allow RGP's and NPW's to be located in those districts, albeit subject to certain special conditions and restrictions, should be viewed as part of a comprehensive plan to facilitate the establishment of such gathering places and houses of worship within the Village. Respondents have clearly identified this as the goal and have identified their Zoning Code as the *de facto* comprehensive plan. Therefore, Respondents' elimination of construction impacts from their SEQRA review could be regarded as segmentation, particularly where they have projected that a total of 13 houses of worship, three per square mile, are likely to be established in the Village. The likely probability of the projection is bolstered by the fact that nonconforming houses of worship currently exist in the Village.

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[8] Petitioners' second cause of action dovetails with their first cause of action, as both causes of action relate to Respondents' failure to consider construction related environmental impacts.

Petitioners have stated a claim that the Village Board allegedly segmented its review of the proposed changes by first rezoning the residential districts and deferring consideration of construction related impacts to future individual permit applications.

Accordingly, Respondents' motion to dismiss Petitioner's second cause of action is denied.

Third Cause of Action

Petitioners' third cause of action alleges that Respondents' decision to issue a negative declaration should be deemed arbitrary and capricious, as it failed to take a "hard look" at the relevant areas of environmental concern and provide a "reasoned elaboration" of the basis for its determination. The areas of environmental concern identified were transportation, consistency with community plans and consistency with community character. Petitioners alleged that the Village Planners identified areas of environmental impact, such as increases in vehicle traffic and pedestrian movements, which the FEAF either did not discuss or did not propose mitigation measures that "clearly negate the continued potentiality of the adverse effects of the proposed action." Petition at 46 (quoting *Merson v McNally*, 90 NY2d 742, 754 [199].

Respondents argue that the third cause of action should be dismissed because they addressed the environmental impacts and modified the Conditional Use standards to address the issues. Respondents argue that "all of the Conditional Use restrictions and standards contained in the Zoning Amendments serve to mitigate impacts of development under the Amendments <u>as compared</u> to the Prior Zoning because none of those restrictions existed under the Prior Zoning." Memorandum of Law at 45 (emphasis in original). Respondents cite limitations on hours of operation, occupancy controls, limitation of the size of places of worship, regulation of accessory uses, front yard restrictions, signage control and landscape requirements as examples.

Respondents contend that Petitioners' reliance on *Merson* is misplaced, because that case involved review of a specific project and the modifications that were proposed throughout the review process by the project sponsor to address the environmental concerns that were raised by the lead agency. Respondents argue that *Merson* did not establish a standard to be applied in every case.

Merson addressed the issue whether the modifications made by the project sponsor converted the negative declaration issued by the lead agency into an improperly conditioned negative declaration. That is not applicable here. In this case, the modifications to the zoning

amendments were made by Respondents throughout the review process in response to input from other agencies and municipalities and following public hearings. Throughout the review process, Respondents modified the conditions and restrictions in order to mitigate the environmental impacts. There was no project that was being evaluated as part of the review process and therefore there was no project sponsor which proposed modifications. Thus, *Merson* is not applicable. In any event, as the court stated in *Merson*, "[w]hat is dispositive is the character and source of the identified modifications." 90 NY2d at 756.

Petitioners have stated a cause of action concerning the adequacy of Respondents' review of the environmental impacts on transportation, consistency with community plans and consistency with community character. CPLR §3211(a)(1) is an improper vehicle for conducting judicial review of a Certified Record.[9]

Accordingly, Respondents' motion to dismiss Petitioners' third cause of action is denied.

Fourth through Sixth Causes of Action: Notice of Claim Requirement

Respondents seek dismissal of Petitioners fourth through sixth causes of action seeking declaratory relief for failure to file a Notice of Claim with the Village Clerk setting forth their allegations. Petitioners' fourth cause of action alleged that the HOW Law failed to comply with GML § 239. Petitioners' fifth cause of action alleged that the HOW Law was not passed in accordance with Local Law Article XVII: Amendments §§1 and 2. Petitioners' sixth cause of action alleged that the HOW Law is null and void because it was passed based upon a Resolution containing materially false and derogatory information.

Petitioners acknowledge that they did not file a Notice of Claim with the Village Clerk. They contend that the timing requirements for filing an Article 78 and filing a Notice of Claim would have prevented them from filing a hybrid action because they could not simultaneously satisfy both filing requirements. They assert that they have since complied with the Notice of Claim requirement by serving a Notice of Claim on the Village Clerk and they provide proof of service. However, Petitioners acknowledge that their Notice of Claim is defective because they did not wait the requisite forty days before filing this proceeding.

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[9] It is apparent that the parties are talking past each other. In the process, neither side presents a clear position to the Court.

Accordingly, as Petitioners acknowledge the procedural defects in their fourth through sixth causes of action, Respondents' motion to dismiss those claims is granted.

Motion to Intervene

The Orthodox Jewish Coalition of Chestnut Ridge ("OJC") and Congregation Birchos Yitzchok, jointly moved for permission to intervene in the proceeding. Proposed intervenors claim that they have a substantial interest in the proceeding because if the HOW Law is declared null and void, they would not be able to legally exercise their religion communally within the Village. Affirmation of Abraham Willner at ¶¶ 3-5; Affirmation of Avrohom Fromovitz at ¶¶ 3-5.

Petitioners do not oppose the motion for intervention.

Respondents do not oppose intervention as to the Article 78 causes of action. Respondents oppose intervention as to the declaratory judgment causes of action because it may cause delay and proposed intervenor's affirmative defenses may not align with those asserted by Respondents. Respondents contend that proposed intervenors do not have a substantial interest in these causes of action other than to bolster their arguments in a pending action against the Village under the Religious Land Use law.

Intervenors' motion is granted pursuant to CPLR §7802 (d) as to Petitioners' Article 78 causes of action challenging Respondents' review under SEQRA. CPLR §7802(d) authorizes "interested persons" to intervene. "[I]ntervention should be permitted where the intervenor has a real and substantial interest in the outcome of the proceedings." *Bernstein v Feiner*, 43 AD3d 1161, 1162 [2nd Dept 2007]; *County of Westchester v Department of Health of State of N.Y.*, 229 AD2d 460, 461 [2nd Dept 1996]. Proposed intervenors have a real and substantial interest in the outcome of the proceeding as they seek a legal avenue to more easily practice their religion communally in the Village. Accordingly, the motion to intervene in the Article 78 causes of action is granted.

The branch of the motion to intervene as to the declaratory judgment causes of action is denied as those causes of action may not be maintained and have been dismissed.

SUMMARY

It is

ORDERED, that Respondents' motion to dismiss is denied as to the first through third causes of action; and it is further

ORDERED, that Respondents' motion to dismiss is granted as to the fourth through sixth causes of action; and it is further

ORDERED, that the motion to intervene by the Orthodox Jewish Coalition of Chestnut Ridge and Congregation Birchos Yitzchok is granted; and it is further

ORDERED, that Respondents and Intervenors shall serve and file their answers to the first through third causes of action on or before November 18, 2019. Petitioners shall serve their reply on or before November 25, 2019. The return date of the Petition is adjourned to November 27, 2019. The parties are restricted to a 25-page memorandum of law or affirmation which sets forth legal argument.[10]

The foregoing constitutes the Decision and Order of this Court.

Dated: October 4, 2019
New City, NY

ENTER

HON. PAUL I. MARX, J.S.C.

[10] The Court found much of the briefing on the motion to dismiss by both parties to be unhelpful, at times confusing and too frequently not on point. The Court requires clear, concise language and case citations that elucidate what a proper SEQRA review entails. This is not a contest of the greatest number of words. The focus must be placed on Respondents' SEQRA analysis and how it did or did not meet SEQRA's requirements.