To commence the statutory time 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
ENVIRONMENTAL CLAIMS PART
NINTH JUDICIAL DISTRICT, COUNTY OF WESTCHESTER

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In the Matter of the Application of

GLORIA MAGAT, HELEN A. STEPHENSON, LAWRENCE E. LEVITZ, CHARLENE BERG-KIBEL, MARGOT STEVENSON, GABRIELLI BARNI and GUISEPPE BARNI,

Petitioners,

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

-against-

THE VILLAGE OF BRONXVILLE PLANNING BOARD
THE VILLAGE OF BRONXVILLE and
LAWRENCE HOSPITAL CENTER,

Respondents.

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FILED AND ENTERED ON 2-25-2014 WESTCHESTER COUNTY CLERK

Index No.: 0444 / 13
Fully Submitted: 11 / 1 / 13
DECISION AND ORDER

LEFKOWITZ, J.,

The following documents numbered 1 to 270 were read on this petition for judgment pursuant to article 78 of the Civil Practice Law and Rules:

Notice of Petition - Verified Petition (hereafter, "Petition") - Exhibits - Affidavits - Affidavits of Service	1 - 18
Verified Answer (respondents, The Village of Bronxville Planning Board [hereafter, the "Board"] and, The Village of Bronxville [hereafter, "VOB"], [collectively hereafter, the "Vil Resps"]) - Affidavit in Opposition - Exhibits - Memorandum of Law in Opposition - Return of Record - Supplemental Record with Exhibits - Affidavits of Service	19 - 249
Verified Answer (respondent, Lawrence Hospital Center [hereafter, "LHC"]) - Affidavit in	

Opposition - Exhibits - Memorandum of Law in Opposition - Amended Memorandum of Law in Opposition - Affidavits of Service	250 - 267
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Upon consideration of all of the foregoing, and for the following reasons, the Petition is denied.

Factual and Procedural Background

LHC has for decades operated in VOB, in Westchester County, a hospital currently housed in a six-story, plus basement, brick building. In December 2010, LHC submitted an application to the Board for approval of a site plan for a two-story, plus basement, addition to be annexed to the existing building within the bounds of the parcel on which the existing building is located (hereafter, the "Project"). The addition would, among other things, house operating rooms and a new facility for the care of cancer patients. The site plan included a foundation which would support a structure of more than two stories. And in a memorandum dated January 25, 2011, Frederick P. Clark Associates, Inc., a consultant retained by the Board, inter alia, stated: "Although an application for a 41,923 square-foot facility was submitted, we understand from the Applicant that the Proposed Action may be the first phase of a much larger addition to the hospital and may be part of the implementation of a master plan for the hospital." (A copy of the memorandum [hereafter, the "Clark Memo"] is contained in the Record at 0364-0367[1]).

At the Board's request, LHC submitted to the Board an environmental assessment form (hereafter, "EAF") on February 4, 2011; annexed to the EAF was a letter to the Board from "Edward M. Dinan, President & CEO," dated February 3, 2011, in which, inter alia, Mr. Dinan stated:

> Lawrence Hospital has no intention of any future vertical expansion beyond what it [*sic*] being currently proposed. Although the

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[1] The Return of Record consists of 201 separate documents in chronological order with bates pagination. The Supplemental Record with Exhibits consists of the Supplemental Record and Exhibits A through K. The Return of Record and Supplemental Record with Exhibits will be referred to collectively hereafter as the "Record." Documents contained in the Return of Record are cited by the bates page numbers at which they appear, e.g., "Record at 0000."

> foundation is being engineered to support up to six-stories, there is no master plan for expanding beyond the three-stories being proposed nor is there any planned phased development. Rather, the proposed addition is being designed so that future stewards of Lawrence Hospital Center may potentially have options if the need arises, if at all, for future expansion.

(Record at 4290).

On February 9, 2011, the Board determined that the proposed site plan constituted a Type I action and declared itself lead agency for the purpose of conducting an environmental review under article 8 of the Environmental Conservation Law (also known as the State Environmental Quality Review Act [hereafter, "SEQRA"]). The Project was discussed at the Board's public meetings on March 9, 2011, April 13, 2011, May 11, 2011, June 8, 2011, July 13, 2011, September 13, 2011, October 12, 2011, November 9, 2011, December 14, 2011, and January 11, 2012.

In January 2012, the Board circulated a revised EAF to involved agencies. Because approval of the proposed site plan would require floor area, street frontage and setback variances from the VOB Zoning Code (hereafter, "Zoning Code"), the Village of Bronxville Zoning Board of Appeals (hereafter, "ZBA") was among the involved agencies to which the revised EAF was circulated. The ZBA conducted a review of the variances that would be required and the potential environmental impacts therefrom, and submitted a memorandum regarding the matter, dated June 5, 2012, to the Board. (A copy of the memorandum is contained in the Record at 2591-2594). The ZBA's memorandum was discussed and reviewed by the Board at its public meeting on June 13, 2012.

At the conclusion of its public meeting on July 11, 2012, the Board determined that based upon its review and the changes made to LHC's application during the course thereof, there were no potentially significant adverse environmental impacts from the Project; consequently, the Board issued a negative declaration (hereafter, the "Neg Dec," a copy of which is contained in the Record at 2650-2776) and did not require the preparation of an environmental impact statement (hereafter, "EIS"). The Neg Dec included references to the Clark Memo and the February 3, 2011, letter from Mr. Dinan, and an explanation why the Board did not consider whether there would be any potential environmental impacts associated with the construction of four additional floors on top of the two-story, plus basement reflected in LHC's site plan. (*See* Record at 2659).

On October 23, 2012, the ZBA issued a decision granting the variances required under the

proposed site plan. At the conclusion of its meeting on December 12, 2012, the Board voted in a single Findings and Decision, to grant LHC's applications for preliminary and final site plan approval (*see* Record at 2848-2898); the Board also voted in a separate Findings and Decision to grant LHC's application for a special use permit (*see* Record at 2899-2913).

Petitioners are residents of the Village of Bronxville, all of whose properties are allegedly "located immediately across the street from" the site of the Project. (Petition at ¶¶5, 6, 7, 8, 9, 10 and 11). Petitioners commenced the instant special proceeding pursuant to CPLR art. 78 by filing the Petition with the Dutchess County Clerk's Office on January 14, 2013. Petitioners seek judgment annulling and vacating the Neg Dec, and the Board's approval of the special use permit and site plan applications. In the first of five separately stated and numbered causes of action, petitioners allege that the Board failed to comply with the procedural requirements of SEQRA. In the second cause of action petitioners allege that the Board failed to comply with the substantive requirements of SEQRA. In the third cause of action petitioners allege that the Project is not consistent with the village's comprehensive plan. In the fourth cause of action petitioners allege that the Board failed to comply with requirements for site plan approval contained in the Zoning Code. In the fifth cause of action petitioners allege that the Board failed to issue a special use permit as required under the Zoning Code.

In lieu of responsive pleadings, LHC and the Vil Resps each made a motion pursuant to CPLR 506(b) and 507 for an order granting a change of venue to Westchester County, and pursuant to CPLR 3211(a)(5) to dismiss the Petition on the ground that the proceeding could not be maintained because it had not been timely commenced under the applicable statute of limitations. By Decision & Order dated May 3, 2013, Supreme Court, Dutchess County (Hon. Christine A. Sproat, J.S.C.), granted the motions for a change of venue and transferred the proceeding and any other requests for relief to Westchester County.

By Order of Hon. Alan D. Scheinkman, Administrative Judge of the Ninth Judicial District, dated May 30, 2013, the proceeding was assigned to this Court. By Decision and Order dated and entered July 9, 2013, inter alia, this Court denied the motions to dismiss and ordered that respondents were permitted to serve and file answers to the Petition. LHC's Verified Answer and the Vil Resps' Verified Answer were each filed on October 7, 2013. The Petition was deemed fully submitted upon the filing of petitioners' reply affidavit and memorandum of law on November 1, 2013.

Discussion

The Petition is denied. "It is settled that a special proceeding is subject to the same standards and rules of decision as apply on a motion for summary judgment, requiring the court to decide the matter 'upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised' (CPLR 409[b] [other internal citations omitted])." *Matter of Karr v Black*, 55 AD3d 82, 86 (1st Dept 2008); *see also Matter of Bahar v Schwartzreich*, 204 AD2d 441, 443 (2nd Dept 1994) (applying summary judgment standard in article 78 proceeding). As the pleadings, papers and admissions submitted herein – including the certified transcripts of the record of the proceedings under consideration (*see* CPLR 7804[d]) – fail to demonstrate the existence of a triable issue of fact and do establish that respondents are entitled to judgment as a matter of law, the Petition must be denied. *See* CPLR 3212(b); *Matter of Izzo v Lynn*, 271 AD2d 801, 802 (3rd Dept 2000); *Matter of Lupoli v Conservation Bd. of the Town of Southhampton*, 267 AD2d 387 (2nd Dept 1999).

First Cause of Action

In the first cause of action petitioners contend that the Board failed in several respects "TO COMPLY WITH THE PROCEDURAL REQUIREMENTS OF [SEQRA]." (Petition at 12).

Firstly, petitioners contend that the Board failed to issue a determination of significance in a timely manner. (*See id.* at ¶¶61-64).

Pursuant to 6 NYCRR 617.6(b)(3)(ii):

> The lead agency must determine the significance of the action within 20 calendar days of its establishment as lead agency, or within 20 calendar days of its receipt of all information it may reasonably need to make the determination of significance, whichever occurs later, and must immediately prepare, file and publish the determination in accordance with section 617.12 of this Part.

Petitioners argue that because the Board "gave notice of its intent to act as SEQRA lead agency on February 9, 2011[,] . . . the last day on which [it] should have made its determination of significance was prior to April 2011." (Petition at ¶64). The Neg Dec was issued on July 11, 2012, 575 days after LHC submitted its application for site plan approval and 515 days after the Board was

established as lead agency.

However, "the time limits for SEQRA review are directory, not mandatory." *Omabuild USA No. 1 v State of New York*, 207 AD2d 335 (2nd Dept 1994). The Record establishes that upon receipt of LHC's application, the Board undertook to gather substantial data, held several public meetings, and received and considered comments from interested parties – including petitioners – and agencies – including the ZBA. Then, the Board issued its determination of significance at its next regularly scheduled meeting after receiving the ZBA's memorandum. In such circumstances, the Neg Dec was not untimely. *See, e.g., Matter of Nicklin-Mc Kay v Town of Marlborough Planning Bd.*, 14 AD3d 858, 861 (3rd Dept 2005) (holding that negative declaration issued 853 days after submission of application that was subject of review was not untimely).

Secondly, petitioners contend that the Board's failure to require preparation of an EIS violated SEQRA. (*See* Petition at ¶¶65-69). The Board determined that the Project described in the EAF constituted a Type I action, which "carries with it the presumption that it is likely to have a significant adverse impact on the environment and may require an EIS" (6 NYCRR 617.4[a][1]). However, said determination "did not, per se, necessitate the filing of an [EIS]." *Shop-Rite Supermarkets, Inc. v Planning Bd. of the Town of Wawarsing*, 82 AD3d 1384, 1386 (3rd Dept 2011) *appeal denied* 17 NY3d 705 (2011).

"While an EAF is used to determine significance or nonsignificance, the purpose of an EIS is to examine the identified potentially significant environmental impacts which may result from a project." *Matter of Merson v Mc Nally*, 90 NY2d 742, 751 (1997). Thus, an EIS is not required and "a negative declaration may be properly issued on a Type I action, where . . . the project has been modified during the initial review process to accommodate environmental concerns of the lead agency and other interested parties[, provided t]he modifications . . . negate the continued potentiality of the adverse effects of the proposed action" (*Matter of Thorne v Vil. of Millbrook Planning Bd.*, 83 AD3d 723, 725 [2nd Dept 2011] *lv denied* 17 NY3d 711 [2011]), and the "declaration is not the product of closed-door negotiations" between the applicant and the agency (*Matter of Vil. of Tarrytown v Planning Bd. of Vil. of Sleepy Hollow*, 292 AD2d 617, 619-620 [2nd Dept 2002] *lv dismissed in part and denied in part* 98 NY2d 609 [2002]).

The Record in the instant proceeding establishes: that the Project was modified during the initial review process to accommodate concerns, both environmental and aesthetic, voiced by the

Board and other interested parties, including petitioners; that said review process was conducted in public; that there is no evidence that the Neg Dec was the product of any closed-door negotiations between the Board and LHC; and, that said modifications as reflected in the Neg Dec purportedly negate any potentially significant adverse environmental impacts from the Project. Therefore, the Board's failure to require preparation of an EIS did not violate SEQRA.

Nor did the Neg Dec constitute an impermissible conditioned negative declaration (hereafter, "CND").[2] A CND is a negative declaration for an Unlisted action in which the lead agency has included conditions precedent in mitigation of potentially significant adverse environmental impacts. *See* 6 NYCRR 617.2(h). A lead agency may not use a CND where it has determined that the project constitutes a Type I action. *See* 6 NYCRR 617.3(b) and 617.7(d). Nor in such circumstances may a lead agency issue what amounts to a de facto CND. *See Matter of Merson v Mc Nally*, 90 NY2d at 753 (holding that "a lead agency clearly may not issue a negative declaration [for a Type I action] on the basis of conditions contained in the declaration itself"). Thus, where a negative declaration is issued on a Type I action for a project that has been modified during the initial review process, "[t]he modifications may not be conditions unilaterally imposed by the lead agency, but adjustments incorporated by the project sponsor to mitigate concerns identified by the public and the reviewing agencies, and be publicly evaluated prior to issuance of the negative declaration." *Matter of Thorne v Vil. of Millbrook Planning Bd.*, 83 AD3d at 725; *see also Inc. Vil. of Poquott v Cahill*, 11 AD3d 536, 541 (2nd Dept 2004) (holding that mitigating measures contained in negative declaration did not render it procedurally defective where "those measures were incorporated as the result of an open and deliberative process") *lv dismissed in part and denied in part* 5 NY3d 819 (2005).

In the instant proceeding, the Neg Dec itself contained no explicit conditions and the Record establishes that the modifications to the original EAF represented adjustments incorporated by LHC to mitigate concerns identified during what was a very public, open and deliberative process. *Compare, e.g., Matter of Shawangunk Mtn. Envtl. Assn. v Planning Bd. of Town of Gardiner*,

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While there is no specific contention in the paragraphs headed, "FIRST CAUSE OF ACTION" (Petition at 12), that the Neg Dec constituted an impermissible CND, the claim can be inferred from various allegations in the Petition (*see, e.g.*, Petition at ¶¶46-49, 88), and was addressed by the parties in their memoranda of law.

157 AD2d 273, 277 (3rd Dept 1990) (holding that negative declaration should have been annulled because "it is abundantly evident from the record that the mitigating measures proposed were concessions extracted from [the applicant] by [the Planning Board] and its consultant as necessary prerequisites to the issuance of the negative declaration"). Therefore, the Neg Dec did not constitute an impermissible, de facto CND.

Therefore, the first cause of action is denied.

Second Cause of Action

In the second cause of action petitioners contend that the Board failed "to Strictly Comply with SEQRA Substantive Mandates." (Petition at 20). Upon a claim that an agency determination does not satisfy SEQRA substantively, a court "may 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 (source of quoted language and other internal citations omitted)." *Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417 (1986). Moreover, "an agency's substantive obligations under SEQRA must be viewed in light of a rule of reason." *Id.*

Firstly, petitioners contend that the Board improperly deferred consideration of potentially significant adverse environmental impacts because its findings and decision granting LHC's application for site plan approval (*see* Record at 2848-2865) contained several conditions concerning post-approval verification and site monitoring by the VOB Superintendent of Buildings. (*See* Petition at ¶¶98-108). "A lead agency improperly defers its duties when it abdicates its SEQRA responsibilities to another agency or insulates itself from environmental decisionmaking." (*Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, 9 NY3d 219, 234 [2007]), as where, for example, it identifies a potentially significant impact at the outset but concludes its SEQRA review without addressing the issue and directs the applicant to seek review of such issue before another agency (*see, e.g.*, *Matter of Penfield Panorama Area Community, Inc. v Town of Penfield Planning Bd.*, 253 AD2d 342, 349-350 [4th Dept 1999] [holding that it was improper deferral for planning board to issue final EIS in which it conditioned project approval upon approval from other agencies of plan to remediate hazardous waste concern that had been identified in draft EIS]).

However, the mere fact that a planning board imposes conditions in approving a site plan

does not implicate the adequacy of the SEQRA process that preceded said approval. *See Matter of Basha Kill Area Assn. v Planning Bd. of Town of Mamakating*, 46 AD3d 1309, 1312 (3rd Dept 2007) (holding that imposition of post-approval conditions did not constitute improper deferral because, inter alia, "the law permits and contemplates that site plan approvals . . . can be conditional") *lv denied* 10 NY3d 712 (2008). In the instant proceeding, the Record establishes that during the SEQRA process the Board exercised its own judgment in determining whether there were any potentially significant adverse environmental impacts from the Project. Therefore, imposing conditions upon its approval of LHC's site plan application did not constitute improper deferral of the Board's duties under SEQRA.

Secondly, petitioners contend that the process which culminated in the Neg Dec was impermissibly segmented because the Board failed to consider whether there were any potentially significant adverse environmental impacts from the construction of four additional floors on top of the two stories plus basement reflected in LHC's site plan. (*See* Petition at ¶¶109-122). "'Segmentation' means the division of the environmental review of an action such that various activities or stages are addressed . . . as though they were independent, unrelated activities, needing individual determinations of significance." 6 NYCRR 617.2(ag). "The regulations generally prohibiting 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." *Matter of Long Is. Pine Barrens Socy. v Planning Bd. of Town of Brookhaven*, 204 AD2d 548, 550 (2nd Dept 1994) *lv dismissed in part and denied in part* 85 NY2d 854 (1995).

In conducting its review of a proposed action a lead agency must also consider "other simultaneous or subsequent actions which are included in any long-range plan of which the action under consideration is a part." *Matter of Farrington Close Condominium Bd. of Mgrs. v Inc. Vil. of Southampton*, 205 AD2d 623, 626 (2nd Dept 1994). The rule against segmentation is violated where the evidence establishes that the action reviewed and the unconsidered action were "part of an integrated and cumulative development plan sharing a common purpose." *Matter of Town of Blooming Grove v County of Orange*, 103 AD3d 655, 657 (2nd Dept 2013) *lv denied* 21 NY3d 857 (2013). The rule is not violated where the unconsidered action was "speculative and hypothetical," and there is no evidence that the action reviewed by the lead agency was but "the first phase of a

larger, unified project." *Matter of Vil. of Tarrytown v Planning Bd. of Vil. of Sleepy Hollow*, 292 AD2d at 620.

In the instant proceeding, the only indications in the Record that the action reflected in the site plan might have been part of a larger plan to construct a six-story addition, are the fact that the foundation proposed therein would support an addition of more than two stories and the statement in the Clark Memo that some unidentified source had made an elusion from which the consultant inferred that LHC might have some undefined master plan. As is evident from the Neg Dec itself, the Board explored the possibility that there might be, and directed LHC to explain whether there was, such a plan; in response to which directive LHC provided a reasonable explanation for the Project's foundation specifications and expressly stated "that the Hospital does not have current or future plans to expand beyond the three-level addition that is the subject of the current application." (Record at 2659).

Based on said representations, the Board found the Project "to be a whole action and not part of any long-range plan," and that any future applications for such expansion constituted "a necessarily speculative or hypothetical plan at this time." (*Id.*) Nor is there any evidence in the Record that the addition reflected in the site plan was actually the first phase of a larger, unified project. Therefore, the Board's failure to consider the potential environmental impacts from the construction of four additional floors did not constitute impermissible segmentation. *See Matter of Saratoga Springs Preserv. Found. v Boff*, 110 AD3d 1326,1328 (3rd Dept 2013) (holding that there was no impermissible segmentation where lead agency considering demolition application relied on applicant's representation that he had no plan for post-demolition development) *and compare with Matter of Teich v Buchheit*, 221 AD2d 452, 453 (2nd Dept 1995) (holding that, the applicant's "contention to the contrary notwithstanding," failure to consider future expansion constituted impermissible segmentation in light of extensive evidence of a long-range plan and that the action being reviewed was included in the first phase of said plan).

Petitioners' remaining contentions in support of the second cause of action amount to no more than their disagreement with the Board's findings that the Project presented no potentially significant adverse environmental impacts related to traffic, noise or community character, and its failure to adopt "numerous feasible alternatives" proposed by petitioners. (*See* Petition at ¶¶123-161).

However,

> the Legislature in SEQRA has left the agencies with considerable latitude in evaluating environmental effects and choosing among alternatives. Nothing in the law requires an agency to reach a particular result on any issue, or permits the courts to second-guess the agency's choice, which can be annulled only if arbitrary, capricious or unsupported by substantial evidence (internal citation omitted).

Matter of Jackson v New York State Urban Dev. Corp., 67 NY2d at 417.

In sum, the Record establishes that the Board identified all areas of environmental concern relevant to the Project, took a hard look at them, and made a reasoned elaboration of the bases for its determination. That determination, enunciated in the Neg Dec, was not arbitrary or capricious and was well-supported by substantial evidence. Therefore, the second cause of action is denied.

Third Cause of Action

In the third cause of action petitioners challenge the Board's alleged "Failure to Comply with Village's Community/Comprehensive Plan." (Petition at 32). The gravamen of this cause of action appears to be that the Project is not consistent with the Village Of Bronxville Community Plan 2009 (hereafter, the "Community Plan")[3]; therefore, the Board's determination that it is consistent "is irrational, arbitrary and capricious and not supported by substantial evidence and should be annulled" (*id.* at ¶178). However, the Record does not support petitioners' contentions and, in fact, establishes that the Project is not inconsistent with the Community Plan. For example, the Community Plan notes that the area of the village in which Lawrence Hospital has been located since 1909 "is [– i.e., since well before 2009 –] dominated by the presence of Lawrence Hospital" (Community Plan at 35), and that "Lawrence Hospital has filed a certificate of need with the State for a cancer center" (*id.* at 45). The Community Plan contains no language indicating, or that would support an inference, that an expansion of LHC's physical plant to accommodate that cancer center, as contemplated in the Project – wholly contained as it would be within the bounds of the parcel on which LHC is located – would be inconsistent with its goals or recommendations for the future. (*See id.*, "2009

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3 The Community Plan, which was adopted by the VOB Board of Trustees on March 9, 2009, is the most recent iteration of the comprehensive plan that the Board is required to prepare, and to review at least every five years. *See* Community Plan at 1; Zoning Code § 310-45.

Recommendations," at 74-78).

Moreover, assuming arguendo that there were evidence of some inconsistency, petitioners cite to no authority in support of their proposition that the Neg Dec, site plan approval and special use permit must in consequence be annulled and vacated. (*See* Petition at 40). A zoning determination is not invalid for inconsistency with a comprehensive plan if it does not conflict with the fundamental land use policies and development plans of a municipality. *See Matter of Bergami v Town of Rotterdam*, 97 AD3d 1018, 1020 (3rd Dept 2012). "The obligation is support of comprehensive planning, not slavish servitude to any particular comprehensive plan. Indeed, sound planning inherently calls for recognition of the dynamics of change." *Matter of Town of Bedford v Vil. of Mt. Kisco*, 33 NY2d 178, 188 (1973).

In the instant proceeding, the Record establishes that the Board's determinations were not in conflict with VOB's fundamental land use policies and development plans as elucidated in the Community Plan, and were consistent with sound, comprehensive planning in general. Therefore, the third cause of action is denied.

Fourth Cause of Action

In the fourth cause of action petitioners allege that the "Board Failed to Comply with the Site Plan Approval Requirements." (Petition at 34). Petitioners contend that, taken together, sections 310-26, 310-27 and 310-28 of the Zoning Code require that when considering an application for site plan approval the Board engage in a two-step process, involving first preliminary and then final approval, and that in granting LHC's application for both in a single Findings and Decision, the Board violated that requirement. (*See id.* at ¶¶180-190).

However, Zoning Code § 310-27(E) provides:

> (1) The Planning Board shall review such application [for preliminary site plan approval] and after notice and hearing shall take official action within 62 days after such hearing by granting preliminary approval or preliminary approval with modifications . . . or disapproving the application . . .
>
> (2) If the Planning board approves the application without modification, it may deem such action as final approval of the application within the meaning of Subsection D of § 310-28 of this article.

The Record establishes that the Board complied with Zoning Code § 310-27(E)(1) and (2). LHC's application triggered, and was necessarily discussed during the 12 public meetings at which the Board conducted, its environmental review of the Project. The site plan itself underwent changes as part of the process which culminated in, and in keeping with, the Neg Dec. Following issuance of the Neg Dec ,the Board discussed the site plan application – that is, the application for approval of the site plan reflected in the Neg Dec – at additional public meetings before granting approval without further modification. Thus, the Board reviewed the application and made a timely determination after notice and hearing; and because it did so without modifying the site plan that had been the subject of said review, notice and hearing, the Board properly deemed said determination as final approval. Therefore, the fourth cause of action is denied.

Fifth Cause of Action

In the fifth cause of action petitioners allege that the "Board Failed to Issue the Required Special Use Permit." (*Id.* at 38). However, the Record establishes that the Board did in fact issue the special use permit (*see* Record at 2899-2913) and petitioners have failed to raise a triable issue that they did not. Therefore, the fifth cause of action is denied.

Accordingly, for the foregoing reasons, it is

ORDERED that the Petition is denied in its entirety and the above-captioned special proceeding is dismissed.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York

February 25, 2014

ENTER:

HON. JOAN B. LEFKOWITZ
Justice of the Supreme Court

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