To be Argued by:
STEVEN N. MOGEL
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Second Department

In the Matter of the Application of

HILDA KOGUT, ROBERT E. ASSELBERGS and MAGALI DUPUY,

Petitioners-Respondents,

– 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-Appellants.

CONGREGATION BIRCHAS YITZCHOK, a New York Religious Corporation and the ORTHODOX JEWISH COALITION OF CHESTNUT RIDGE, an unincorporated association,

Non-Party Respondents.

Docket No.: 2019-11974

BRIEF FOR PETITIONERS-RESPONDENTS

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1. Did the Supreme Court properly hold that Petitioners-Respondents have standing to pursue their claims under the State Environmental Quality Review Act ("SEQRA")?

Yes.

2. Did the Supreme Court properly hold that Respondents-Appellants failed to demonstrate that there are no factual allegations within the four corners of the Notice of Petition and Verified Petition dated March 21, 2019 which, taken together, manifest any cause of action cognizable by law?

Yes.

3. Did the Supreme Court properly hold that Respondents-Appellants failed to produce documentary evidence that conclusively established a defense to the asserted claims as a matter of law?

Yes.

COUNTERSTATEMENT OF FACTS

Since at least the passage of Village Local Law 6 of 2001, "churches and similar places of worship" (hereinafter "Places of Worship") have been designated as a permitted use, by special permit of the Village Board, in almost every residential zone in the Village of Chestnut Ridge. (R 95-99). Places of Worship were categorized as "use group 'c,'" (R 100–111) setting forth a minimum lot area of five (5) acres, among other bulk requirements. (R 112). At a Village Board meeting held on February 22, 2018, the Village Board revealed to the public for the first time that it had been, at the behest of and in consultation solely with an unincorporated association known as the Orthodox Jewish Coalition of Chestnut Ridge, developing a comprehensive overhaul of the Village's zoning law pertaining to Places of Worship over several months with the assistance of the firm of Nelson, Pope & Voorhis, LLC ("Village Planners"). (R 31, 577-582).

This amendment to the existing zoning law of the Village ("House of Worship Law" or "HOW Law") would ultimately create three (3) categories of land use, to wit: (a) Residential Gathering Places (RGP); (b) Neighborhood Places of Worship (NPW); and (c) Community Places of Worship (CPW). All three uses would be permitted in almost every Village

zoning district. CPWs would be similar to pre-amendment Places of Worship. (R 650 -661). Both RGPs and NPWs were entirely new categories of land use. (R 600, 615).

To state that the HOW Law "does not allow any new land uses that were not permitted under the Prior Regulations" and to describe RGPs and NPWs as only permitting "decreased [ ] minimum lot area requirements for uses already permitted throughout the Village," as Respondent-Appellants ("Appellants") assert, is beyond dissembling; it is simply and demonstrably false. *Brief for Respondents-Appellants dated June 26, 2020 ("Appellants' Brief") 5, 11*. RGPs, defined as one-family detached residences for which "a dedicated portion" would be used for large gatherings-either for religious or secular uses- that (a) occur more than 12 times per year; and (b) were comprised of 15 or more persons; and (c) did not exceed 49 persons "or the maximum allowable according to section 17.B of Article XII, or the maximum allowable number under the New York State Uniform Fire Prevention and Building Code, whichever is less."[1] (R 651). RGPs would

[1] Article XII provides, in relevant part, that "the maximum number of non-resident persons using the Residential Gathering Place at any time shall be determined either by dividing the net lot area by 500 square feet per person, or by the maximum number calculated according to the definition of 'Residential Gathering Place' in this chapter, whichever is less." (R 651).

be permitted in all zones of the Village. (R 657-658). Among other concessions and conditions, RGPs were permitted:

a. to be established upon undersized lots (up to twenty [20%] percent smaller than the minimum lot size and minimum lot width for a single-family residence in the zone);
b. to be established upon overdeveloped lots (up to ten [10%] percent more than the maximum development coverage for a single-family residence in the zone)[2]
c. to use a maximum of two rooms and up to 50% of the gross floor area for residential gathering purposes;
d. to post a sign advertising the RGP;
e. to operate seven days a week, and all hours of the day (except between the hours of 12:00a.m. and 6:00a.m., which operation would be permitted "only" up to three times per year); and
f. to utilize both on-site and off-site parking to accommodate its users.

(R 652).

NPWs would also be permitted in all zones in the Village in structures as small as single-family residences, upon the minimum lot size for single-family residences in the zone. NPWs could be up to 10,000 square feet in size. As with RGPs, NPWs were permitted:

a. To post a sign advertising the NPW;
b. to operate seven days a week, and all hours of the day (except between the hours of 12:00a.m. and 6:00a.m., which operation would be permitted "only" up to three times per year);
c. to allow occupancy of the structure for the maximum number of persons permitted under NYS fire and building codes; and
d. to utilize both on-site and off-site parking to accommodate its users.
e. to house a single-family residential unit.

NPW would also be permitted to include "[a]ccessory facilities and functions such as classrooms, social halls, administrative offices, bath and

[2] Said additional development coverage is to be utilized for on-site parking only. (R 652).

shower facilities, gymnasiums and indoor recreation facilities." (R 653-654).

The previously permitted houses of worship bear no resemblance to RGPs which, by way of only one example, may be used as houses of worship under the HOW Law, but are emphatically not limited to usage for religious worship (another fact which Appellants studiously ignore). NPWs bear no resemblance to the former zoning law regarding places of worship, as they (a) may include a residential component; and (b) have no minimum lot size, as opposed to the 5-acre minimum under the prior law, among other distinctions. The Village's own planners unequivocally state that RGPs and NPW are "new uses" which are not permitted under the preexisting zoning. (R 600) ("Residential Gathering Places currently are not expressly permitted in the Village, and are therefore deemed prohibited under the current zoning code."); (R 624) ("The proposed action would allow new uses involving gatherings or worship services . . .").

From the period beginning when the House of Worship Law was first revealed to the public on February 22, 2018 through the last evening of the Public Hearing thereupon on January 15, 2019, the Village Board had before it a laundry list of environmental concerns from its own Planning Board,

from Alan Sorensen, AICP of Planit Main Street, Inc. (a certified planner engaged by CUPON of Chestnut Ridge, a local advocacy group), from neighboring communities such as the Town of Orangetown and Clarkstown, from members of the public, and even from the Village's own planners, raising issues regarding parking, pedestrian and vehicular traffic and hazards, noise, lighting, erosion, stormwater, expansion of sidewalks, police, fire, ambulance, sewer, water, and inconsistency with community character and community planning with regard to the passage of the HOW Law, an action designated as a "Type I" action under SEQRA.

Although ignoring many likely environmental impacts, including the common sense notion that the HOW Law would undoubtedly result in construction-related environmental impacts, the Village's Planners identified three (3) areas of "moderate to large" impact; namely, Transportation (i.e., that "the proposed action may alter the present pattern of movement of people or goods" and "increase in pedestrian movements and on-street parking at gathering places and places of worship may create hazards for pedestrians and motorists"), Consistency with Community Plans (i.e., "the proposed action's land use components may be different from, or in sharp contrast to, current surrounding land use pattern[s]"), and Consistency with

Community Character (i.e., "nonresidential assembly and place of worship uses may be established within existing homogeneously developed residential neighborhoods."). (R 430-431).

The Village's Planners further acknowledged that "[t]he proposed action is not consistent with adopted land use plans" and is "inconsistent with the existing community character" with the new, proposed uses being non-residential, requiring more parking spaces and on-site walkways, access ramps, paving, lighting, being "somewhat" larger in size and bulk and resulting in increased noise than single family homes. (R 431).

Notwithstanding all of the above, the Village's Planners ultimately concluded that the House of Worship Law "will result in no significant adverse impact on the environment and, therefore, an environmental impact statement need not be prepared." (R 614). On January 15, 2019, the Village Board elected to issue a negative declaration under SEQRA ("Neg Dec"), and on February 21, 2019, the Village Board voted upon and approved Resolution 2019-12 ("Resolution"), approving the House of Worship Law. (R 627–649).

The Resolution describes the adoption of the Neg Dec, in part, as:

> ". . . determining that there were no significant adverse environmental impacts associated with implementing the

(cont.)

> proposed local law as compared to impacts that may result from applications made under the existing zoning code, and/or no substantial environmental impacts exist that could not be mitigated through the site specific SEQRA reviews to be undertaken when applications for approval are made under the proposed local law . . .”

(R 640).

The HOW Law was stamped filed with the New York State Department of State on March 5, 2019 thereby becoming, in accordance with its terms, effective as of that date. (R 650).

Petitioners-Respondents (“Respondents”) brought an action against Appellants by Notice of Petition and Verified Petition dated March 21, 2019 (“Petition”) commenced pursuant to CPLR §3001 and Article 78 seeking, *inter alia*, to vacate the Neg Dec as arbitrary and capricious, and for failure to comply with the requirements of SEQRA. (R 20-21). Appellants moved to dismiss by Notice of Motion dated May 3, 2019 based upon CPLR §3211(a)(1), (3), and (7). (R 704). By motion dated May 3, 2019, the Non-Party Respondents herein moved to intervene. (R 1431–1449). By Decision and Order of the Honorable Paul I. Marx, J.S.C. dated October 4, 2019 (“Decision”), Appellants’ motion to dismiss was granted in part and denied

in part (with regard to Respondents first through third causes of action).[3] (R 4-19). The Non-Party Respondents motion to intervene was granted. The instant appeal followed.

[3] Respondents' Fourth, Fifth and Sixth causes of action were declaratory in nature and were dismissed due to Respondents' failure to properly file a Notice of Claim in compliance with GML §239. The Respondents did not appeal, electing instead to assert the identical causes of action in a separate suit in Rockland County Supreme Court with the identical parties herein (*sans* the Non-Party Respondents) at Index No. 036311/2019. Defendants therein (Appellants herein) moved to dismiss pursuant to CPLR §3211(a)(5). By Decision and Order dated March 5, 2020, the Hon. Paul I. Marx, J.S.C. denied Defendants motion. Defendants filed Notice of Appeal dated March 13, 2020. As of the date of the instant Brief, same has not been perfected.

ARGUMENT

POINT I

SUPREME COURT PROPERLY HELD THAT RESPONDENTS HAVE STANDING TO PURSUE THEIR CLAIMS UNDER SEQRA

In the Decision, the lower court found that (a) Respondents alleged that the HOW Law "affects almost every residential district in the Village"; (b) each Respondent identifies the district where they live, all of which are residential districts to which the HOW Law applies;[4] and (c) therefore, "the zoning scheme for [Respondents'] property has been changed." The lower court held that, as residents in the affected zoning districts and as owners of

[4] Appellants herein argue that "[t]he Court should have never considered" the affidavits submitted by Respondents, which explicitly identified the zoning district in which they resided, as same constituted "new arguments" and "especially because the Village was not permitted to submit any reply papers." *Appellants' Brief 19, fn 10*. This argument is, quite simply, bizarre. Aside from the fact that merely stating what zone they reside in does not constitute a new "argument" on behalf of Respondents, Appellants made a pre-answer motion to dismiss and the Respondents' affidavits submitted therewith are part of Respondents' response in opposition thereto. CPLR §3211 explicitly anticipates and authorizes the submission of evidence in opposition to a motion to dismiss to be submitted by affidavit. See CPLR §3211(d) ("Should it appear from affidavits submitted in opposition to a motion made under subdivision [a] or [b] . . ."); Trump Vill. Section 4, Inc. v. Bezvoleva, 161 A.D.3d 916, 918 (2nd Dep't. 2018). The practical consequence of not permitting evidence to be submitted in opposition to a CPLR §3211 motion would result in quite a boon to movants, i.e., the granting of almost every motion. Even if Respondents were barred from specifying in which zone they actually reside (which they clearly are not), it was conceded by Appellants that the Respondents are all residents of the Village (R 790) and admitted by the Village's Planners that RGPs and NPWs have been added as new uses to each and every residential district of the Village. (R 600, 615). Therefore, simple deductive reasoning dictates that Respondents own property in a zoning district affected by the HOW Law.

property in said zones, Respondents 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." (R 10). The lower court's holding is correct, as it is mandated by controlling Court of Appeals precedent, caselaw in this Court, caselaw in the appellate courts in each and every other judicial department in the State of New York, and plain common sense.

Appellants reject the requisite inquiry for standing in SEQRA cases involving zoning, such as the instant case, to apply the self-same standard that has been repeatedly and explicitly rejected by the courts of this state. All of this is done in an effort to insulate from judicial review of any kind the manner in which the Village Board employed SEQRA to change its zoning ordinance. In order to effectuate this sleight of hand, Appellants seek to limit the unmistakable rulings of the Court of Appeals through a novel and wholly unsustainable interpretation of language in both the controlling and other inapposite cases.

Any analysis of standing in a SEQRA case involving zoning issues must begin with the Court of Appeals' decisions in Har Enterprises v. Town of Brookhaven, 74 N.Y.2d 524 (1989), and Gernatt Asphalt Products, Inc. v. Town of Sardinia, 87 N.Y.2d 668 (1996). As delineated by the Court of Appeals in Gernatt, and as asserted by Appellant herein, standing to challenge an administrative action ordinarily requires petitioner to allege (a) injury; (b) "that the interest to be asserted is within the zone of interest protected by the statute" and; (c) with regard to a SEQRA challenge, that the nature of the injury is "environmental and not solely economic in nature." Gernatt at 687.

Citing Gernatt, the lower court held, "[t]his 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." Under these circumstances, "the owner of property that is the subject of rezoning need not allege the likelihood of environmental harm . . . In those circumstances, the "property owner has a legally cognizable interest in being assured that the town satisfied SEQRA before taking action to rezone its land."

Gernatt Asphalt Products, Inc., 87 N.Y.2d at 687 (citing Har Enterprises, 74 NY2d at 529).

The Court of Appeals in Har Enterprises stated:

> "In deciding whether an owner has standing to ask a court to review SEQRA compliance, the question is whether it has a significant interest in having the mandates of SEQRA enforced. An owner's interest in the project may be so substantial and its connection to it so direct or intimate as to give it standing without the necessity of demonstrating the likelihood of resultant environmental harm.

Id.

Appellants argue, however, that the holdings in Har and Gernatt are narrow and distinguishable from the instant case. In Har, the petitioner purchased three (3) parcels which had been zoned commercial. Id. at 527. After petitioner entered into a contract to construct a supermarket on the largest of the parcels, the respondent therein held a public hearing upon changing the zoning upon these parcels to residential use. Id. In Gernatt, the petitioner was the owner of land utilized for mining and the respondents passed ordinances which removed new mines as permitted uses within the municipality. Gernatt Asphalt Products, Inc. v. Town of Sardinia, 74 NY2d at 687-688. As the HOW Law is municipality-wide in nature, Respondents' property is not "uniquely the subject of the proposed action" in the same

manner as either Har or Gernatt and, therefore, it is not included within the narrow exceptions to standard SEQRA standing analysis established in these two cases. *Appellants' Brief 27.*

Unfortunately for Appellants, in the decades that have elapsed since the decisions in Har and Gernatt, this department has held precisely as did the lower court herein, i.e., that ownership of property being rezoned confers standing under SEQRA, and rejected the rationale advanced by Appellants herein. In Bloodgood v. Town of Huntington, 58 AD3d 619 (2nd Dep't 2009), the Town of Huntington passed a local law permitting '"mixed use buildings' in the C-6 General Business District." Id. at 621. Petitioners therein, both individual and organizational, challenged the local law under SEQRA. The Supreme Court, Suffolk County granted dismissal of two individual petitioners, owners of commercial properties (an auto repair shop and a restaurant) within the district being rezoned for lack of standing as "the protection of commercial interest is insufficient to support a challenge to the SEQRA determination of a legislative body." Bloodgood v. Town of Huntington, 2007 NY Slip Op 31064 (2007). This Court reversed this holding, without any showing that these commercial properties were "uniquely the subject of the proposed action" à la the petitioners in Har and

Gernatt, but rather simply because they are the owners of property within the district being rezoned. Bloodgood v. Town of Huntington, 58 AD3d at 621 ("These petitioners-plaintiffs are owners of commercial property within the C-6 General Business District. "'[W]here the challenge is to the SEQRA review undertaken as part of a zoning enactment, the owner of property that is the subject of the rezoning need not allege the likelihood of environmental harm'") (citations omitted); see also Shapiro v. Torres, 153 AD3d 835, 836 (2nd Dep't 2017) ("Close proximity alone is insufficient to confer standing where there are no zoning issues involved . . .").

This Court is not alone in rejecting the narrow interpretation of Har and Gernatt advanced by Appellants herein. In fact, the First, Third, and Fourth Judicial Departments hold as this Court did in Bloodgood, without the qualification or limitation advocated for by Appellants. See Matter of Rent Stabilization Assn. of N.Y.C., Inc. v. Miller, 15 AD3d 194 (1st Dep't 2005) ("Since the instant case does not involve a zoning enactment, petitioners are not entitled to the presumption that they have suffered harm"); Matter of Hohman v. Town of Poestenkill, 179 AD3d 1172, 1173 (3rd Dep't 2020) ("'[U]nlike . . . cases involving zoning issues, there is no presumption of standing to raise a SEQRA or other environmental challenge

based on a party's close proximity alone."); Matter of Village of Woodbury v. Seggos, 154 AD3d 1256, 1258 (3rd Dep't 2017) ("'[U]nlike in cases involving zoning issues, there is no presumption of standing to raise a SEQRA [or other environmental] challenge based on a party's close proximity alone."); Matter of Save our Main St. Bldgs. v. Greene County Legislature, 293 AD2d 907 (3rd Dep't 2002) ("[W]hen no zoning-related issue is involved, there is no presumption of standing to raise a SEQRA challenge based on a party's close proximity alone."); Matter of Boyle v. Town of Woodstock, 257 AD2d 702, 704 (3rd Dep't 1999) ("It is well settled that unless the claimed SEQRA violation relates to a zoning enactment, a party must allege a specific environmental injury which is 'in some way different from that of the public at large.'"); Matter of Buerger v. Town of Grafton, 235 AD2d 984 (3rd Dep't 1997) ("unless the SEQRA review was undertaken as part of a zoning enactment, standing will be conferred upon a party seeking to raise a SEQRA challenge only if it can demonstrate that it will suffer a specific environmental injury . . ."); Matter of Kindred v. Monroe County, 119 AD3d 1347 (4th Dep't 2014) ("Where, as here, the proceeding does not involve a 'zoning related issue . . ., there is no

presumption of standing to raise a SEQRA challenge' based solely on a party's proximity.").

Appellants do not cite to a single case in which the owner of real property which has been rezoned has been found not to have standing to raise a SEQRA challenge. Respondents respectfully submit that is because no such reported case exists, at least at the appellate level. Appellants instead ask that this Court overturn the decision of the lower court vis-à-vis Respondents' standing as owners of property being rezoned by reliance upon the decision of the Court of Appeals in Matter of Association for a Better Long Is., Inc. v. New York State Dept. of Envtl. Conservation, 23 NY3d 1 (2014) and similar inapposite cases. In Better Long Is., the NYSDEC adopted amendments establishing "a formal process through which individuals could obtain a permit to allow for the incidental taking" of endangered or threatened species. Id. at 2. The Court of Appeals found that the property owners therein (governmental entities) had standing to raise challenges to the respondents' compliance with ECL 3-0301(2)(a) and section 202 of the State Administrative Procedure Act, but held "[w]e do not, and need not, decide whether land ownership, by itself, could satisfy the injury requirement." Id. at 7. Appellants herein latch upon this statement as

support for their assertion that, notwithstanding the holdings of the Court of Appeals and every appellate division in New York State, the Court of Appeals "has never held that land ownership, by itself, satisfies the injury-in-fact requirement for standing." *Appellants' Brief 20.*

Unfortunately for Appellants, as stated above, Better Long Is. and each and every other case cited by Appellants do not involve the owner of property that has been rezoned and, as such, are both inapplicable to the instant matter and irrelevant as regards the volumes of caselaw and precedent referenced and discussed, *supra*. In fact the Third Department, in hearing the trial court's appeal in Better Long Is. itself, explicitly distinguished between how standing would be determined in that case as opposed to those involving zoning issues. Matter of Association for a Better Long Is., Inc. v. New York State Dept. of Envtl. Conservation, 97 AD3d 1085, 1086 ("Unlike property owners affected by a zoning reclassification . . . petitioners' allegations that they may be required to comply with the regulations is potential, speculative harm that is insufficient to confer standing."). The Court of Appeals did not disagree.

Perhaps even more importantly than Appellants' purposeful mischaracterization of decades of controlling caselaw throughout the State

of New York, Appellants simply fail to discuss or even mention the ubiquitous concern and admonition of the Court of Appeals vis-à-vis standing analysis; i.e., not to construe standing principles in such a restrictive and heavy handed manner[5] as to "insulate decisions such as this from judicial review, a result clearly contrary to the public interest." Har Enterprises v. Brookhaven, 74 NY2d at 530. Given that the HOW Law itself does not identify any particular project for consideration and SEQRA analysis, it is quite literally impossible for anyone (not simply these particular Respondents, but anyone on the planet earth) to meet the standing requirements advocated by Appellants herein.

If Appellants were to hypothesize the environmental impact of, for example, motorcycle clubs being established at the single-family homes on undersized lots next door to their homes (as would be a permitted use as a RGP) or the conversion of their next door neighbor's single family home into a 10,000 square foot NPW with "[a]ccessory facilities and functions such as classrooms, social halls, administrative offices, bath and shower facilities, gymnasiums and indoor recreation facilities" hosting weddings,

[5] See Sun-Brite Car Wash, Inc. v. Bd. of Zoning & Appeals of Town of N. Hempstead, 69 N.Y.2d 406, 413–14 (1987).

among other events, Appellants herein would undoubtedly prevail when arguing that no such proposed application exists and the environmental injuries that would likely result from such a use (e.g., noise, parking, etc.) are therefore purely speculative. Appellants openly acknowledged this inescapable fact, when they stated:

> "[Respondents] fail to establish standing because they have (not)[6] sufficiently pled that they are affected by the Zoning Amendments, and have not, ***and cannot show or even allege that they would actually be harmed by the Village's actions.***

(R 800) (emphasis in original).

The Respondents herein are not merely, as were the petitioners in Har and Gernatt, the owners of property for which purely commercial interests are at stake. The properties being rezoned by the HOW Law are Respondents' own homes and the homes of each and every one of their neighbors. There is simply no interest more "substantial" or "connection . . . so direct or intimate" as this. The lower court was undoubtedly correct in holding that Respondents herein have standing.

[6] It was assumed that the absence of the negative article is a typographical error, rather than an admission that Respondents have, in fact, "sufficiently pled that they are affected by the Zoning Amendments."

POINT II

SUPREME COURT PROPERLY HELD THAT APPELLANTS FAILED TO DEMONSTRATE THAT THERE ARE NO FACTUAL ALLEGATIONS WITHIN THE PETITION'S FOUR CORNERS WHICH, TAKEN TOGETHER, MANIFEST ANY CAUSE OF ACTION COGNIZABLE BY LAW OR THAT APPELLANTS HAVE PRODUCED DOCUMENTARY EVIDENCE THAT CONCLUSIVELY ESTABLISHED A DEFENSE TO THE ASSERTED CLAIMS AS A MATTER OF LAW

In order to prevail on a motion to dismiss under 3211, the burden is on the movant to establish that, within the pleading's four corners, there are no "factual allegations . . . discerned which taken together manifest any cause of action cognizable at law." 511 West 232nd Owners Corp., et al v. Jennifer Realty Co., et al, 98 N.Y.2d 144, 152 (2002) (citations omitted). The Court must "liberally construe the complaint . . . and accept as true the facts alleged in the complaint . . ." Id (citations omitted). The Court must further "accord plaintiffs the benefit of every possible favorable inference." Id. Specifically, "[d]ismissal under CPLR 3211(a)(1)", the Court of Appeals in 511 West 232nd Owners Corp. holds, "is warranted 'only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" Id. at 151 (citations omitted).

It is somewhat startling to see a 52-page brief appealing a denial of a motion to dismiss pursuant to CPLR §3211 that nowhere mentions the well-established legal standard cited above that Appellants must have met in order to have prevailed on said motion in the lower court. It is more startling to see that Appellants' argument to this Court continues to utterly ignore said standard and instead advance an "arbitrary and capricious or abuse of discretion" standard whose attempted application to the appeal at hand is unsupportable as a matter of law. *Appellants' Brief 33*. Appellants cite no cases in their brief wherein an agency is accorded the deference of an "arbitrary and capricious or abuse of discretion" standard upon a CPLR §3211 motion. Respondents respectfully submit that is because no such reported case exists, given that such a standard would fly in the face, as it does, of crystal clear caselaw.

It is Respondents' position that Appellants' CPLR §3211 motion itself was simply advanced as a dilatory tactic, intended to delay adjudication of the underlying Article 78 proceeding and to exhaust Respondents' resources. The lower court itself observed that "CPLR §3211(a)(1) is an improper vehicle for the conducting of judicial review of a certified record." (R 17). By prosecuting an appeal in this manner,

Appellants are seemingly willing to gamble once again that this Court is at least as forgiving of these tactics as the court below.

A. First Cause of Action

In order to satisfy the requirements of SEQRA vis-à-vis the HOW Law, it is incumbent upon Appellants, as lead agency, to "identify the relevant areas of environmental concern," to "take a hard look" at said areas, and make a "reasoned elaboration" of the basis for its determination. See Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 416-417 (1986). It is impossible, however to take a "hard look" or to make a "reasoned elaboration" of the basis of a determination upon a relevant area of environmental concern if there is a total failure to consider said relevant areas at all.

In the First Cause of Action, Respondents alleged that Appellants had failed to identify and consider several likely adverse environmental construction related impacts including, but not limited to, construction continuing for more than one year or in multiple phases, physical disturbance or vegetation removal, siltation or other degradation of receiving water bodies due to storm water discharge, and construction of paved parking area for 500 or more vehicles. (R 10). Appellants admitted that

they did not engage in such an inquiry, as there were no projects proposed in connection with the HOW Law and, therefore, any "projections of construction impacts would be purely speculative." (R 10-11).

Appellants cited to extensive case law that, under such circumstances, "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." (R 11) (citations omitted). The lower court observed:

> "Having advanced that contention, [Appellants] then failed to project a reasonable worst case scenario and analyze the resulting environmental impacts. If one was undertaken, [Appellants] have not pointed to it."

(R 11).

The lower court continued:

> "[Appellants'] 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. . . Yet, [Appellants] declined to address the environmental impact from the construction activity that will likely ensue. Instead, they deferred considering such impacts to the SEQRA review that will accompany future individual permit applications. [Appellants] 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."

The lower court, citing Fischer v. Giuliani, 280 AD2d 13 (1st Dep't 2001) and several other cases, held that Appellants were not permitted to defer SEQRA analysis of likely environmental impacts of the HOW Law until specific projects seek approval. Coupled with the observation that the HOW Law was designated as a Type "1" under SEQRA, which "carries with it the presumption that it is likely to have a significant adverse impact on the environment," and for which, accordingly, "there is a relatively low threshold that must be met to require the issuance of a positive declaration under SEQRA," the lower court found that Respondents had, indeed, alleged "factual allegations . . . discerned which taken together manifest any cause of action cognizable at law." 511 West 232nd Owners Corp., 98 N.Y.2d at 152. (R 13).

In their brief arguing that the First Cause of Action should have been dismissed by the lower court, Appellants do not (of course) mention the requisite legal standard for dismissal under CPLR §3211, nor do they point to any evidence that disputes the preceding, although now conveniently no mention is made of the standard that Appellants themselves advanced in the lower court; to wit, that the proper SEQRA analysis they should have undertaken was 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." Fischer v. Guiliani, 280 AD2d at 17. Appellants do not now identify any "worst case scenario" that the lower court somehow missed in its review of the extensive record, nor any caselaw which contradicts the applicability of the standard that they themselves advanced below.

Appellants do not deny that the Village Planners themselves estimated that the HOW Law would result in the establishment of 13 houses of worship, but take the position that once said estimate was advanced, their SEQRA analysis vis-à-vis the likely environmental impacts of said houses of worship was complete until a site-specific application is proposed. Appellants take this position while pointedly ignoring, and failing to identify any caselaw contradicting, the holding in Fischer or the other cases cited by the lower court in support thereof.

Appellants cannot be heard now to disavow that they were obligated to "consider a reasonable worst case scenario" prior to issuance of a Neg Dec. Appellants cannot be heard now to disavow their own estimation as to the amount of likely construction as merely rank speculation. Finally, Appellants cannot assert, against well-established precedent, that they were

entitled to defer SEQRA analysis of likely environmental impacts of the HOW Law that they themselves identified until specific projects seek approval under that law.

B. Second Cause of Action

Respondents allege in the Second Cause of Action that Appellants improperly segmented SEQRA review of the HOW Law, by refusing to consider the cumulative effects of, *inter alia*, construction related environmental impacts and, as discussed *supra*, deferring any consideration of said environmental impacts until site-specific SEQRA review is conducted as part of the permitting process.

In the lower court, Respondents cited to Riverhead Business Improvement District Management Ass'n Inc. v. Stark, 253 A.D.2d 752 (1998), wherein this Court held that "[t]o comply with SEQRA, the Town Board was obligated to consider the environmental concerns that were reasonably likely to result from its zoning amendment at the time of its enactment," not at the time a specific project was put forth for approval. (R 1508).

A very real example of the dangers of failing to consider cumulative effect is elucidated by licensed planner Alan Sorensen in his discussion of

siltation and degradation of surface water (which was never mentioned in either of the Village Planners' standard full environmental assessment forms). With construction of required new on-site parking areas, and the construction of larger structures upon single-family residential lots, impervious surfaces will increase and create additional stormwater discharge. However, as Mr. Sorensen states:

> "The 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."

(R 584). In short, the environmental impacts of the added impervious surfaces will often never be the subject of a "site-specific SEQRA analysis."

Appellants responded below by seeking to narrow the Riverhead holding to zoning amendments passed wherein a specific project is contemplated, once again persisting in dismissing any construction related impacts as speculative. Before this Court, Appellants continue to rest their argument solely upon this notion, although they now elect not to bother to mention the Riverhead case at all.

The lower court held:

> "Therefore, [Appellants'] 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."

(R 15).

Given the above, Respondents herein clearly met the standard to survive Appellants' motion to dismiss and the lower court was undoubtedly correct in so holding.

C. <u>Third Cause of Action</u>

Respondents' Third Cause of Action alleged that the HOW Law is null and void as the Appellants failed to take a "hard look" at the potential environmental impacts upon transportation, consistency with community plans, and consistency with community character, which the Village Planners themselves identified as areas upon which the HOW Law would potentially have moderate to large adverse environmental impacts.

In the lower court, Respondents alleged that:

> "53. Without repeating the arguments set forth in the Petition and *supra*, the [Appellants] either failed to evaluate these concerns at all, failed to provide a 'reasoned elaboration' for the bases for their determination, and/or lacked any empirical,

(cont.)

> objective or factual data or evidence to support their analysis at all, relying instead on 'conversations' and guesswork that could not be characterized as anything but arbitrary and capricious.
>
> 54. [Appellants] have only argued for their interpretation of the case law, which clearly does not meet their burden of establishing a complete defense to the Third Cause of Action upon documentation."

(R 1510).

Appellants now take the position that, based upon caselaw in the Southern District of New York and two trial level holdings, they are entitled to judgment as a matter of law "[b]ecause [Respondents] failed to meaningfully oppose the Village's motion with respect to the third cause of action, [Respondents] waived that right, and its third cause of action should have been dismissed." This position, of course, is meritless, as this Court held in Bloodgood "[o]n a motion to dismiss pursuant to CPLR 3211 and 7804 (f), the petition-complaint alone must be considered, and all of its allegations are deemed true and afforded the benefit of every favorable inference." Bloodgood v. Town of Huntington, 58 A.D.3d at 621.

Furthermore, as is their wont throughout this case as observed by the lower court,[7] Appellants improperly seek to switch the burden of proof from

[7] See (R 12).

themselves to Respondents. The Petition details the inadequate manner in which Appellants evaluated potential environmental impacts upon the three areas identified by the Village Planners. In seeking to dismiss under §3211(a)(1), it is not incumbent upon Respondents to once again reference the written findings of licensed planner Alan Sorensen, or any of the other portions of the certified record, in order to survive said motion. As the Court of Appeals in 511 West 232nd Street Owner's Corp. unequivocally states, the burden of proving that Appellants have demonstrated that the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" is unquestionably Appellants'. Id. at 151.

The fact is that Appellants have argued that they have taken the requisite "hard look" with regard to these three (3) areas based upon the determinations of the Village Planners based, in part, upon reliance upon the conditional use/special permit standards and site-specific SEQRA reviews that have already been discussed and, Respondents respectfully submit, discredited in detail, *supra*. Respondents, based not only upon common sense, but upon Mr. Sorensen's written reports, admissions and omissions by the Village Planners, and admissions by the Appellants themselves, argue

that Appellants have not done so. It is up to a trial court to weigh the respective value of the documentary evidence in support of each of these two positions and make a determination upon the merits. There is simply no legal basis for completely disregarding Respondents' evidence and argumentation on its face and finding that Appellants' evidence and argumentation must prevail as a matter of law. The lower court explicitly so held, stating "CPLR §3211(a)(1) is an improper vehicle for conducting judicial review of a Certified Record." (R 17).

CONCLUSION

While the instant litigation extends over many hundreds of pages, this litigation was prompted by and revolves around the determination by the Appellants, based upon no evidence-based studies of any kind, that the passage of the HOW Law could not reasonably result in even one significant adverse effect upon the environment, thereby justifying the issuance of a negative declaration and the termination of any further environmental inquiry into the challenged action.

Appellants made this determination despite the fact that the passage of the House of Worship Law is a Type I action under SEQRA and, therefore, it is presumed under the law that the action is likely to have a significant adverse environmental impact and, consequently, the threshold for preparation of an Environmental Impact Statement (EIS) is "relatively low." See Omni Partners, L.P. v. Cty. Of Nassau, 237 A.D.2d 440, 442 (2nd Dep't 1997) ("An EIS is required if the action may include the potential for even one significant adverse environmental impact (*see*, 6 NYCRR 617.7 [a] [1])").

According to Appellants, despite all of the above, there is no reasonable possibility of even one significant adverse effect upon the

environment in having your current single-family neighbor in your "high-quality, low-density, single-family detached neighborhood of a quiet, wooded and suburban character" (R 120) convert his/her house on an undersized single-family lot to an RGP, an entirely new use in the Village, which could then be utilized by up to 49 people packed into no more than two rooms comprising only up to 50% of the gross floor area, seven days a week, 365 days a year, except during the hours of 12:00a.m. and 6:00a.m. (except for no-regularly scheduled activities, which have no limitation on hours of operation) for religious, or non-religious, gatherings.

According to Appellants, there is no reasonable possibility of even one significant adverse effect upon the environment in having your current single-family neighbor in your "high-quality, low-density, single-family detached neighborhood of a quiet, wooded and suburban character" convert his/her single-family lot to a NPW, which could be up to 10,000 square feet (the size of a chain drug store) which would then be utilized by up to 500 people, seven days a week, 365 days a year, except during the hours of 12:00a.m. and 6:00a.m. for religious gatherings and accessory uses, such as the use of the NPWs permitted "classrooms, social halls, administrative

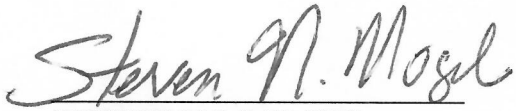
offices, bath and shower facilities, gymnasiums and indoor recreation facilities." (R 653-654).

Even if Appellants' position is consistent with the letter of the law, which it most emphatically is not, at its most essential, it requires the complete suspension of all common sense. Respondents' professional planner, Appellants' own Planning Board, representatives of neighboring municipalities, members of the public, and many others have concluded that the HOW Law has a reasonable possibility of several significant adverse effects upon the environment. This conclusion is objectively reasonable.

Given the above, Respondents respectfully request that this Court affirm the Decision of the Supreme Court, Rockland County (Marx, J.) dated October 4, 2019 which denies Appellants' motion to dismiss in part, together with an award of costs on this appeal to Respondents.

Dated: October 13, 2020
Monticello, New York

Respectfully Submitted,



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PRINTING SPECIFICATIONS STATEMENT

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Dated: October 13, 2020

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