SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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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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AFFIRMATION IN RESPONSE TO CROSS-MOTION TO DISMISS AND IN OPPOSITION TO MOTION TO INTERVENE

Index No. 031506/2019

Petitioners-Plaintiffs, HILDA KOGUT, ROBERT E. ASSELBERGS and MAGALI DUPUY ("Petitioners"), by and through their attorney, Steven N. Mogel, Esq., as and for their Response to Respondents' Motion to Dismiss under CPLR §3211 and CPLR §9208 and in Opposition to the Cross-Motion to Intervene of Congregation Birchas Yitzchok and the Orthodox Jewish Coalition of Chestnut Ridge ("Proposed Intervenors") allege as follows:

1. As set forth in detail and at length in the Notice of Petition and Verified Petition of Petitioners-Plaintiffs dated March 21, 2019 ("Petition"), the instant hybrid proceeding was commenced pursuant to CPLR §3001 and Article 78 of the Civil Practice Law and Rules seeking, *inter alia*:

   a. to vacate and annul the Negative Declaration under the State Environmental Quality Review Act ("SEQRA") issued by the Board of Trustees of the Village of

Chestnut Ridge of January 15, 2019 ("Neg Dec") pertaining to a local law entitled "A Local Law Amending Local Law No. 20 of 1987, the Zoning Law of the Village of Chestnut Ridge, with regards to Residential Places of Assembly and Houses of Worship" ("House of Worship Law") as same was arbitrary and capricious; and

b. a declaratory judgment declaring that the House of Worship Law is null and void as the lead agency failed to comply with the requisite procedures under SEQRA; and

c. a declaratory judgment that the House of Worship Law is null and void for failure to comply with General Municipal Law §239; and

d. a declaratory judgment that the House of Worship Law is null and void as it was not passed in accordance with Village of Chestnut Ridge local law Article XVII: Amendments, §1 and 2; and

e. a declaratory judgment that the House of Worship Law is null and void as it is was passed in reliance upon a municipal resolution that contained materially false and derogatory information.

INTRODUCTION

2. While the instant litigation extends over many hundreds of pages, this litigation was prompted by and revolves around the determination by the Respondents, based upon no evidence-based studies of any kind, that the passage of the House of Worship Law ***could not reasonably result in even one significant effect upon the environment***,[1] thereby justifying the

[1] See, e.g., 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])").

issuance of a negative declaration and the termination of any further environmental inquiry into the challenged action.[2]

3. The Village of Chestnut Ridge ("Village") made this determination despite the fact that, as the firm of Nelson, Pope & Voorhis, LLC ("Village Planners") readily admit, the House of Worship Law creates two entirely new land uses[3] (i.e., Residential Gathering Places [RPGs] and Neighborhood Places of Worship [NPWs]) which can be constructed in ninety (90) percent of the geographical area of the Village and that, although "houses of worship" were permitted throughout (almost) all of the residential zones of the Village under the preexisting law, same bear no resemblance to either RGPs or NPWs in a myriad of ways including, but certainly not limited to (a) the fact that RGPs ***may*** be used as houses of worship under the House of Worship Law, but are emphatically ***not limited*** to usage for religious worship; (b) RGPs may be situated on lots that are as little as 80% of the minimum size for a single-family residence and; (c) NPWs can be situated on lots that meet the minimum size for a single-family residence, but houses of worship under the preexisting law required a minimum of five (5) acres. See House of Worship Law, a copy of which is annexed to the Petition as Exhibit "26."

4. The Village made this determination despite the fact that, as the Village's Planners admit, the creation of RPGs and NPWs will have potentially moderate to large environmental impacts in the areas of Transportation (i.e., increased vehicle and pedestrian traffic with a corresponding increased risk of safety hazards upon roads with no or limited sidewalks and increased on-street parking), Consistency with Community Plans (i.e., said uses are not consistent with adopted land use plans), and Consistency with Community Character (i.e., said

[2] By designating Petitioners' claims under ¶2, *supra,* as the core or central arguments in the instant litigation, Petitioners do not mean to imply that the other causes of action raised therein are infirm in any way. Petitioners argue that each and every cause of action raised in the Petition, on its own, represents a fatal flaw in the House of Worship Law and requires its invalidation.

uses are non-residential, require more parking spaces and on-site walkways, access ramps, paving, lighting, larger size and bulk, and may result in increased noise). See Memoranda to Respondent Presti and the Board of Trustees dated October 26, 2018 ("10/26/18 Nelson Memorandum"), 1-2, a copy of which is annexed to the Petition as Exhibit "17."

5. The Village made this determination despite the fact that, although ***not*** admitted by the Village Planners, common sense (bolstered by the professional opinion of Alan Sorensen, AICP and others) dictates that the creation of RPGs and NPWs in the above-described neighborhoods will also undoubtedly have significant environmental impacts in the areas of increased construction, erosion, stormwater discharge, creation of parking for more than 500 vehicles, etc. as is set forth in detail in the Petition.

6. The Village 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 at 442.

7. According to Respondents, despite all of the above, there is no ***reasonable possibility of even one significant 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"[4] convert his/her house on an undersized single-family lot to an RGP, which would then be utilized by up to 49 people packed into no more than two rooms

[3] See FEAF submitted by the Village Planners dated January 9, 2019 ("1/9/19 FEAF"): Part 3 at 10, annexed to the Petition as Exhibit "23."
[4] Memorandum introducing the draft House of Worship Law by Village Planners dated February 9, 2017 ("2/9/17 Nelson Memorandum"), 1, annexed to the Petition as Exhibit "5."

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.[5] for religious, or non-religious, gatherings.

8. For example, a motorcycle club would fit squarely within the definition of an RGP, as would a host of uses unrelated to religious worship.

9. According to Respondents, there is no ***reasonable possibility of even one significant 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)[6] 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." *House of Worship Law, 4-5.*

10. Even if Respondents' 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. Petitioners, Petitioner's professional planner, Respondents' own Planning Board, representatives of neighboring municipalities, members of the public, and many others have concluded that the House of Worship Law has a reasonable possibility of several significant effects upon the environment. This conclusion is objectively reasonable. Despite Respondents' shrill allegations to the contrary,[7] Petitioners do not and have never taken the position that accommodations should not be made for the religious needs of their neighbors. Nevertheless, it

[5] Subject to the exception carved out in the House of Worship Law for "non-regularly scheduled" activities, which have no limitation upon the hours of operation.
[6] December 20, 2018 Memorandum by Village Planners to Walter Sevastian, Esq., 1., annexed to the Memorandum of Law as Exhibit "V."

is imperative that Respondents perform their statutory duty to truly take a "hard look" at these impacts through the preparation of an EIS, so that the scope of these impacts may be measured and properly mitigated.

RESPONSE TO MOTION TO DISMISS

Standard:

11. In order to prevail on a motion to dismiss under 3211(a)(1), 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 (Ct. of Appls. 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.

12. 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" (citations omitted).

13. In Respondents' Memorandum of Law in Opposition to Petitioner-Plaintiffs' Verified Petitioner/Request for Declaratory Relief and in Support of Respondent's Motion to Dismiss the Petition Under CPLR 3211 and CPLR 9208 ("Memorandum of Law"), Respondents argue for dismissal as follows:

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[7] See, e.g., Resolution 6 ("The Planit Report clearly concludes that residential neighborhoods are not suitable locations for places of worship.").

a. Petitioners lack standing, as they have not alleged "individual environmental harm," but rather only "purely speculative and generalized community-wide harm in the form of alleged environmental impacts";[8]

b. Respondents did, in fact, identify, take a hard look at, and make a reasoned elaboration for the basis for its determination that the House of Worship Law:

    (i) Will not "involve construction that continues for more than one year or in multiple phases";

    (ii) Will not likely result in increased erosion due to "physical disturbance or vegetation removal";

    (iii) Will not likely lead to "siltation or other degradation of receiving water bodies" due to storm water discharge; and

    (iv) Will not likely "result in the construction of paved parking area for 500 or more vehicles."[9]

c. As a corollary to (b) *supra,* Petitioners' planning consultant "(1) failed to even acknowledge that Places of Worship Uses were already permitted in virtually every zoning district in the Village under the Prior Zoning, (2) failed to account for the significant Conditional Use restrictions included in the Zoning Amendments absent from the Prior Zoning, and (3) projected dire cumulative environmental impacts resulting from the passage of the Zoning Amendments without conducting any objective fact based analysis of potential development

[8] *Memorandum of Law, 5.*
[9] *Id at 28-29.* This argument corresponds to Petitioners' First Cause of Action.

under the Zoning Amendments based on a qualitative method,"[10] which impacts were therefore "wholly speculative."[11]

d. Respondents reliance upon subsequent site-specific SEQRA analysis to mitigate any currently identified areas of environmental significance would be inappropriate only if there was a project presently proposed under the House of Worship Law. As no such project is currently proposed, such reliance is wholly permissible.[12]

e. The House of Worship Law was passed by motion of the Village Board in compliance with Article XVII of the Village of Chestnut Ridge Zoning Law ("Zoning Law")[13] not, as explicitly stated in Resolution 2019-12 ("Resolution"), by "written petition submitted by Brooker Engineering, PLLC, in letter form, submitted on behalf of the Orthodox Jewish Coalition of Chestnut Ridge";[14]

f. Respondents complied with the requirements of GML 239-m because all changes to the local law after its second submission for county review on

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[10] *Id at 14.*
[11] *Id at 32.*
[12] *Id at 34-38.* This argument corresponds with Petitioners' Second Cause of Action.
[13] *Id at 8-9.*
[14] Resolution, 1, a copy of which is annexed to the Petition as Exhibit "25." Petitioners will not further address Respondents' argument that the passage of the House of Worship Law was compliant with Chestnut Ridge local law Article XVII ("Art. XVII," annexed to the Petition as Exhibit "29"), instead referring the Court to the Petition, the text of Art. XVII, the November 1, 2017 Brooker Engineering letter ("11/1/17 Brooker letter," annexed to the Petition as Exhibit "30"), and the Resolution. At a minimum, the documentary evidence submitted fails to conclusively establish a defense to the asserted claims as a matter of law and, as a consequence, Respondents have failed to meet their burden for dismissal of Petitioners' Fifth Cause of Action.

September 17, 2018[15] were "not substantive" and therefore did not require resubmission;[16]

g. No authority was cited to void the Resolution upon the basis that same falsely stated that the undersigned "espoused conspiracy theories as to the genesis of the proposed law"; and[17]

h. Petitioners Fourth, Fifth and Sixth claims for declaratory judgment must be dismissed for failure to comply with CPLR §9802.[18]

Standing:

Each Petitioner herein has standing to bring the instant action, as each Petitioner is the owner of property that is subject to rezoning under the House of Worship Law.

14. Respondents' argument that Petitioners lack standing in the instant action is a jerry-rigged contraption that is created by Respondents only by improperly ignoring controlling precedent by the Court of Appeals.

15. Petitioners cited in the Petition the decisions of the Court of Appeals 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, 678 (Ct of Appls 1996) for the principal that the owners of

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[15] Affidavit of Florence Mandel dated April 26, 2019 ("Mandel Affidavit"), 2 at ¶6, included as an exhibit to the Memorandum.

[16] *Memorandum of Law, 10.* Respondents also argue that all comments by Rockland County Department of Planning ("RC Planning") were either incorporated into the House of Worship Law or omitted in RC Planning's second response to Respondents. This argument is addressed in greater detail *infra.*

[17] *Id at 11.* Petitioners will not further address Respondents' argument that the false and defamatory statements made regarding the undersigned within the Resolution and relied upon, in part, for the passage thereof are of no legal significance. The undersigned respectfully refers the Court to the Petition at pages 60-63.

[18] Although not characterized explicitly as grounds for dismissal of any of the stated causes of action, Respondents also argue that, in drafting and filing the Resolution which selectively quoted from the statements of several members of the public who opposed the House of Worship Law, they had no choice but explicitly and selectively name and quote said individuals "to preclude those comments from being attributed to the Village Board in the event of litigation regarding alleged discrimination." *Id at 11-12.* Petitioners respectfully direct the Court to the Resolution itself, the transcripts of the public hearings included as Exhibits "12," "14" and "19" of the Petition, and the Court's own common sense. The existence of the transcripts belies any legitimate need to pick and choose among the statements of opponents of the House of Worship Law, then selectively quote and cite members of the public throughout the Resolution. The intention of the Respondents in quoting some of their constituents and

property that would undergo a change in zoning have standing to bring suit for procedural non-compliance with SEQRA.

16. 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. **For even though such an owner cannot presently demonstrate an adverse environmental effect, it nevertheless has a legally cognizable interest [] in being assured that the decision makers, [] before proceeding, have considered all of the potential environmental consequences, taken the required 'hard look', and made the necessary 'reasoned elaboration' of the basis for their determination."**
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> "Under these rules, we hold that this property owner has a legally cognizable interest in being assured that the town satisfied SEQRA before taking action to rezone its land. In reaching this conclusion, we need not delimit the parameters of the zone of interest in SEQRA compliance or define the precise nexus with the proposed action that a party must demonstrate in order to object for failure of compliance. **It seems evident that if any party should be held to have a sufficient interest to object--without having to allege some specific harm--it is an owner of property which is the subject of a contemplated rezoning.** Here, apparently only the owner of the affected property has a sufficient incentive to bring a review proceeding. To adopt the rule urged by respondent and deny standing--absent an allegation that the owner will suffer some adverse environmental consequence--would insulate decisions such as this from judicial review, a result clearly contrary to the public interest."

Id. at 529 (emphasis added).

17. In Court of Appeals in Gernatt Asphalt Products, Inc. stated:

> "Generally, standing to challenge an administrative action turns on a showing that the action will have a harmful effect on the challenger and that the interest to be asserted is within the zone of interest to be protected by the statute (*see, Matter of Dairylea Coop. v Walkley*, 38 NY2d 6, 10). A nearby property owner may have standing to challenge a proposed zoning change because aggrievement may be inferred from proximity (*Matter of Sun-Brite Car Wash v Board of Zoning & Appeals*, 69 NY2d 406, 413-414). The proximity alone permits an inference that the challenger possesses an interest different from other members of the

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explicitly characterizing them as anti-Semites is self-evident: Respondents are maliciously attempting to intimidate and cause injury to those of their constituents that they regard as their opponents under the guise of "liability."

(cont.)

> community. Standing to raise a SEQRA claim involves this variation: a SEQRA challenger must "demonstrate that it will suffer an injury that is environmental and not solely economic in nature" (*Matter of Mobil Oil Corp. v Syracuse Indus. Dev. Agency,* 76 NY2d 428, 433). **However, where the challenge is to the SEQRA review undertaken as part of a zoning enactment, 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"** (*id.,* at 529; *compare, Society of Plastics Indus. v County of Suffolk,* 77 NY2d 761)."

Gernatt Asphalt Products, Inc., 87 N.Y.2d at 687 (emphasis added).

18. Despite this controlling precedent, which was specifically cited in the Petition, Respondents instead simply neglect to mention the Court of Appeal's rulings so as to engage in a lengthy argument about injury in fact, zone of interest, and the requirement to plead and provide proof of environmental harm which are blatantly inapplicable to the case at hand.[19]

19. Respondents argue:

> "Petitioners fail to establish standing because they have (not)[20] 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.***

(emphasis added).[21]

20. It is for this very reason that the Court of Appeals ruled as it did in Har Enterprises and Gernatt Asphalt Products, Inc. When SEQRA review is undertaken as part of a zoning enactment, the ordinary rules of SEQRA standing would rob owners of affected property of the opportunity to ensure procedural compliance with SEQRA. In fact, it would preclude ***anyone and everyone on the planet*** from an assertion of standing, a result that, as the Har Enterprises

[19] I will defer to the Court for the propriety in a motion of purposefully omitting controlling precedent that is adverse to Respondents' position.

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

Court specifically stated, "would insulate decisions such as this from judicial review, a result clearly contrary to the public interest." Har Enterprises, 74 N.Y.2d at 529.

21. Respondent's sole roundabout and implicit acknowledgement of the Court of Appeals' controlling precedent vis-à-vis the Petitioners is to state that:

> "Again, at bar the Petition fails to even allege which zoning districts the Petitioners reside in . . ." [22]

22. In the ultimate "gotcha," Respondents conclude that Petitioners' purported failure to state which zone they reside in cannot now be addressed, because they cannot "present new arguments in the reply papers."[23]

23. Respondents are simply wrong. Aside from the fact that merely stating the "magic words" (i.e., what zone they reside in) seemingly sought by Respondents would not constitute a new "argument" on behalf of Petitioners, Respondents have made a pre-answer motion to dismiss and the Petitioners' affidavits submitted herewith are part of Petitioners' 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. The Affidavits of Hilda Kogut, Robert Asselbergs, and Magali Dupuy dated May 18, 2019, identifying the zone in which each Petitioner resides, are annexed hereto as Exhibit "1."

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[21] *Memorandum at Law, 15.*
[22] *Id at 20.*
[23] *Id at 16.*

24. It is further worthy of note that, even if Petitioners are now barred from specifying in which zone they actually reside (which they clearly are not), it is conceded by Respondents that the Petitioners are all residents of the Village[24] and admitted by the Village's Planners that RGPs and NPWs have been added as new uses[25] to each and every residential district of the Village. Therefore, simple deductive reasoning dictates that Petitioners own property in a zoning district affected by the House of Worship Law. Given the deferential standard accorded the non-movant in a motion to dismiss, Respondents could not be said to have met their burden upon this argument.

25. Most fascinating, perhaps, is that while Respondents believe that Petitioners cannot have standing because they did not specify the zone in which they reside, even though they (a) are individuals; (b) are acknowledged residents of the Village, and (c) provided the address of the real property they own, the Respondents do believe that two entities have standing herein: namely, Congregation Birchas Yitzchok ("Birchas Yitzchok") and the Orthodox Jewish Coalition of Chestnut Ridge ("OJC"), the proposed intervenors herein.

26. Respondents take the position that:

> "the Village will not oppose the portion of the Motion to Intervene into the causes of actions (sic) made in the Article 78 Proceeding since it cannot in good faith argue that the Proposed Defendants-Intervenors will not be directly 'affected' by the outcome of that aspect of the proceeding."

27. Respondents take this position despite the fact that:

a. Birchas Yitzchok alleges that it owns real property in the Village, but neither specifies the property it owns, nor the zone in which it is located;

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[24] *Memorandum, 5.*
[25] *1/9/19 FEAF: Part 3 at 10,* annexed to the Petition as Exhibit "23."

b. OJC's standing consists of a single affirmation of Avrohom Fromovitz, who alleges that he owns property in the Village, but does not specify its location nor its zone, and asserts that he is "an official" of the OJC, an unincorporated association of seven unnamed "Ultra-Orthodox Jewish congregations" who allege only that their unnamed "[m]embers . . . are owners of [unspecified] properties that have had their zoning changed by the House of Worship Law;" and

c. A search of the Village's records reveals that neither OJC nor Birchas Yitzchok "have made any application to establish a Place of Worship under the Prior Zoning Law or under" the House of Worship Law. *Affirmation of Walter R. Sevastian in Partial Opposition to Intervention Motion dated May 15, 2018 ("Sevastian Intervention Affirmation"), 4, fn 1.*[26]

28. The Respondents make one final effort to wriggle themselves free from the Court of Appeal's rulings in Har Enterprises and Gernatt Asphalt Products, Inc.; to wit:

> ". . . nor do the Zoning Amendments herein rise to the level of rezoning; they simply recategorize already permitted uses and impose stringent Conditional Use requirements on the establishment of Places of Worship in certain zoning districts within the Village."

Memorandum of Law, 20.

29. The implicit argument being made, it seems, is that since the House of Worship Law is not "rezoning" Petitioners' property but only "recategorizing already permitted uses" and

[26] It is for this very reason that Petitioners took pains to describe the genesis and development of the House of Worship Law to the Court in the instant action. The simple, sad fact is that the Respondents make no effort to hide their double standard when it comes to the proposed intervenors, their nominal adversarial relationship notwithstanding. It is open, explicit, and unabashed.

"imposing stringent Conditional Use requirements" on said uses, the standing principles set forth in Har Enterprises and Gernatt Asphalt Products, Inc. should not apply.

30. Characterizing the passage of the House of Worship Law as a mere "recategorization of already permitted uses" which are now subject to more "stringent Conditional Use requirements" is, quite simply, dishonest.

31. As referenced *supra* and discussed in the Petition, the Village's own planners unequivocally state that RGPs are "new uses" which are not permitted under the preexisting zoning,[27] not "recategorizations" of an already permitted use. 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 House of Worship Law, but are emphatically ***not limited*** to usage for religious worship (another fact which Respondents studiously ignore).[28]

32. NPWs must also, by the same rationale, be deemed prohibited under the current zoning code, as they too are not expressly permitted in the Village. NPWs bear no resemblance to the former zoning law regarding places of worship, as they (a) may include a residential component; and (b) may be established on lots as small as those that would meet the minimum lot size for a single-family home, as opposed to the 5-acre minimum under the prior law, among other distinctions.

33. Respondents argument that Petitioners have no standing is, once again, illustrative of the efforts of the Respondents to listen to and do the bidding only of those of the Village's residents that meet their favor, and to silence the rest.

34. Petitioners have standing herein.

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[27] *1/9/19 FEAF: Part 3 at 2,* annexed to the Petition as Exhibit "23" ("Residential Gathering Places currently are not expressly permitted in the Village, and are therefore deemed prohibited under the current zoning code.")

[28] In the interests of economy, the undersigned will not repeat again the many differences between RGPs and the previously permitted houses of worship.

First Cause of Action:

Respondents produce no documentation, nor identify any authority whatsoever which establishes a complete defense as a matter of law to the First Cause of Action alleging Respondents' failure to identify several areas of environmental concern.

35. Petitioners' First Cause of Action identifies three relevant areas of environmental concern[29] which were brought to the attention of Respondents in writing, but which were never addressed or considered in the FEIS or anywhere else in the record. Respondents argument in favor of dismissal is to simply list the documents that the Village's planners and its attorney prepared and filed and declare that, therefore, these areas of environmental concern were addressed. Nevertheless, Respondents cannot specifically cite to a single word in the record which addresses these concerns, as no such words exist.[30]

36. Although not entirely clear as to how it relates to the basis for dismissal of any of the instant causes of action, Respondents argue that Petitioners' planning consultant "(1) failed to even acknowledge that Places of Worship Uses were already permitted in virtually every zoning district in the Village under the Prior Zoning, (2) failed to account for the significant Conditional Use restrictions included in the Zoning Amendments absent from the Prior Zoning, and (3) projected dire cumulative environmental impacts resulting from the passage of the Zoning

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[29] The three areas of concern identified by Petitioners are as follows: (a) that the House of Worship law will "involve construction that continues for more than one year or in multiple phases"; (b) that the House of Worship Law will likely result in increased erosion due to "physical disturbance or vegetation removal," and would likely lead to "siltation or other degradation of receiving water bodies" due to storm water discharge; and (c) that the House of Worship Law would likely "result in the construction of paved parking area for 500 or more vehicles." *Petition, 38-41.*

[30] Respondents then argue that said areas of environmental concern pertain only to site-specific SEQRA inquiries, but provide no authority for that proposition, instead citing caselaw that "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." *Memorandum of Law, 29* (emphasis added). The Petitioners could not agree more.

Amendments without conducting any objective fact based analysis of potential development under the Zoning Amendments based on a qualitative method." *Memorandum, 14.*

37. As for the argument that Mr. Sorensen, Petitioners' planner, somehow missed the fact that houses of worship were already permitted throughout the Village and, therefore, all of his professional analysis as to the potential impacts of going from five (5) acre zoning for a house of worship to the minimum lot size of a single-family home in the case of NPW (or 20% less than for RGPs) should be disregarded is simply another "gotcha" argument that seeks to use some contrived technicality as grounds to disregard ample substantive evidence.

38. Aside from pointing to this purported omission, Respondents never seem to elucidate how Mr. Sorensen's analysis would differ had he explicitly acknowledged that houses of worship were already permitted upon five (5) acre lots in the Village. It obviously does not logically follow that we would then surmise, had Mr. Sorensen so explicitly acknowledged, that going from a five (5) acre minimum lot size to 80% of a minimum lot size for a single family residence does ***not*** pose even a reasonable possibility of a significant increase in on-street parking, pedestrian and vehicular traffic, noise, light, etc.

39. Even if Respondents' argument should be ascribed some validity (which it most emphatically should not), RGPs and NPWs are entirely new uses in the Village, as the Village's own planners have acknowledged, as discussed above, and as discussed in detail in the Petition. Especially as regards the religious/non-religious RGP, an entirely new creature in the Village, the current "high-quality, low-density, single-family detached neighborhood of a quiet, wooded and suburban character" would be the baseline for analysis, which is precisely what Mr. Sorensen's analyses used.[31]

[31] Respondents also state, in the section pertaining to dismissal of the First Cause of Action, "that a site specific EAF [will] be completed in the event that a proposal to develop under the Conditional Use/Special Permit provisions of

40. Respondents' argument that Mr. Sorensen "failed to account for the significant Conditional Use restrictions" must be considerably unpacked. Firstly, is predicated upon the notion that there are, in fact, significant Conditional Use restrictions. Petitioners do not believe, for example, that the restriction of an NPW to "no less than" the minimum lot size for a single-family home consisting of a structure which is "only" up to 10,000 square feet in size, to 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 social halls, indoor recreation facilities, etc.) constitutes a "significant Conditional Use restriction."

41. The fact that Petitioners are dismissive of the significance and efficacy of these purported restrictions is not the equivalent of failing to consider them. It is particularly significant that, while Respondents claim that Mr. Sorensen failed to account for these restrictions, they do not specify in any reasonable fashion how any individual or group of restrictions renders any potentially "moderate to large" environmental impact now only "small to no" environmental impact. That task, which is undeniably the responsibility of Respondents, is addressed with great particularity by Petitioners in pages 46 through 53 of the Petition.

42. Respondents' argument that Mr. Sorensen failed to conduct "any objective fact based (sic) analysis of potential development under the Zoning Amendments based on a qualitative method" is among the most central arguments advanced by Respondents in support of their position.

43. This allegation was directly addressed in the Petition as follows:

> "155. Members of the public, the undersigned, Mr. Sorensen, the Village Planning Board and the Village Planners themselves identified many potential areas of environmental concern, despite the fact that that responsibility belongs to

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the Zoning Amendment is submitted . . ." *Memorandum, 34.* Again, while it is not clear how this pertains to Respondents argument for dismissal of the First Cause of Action, same is addressed in detail in the Petition in Petitioners' Second Cause of Action.

> the Village Board. The topsy-turvy response of the Village Board, however, was to cite the purported "failure" of these parties to provide "analysis of what the potential environmental impacts of establishing houses of worship under the current law are as compared to what would occur under the proposed local law" (emphasis in original) as grounds for finding that the passage of the House of Worship Law had no significant adverse environmental impacts. *Resolution at 6, ¶3; Id. at 7.* Said analysis is an EIS which, despite the repeated underlined and emphasized assertions made in the Resolution, is never incumbent under SEQRA for members of the public to complete."

Petition, 45.

44. The notion that it was and is incumbent upon Petitioners to commission professional pedestrian and vehicular traffic, sewer, water, erosion, and emergency services studies for each and every residential zone in the Village in order to demonstrate to the Respondents that there is the ***reasonable possibility of even one significant effect upon the environment*** is to create a burden that exists nowhere in the law.[32]

45. Respondents' argument has no merit and, by any reading, certainly does not meet the requisite standard for dismissal.

Second Cause of Action:

Respondents produce no documentation, nor identify any authority whatsoever which establishes a complete defense as a matter of law to the Second Cause of Action alleging Respondents' improper segmentation of their SEQRA review.

46. In the Petition, Petitioners observed:

> "A determination that '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 law' was the sole specific criteria cited in the Resolution when discussing the adoption of the Neg Dec . . ."

[32] Despite the fact that Petitioners do not have the burden of conducting any such analyses, I refer the Court to the Affidavit of Alan Sorensen dated March 21, 2019 ("Sorensen Affidavit") annexed to the Petition for an authoritative description of potential impacts on stormwater discharge caused by the addition of conservative estimates of additional parking to be generated, which constitutes a far more detailed "objective fact based (sic) analysis of potential development" than anything provided by the Village's planners.

47. Petitioners argued that said reliance upon "site-specific" SEQRA review constitutes improper segmentation under SEQRA and cited to the Second Department's decision in Riverhead Business Improvement District Management Ass'n Inc. v. Stark, 253 A.D.2d 752 (1998) as authority for this proposition.

48. Respondents herein sought to distinguish the decision in Riverhead, arguing that the Second Department's determination 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, does not apply to the instant controversy. Rather, Respondents argue, the holding in Riverhead is limited to the facts therein, which involved a specific developer with a specific project in development at the time of the rezoning.

49. Respondents do not cite a single case or other authority in support of their position. The Second Department in Riverhead makes no explicit or implicit suggestion of qualification in its holding therein, thereby limiting the principle espoused to such narrow circumstances. On the contrary, the Second Department's holding is as follows:

> "We find without merit the respondents' argument that a full SEQRA review will ultimately be achieved in connection with the eventual site plan approval process for the proposed shopping center. To 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 (*see, Matter of Kirk-Astor Dr. Neighborhood Assn. v Town Bd.*, 106 AD2d 868; *see also, Matter of New York Canal Improvement Assn. v Town of Kingsbury, supra; Matter of Young v Board of Trustees*, 221 AD2d 975, *affd* 89 NY2d 846; *Matter of Eggert v Town Bd.*, 217 AD2d 975; *Matter of Brew v Hess*, 124 AD2d 962, 963-964; *cf., Matter of People for Westpride v Board of Estimate*, 165 AD2d 555).

50. Respondents' effort to narrow the holding in Riverhead definitively fails, however, as some of the cases relied upon by the Second Department therein involve a specific project (e.g., Matter of Kirk-Astor) while others do not involve any such specific project, yet concur with the

holding in Riverhead nevertheless. See New York Canal Improvement Ass'n v. Town of Kingsbury, 240 A.D.2d 930, 932 (3rd Dep't 1997) ("Rejecting respondents' contention that the type of environmental review now sought was premature when no specific project was involved . . ."); Eggert v. Town Bd. of Town of Westfield, 217 A.D.2d 975, 976 (4th Dep't 1995) ("Under those circumstances, the Town Board has not complied with SEQRA by a fleeting glance at the environmental effects of the amendment, by a finding that environmental review is premature because no specific project is involved, or by a statement that SEQRA review would be undertaken when applications for special use permits are received.").

51. In the Affidavit of Alan Sorensen, AICP dated March 21, 2019, Mr. Sorensen points out the danger that refusing to acknowledge and evaluate the potential cumulative effects of the House of Worship Law at the time of its passage could lead to significant adverse environmental impacts later that will never be subject to scrutiny of any kind. Mr. Sorensen writes:

> "The land disturbance to establish a single RGP or NPW may not exceed the 1-acre threshold for requiring a Stormwater Pollution Prevention Plan, but the cumulative impacts will likely result in tens if not hundreds of acres of disturbance, which were not considered with the adoption of the Local Law."

Third Cause of Action:

Respondents produce no documentation, nor identify any authority whatsoever which establishes a complete defense as a matter of law to the Third Cause of Action alleging Respondents' failure to identify, take a hard look at, and make a reasoned elaboration vis-à-vis several areas of environmental concern.

52. In the Petition, Petitioners argue and detail the manner that Respondents failed to take a "hard look" at the areas of environmental concern that the Village itself identified as potentially moderate to large (namely Transportation; Consistency with Community Plans; and Consistency with Community Character), and failed to provide a "reasoned elaboration" for the

bases for its determination. Petitioners respectfully refer to the Court to pages 44 through 53 of the Petition.

53. Without repeating the arguments set forth in the Petition and *supra*, the Respondents 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, 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. Respondents 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.

55. Therefore, Respondents motion to dismiss the Third Cause of Action must be denied.[33]

Fourth Cause of Action:

Respondents produce no documentation, nor identify any authority whatsoever which establishes a complete defense as a matter of law to the Fourth Cause of Action alleging Respondents' failure to comply with General Municipal Law §239.

170. Respondents argue for the dismissal of the Fourth Cause of Action, which detailed Respondents' non-compliance with the requirements of General Municipal Law ("GML") 239-m. Respondents argue that they complied with GML 239-m by referring the proposed House of Worship Law on February 22, 2018 and September 17, 2018. See Affidavit of Florence Mandel dated April 26, 2019. Subsequent changes to the House of Worship Law were "not substantive" and therefore did not require resubmission.

[33] Rather than detail the factual analysis Respondents claim to have conducted (but did not), Respondents instead focus their discussion of the Court of Appeals decision in Merson v. McNally, 90 N.Y.2d 742 (Ct of Appls 1997), cited by the Petitioners for how mitigation measures taken after environmental impacts have been identified are

171. Respondents have provided no documentation that establishes a complete defense to Petitioners' allegations, arguing instead for the Court to adopt their reasoning. Respondents are not, therefore, entitled to dismissal of the Fourth Cause of Action.

172. Respondents also argue that their need to either incorporate or override the recommendations of RC Planning in their March 26, 2018 GML Review that "off-site parking for residential houses of worship [ ] be subject to the availability of sidewalks or suitable walkways between the subject properties," was obviated by the omission of same in the second referral response of said recommendation. Respondents cite no case law or authority of any kind for the proposition that the response of the second referral supplants and negates the first response, rather than being read in conjunction therewith.

173. Although Petitioners are not aware of any caselaw directly on point and believe the matter to be one of first impression, it is Petitioners' position that both responses should be read together. [34]

CPLR §9802:

174. Respondents argue that Petitioners Fourth, Fifth and Sixth Cause of Action should be dismissed for failure of Petitioners to comply with the notice of claim requirements of CPLR §9802 which, as held in BT Holdings, LLC v. Village of Chester, 162 A.D.3d 881 (2nd Dep't 2018), applies to causes of action for declaratory relief.

175. This requirement, as interpreted by the Second Department, renders impossible the bringing of a hybrid Article 78/declaratory judgment action against Village in a myriad of

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evaluated. Again, Respondents fail to cite any caselaw or authority in support of their position and, consequently, fail to demonstrate entitlement to dismissal.

[34] Petitioners will not address their remaining arguments that the passage of the House of Worship Law was not compliant with GML §239-m, instead referring the Court to the Petition at pages 53 through 56.

circumstances that, the undersigned respectfully submits, could not reasonably have been anticipated by the Second Department.

176. CPLR §217, which establishes the four (4) month statute of limitations for an Article 78, specifically authorizes shorter statutes of limitations to be established by local law. Article XVI of the Village of Chestnut Ridge pertaining to Village Board Special Permits, for example, in reliance upon CPLR §217, limits the filing of an Article 78 proceeding for "any decision of the Village Board hereunder" to "thirty (30) days of the filing of the decision in the office of the Village Clerk."

177. As CPLR §9802 states that "no action shall be brought upon any such claim until forty days have elapsed after the filing of the claim in the office of the village clerk," anyone who wanted to file a hybrid Article 78/declaratory judgment action against the Village for the issuance or denial of a Village Board Special Permit would have to file a Notice of Claim with the Village Clerk **ten (10) days BEFORE a decision was filed in the office of the Village Clerk.** The undersigned respectfully submits that this requirement could not be fulfilled while simultaneously adhering to other applicable laws, to wit: the laws of physics, general relativity, etc.

178. Notwithstanding the above, Petitioners served a Notice of Claim upon Respondents by certified mail in compliance with GML §50-e (3)(a). A copy of the Notice of Claim and proof of service thereof are annexed hereto as Exhibit "2."

179. Respondents will undoubtedly take the position that the Notice of Claim is defective as Petitioners brought the instant suit before the filing of the Notice of Claim, rather than waiting forty (40) days thereafter.

180. Should the Court dismiss the Fourth, Fifth and Sixth Causes of Action for failure to adhere to this technical requirement (which dismissal would necessarily be without prejudice), all that would result is that Petitioners would have to purchase a separate index number, prepare a Summons and Verified Complaint for declaratory judgment for the Fourth, Fifth and Sixth Causes of Action, e-file same, then move to consolidate the two separate actions before Your Honor. This action is clearly nowhere near the one (1) year statute of limitations. Nothing of substance will be accomplished and both the parties' and the Court's time and resources will be wasted.

181. Petitioners respectfully request that Your Honor deny Respondents' motion to dismiss the Fourth, Fifth, and Sixth Causes of Action due to non-compliance with the forty (40) day waiting period required CPLR §9802.

182. If Your Honor desires, the Court may hold its decision in abeyance so the undersigned can formally move to amend after the forty (40) day period has elapsed. See Genesee Brewing Co. v. Vill. of Sodus Point, 126 Misc. 2d 827, 833 (Sup. Ct. 1984), aff'd, 115 A.D.2d 313 (4th Dep't 1985) ("However, CPLR 9802 requires that 'no action shall be brought upon any such claim until [40] days have elapsed after the filing of the claim ....' This was concededly not done here. Failure to comply with this requirement may be remedied, however, by service of an amended complaint which alleges that more than 40 days have elapsed without settlement of the claim.") (citation omitted).

OPPOSITION TO MOTION TO INTERVENE

Standard:

183. CPLR §7802(d) provides as follows:

> **"(d) Other interested persons.** The court may direct that notice of the proceeding be given to any person. It may allow other interested persons to

intervene."

184. Whether a party should be permitted to intervene rests squarely within the discretion of the Court. *Id.*; Doe v. Westchester Cty., 45 A.D.2d 308, 312 (2nd Dep't 1974); Citizens Organized to Protect Env't ex rel. Brinkman v. Planning Bd. of Town of Irondequoit, 50 A.D.3d 1460, 1462 (4th Dep't 2008).

185. The Court's discretion in permitting intervention in an Article 78 proceeding is more expansive than in an ordinary plenary proceeding. The Court of Appeals has ruled:

> "This provision [CPLR §7802(d)] grants the court broader authority to allow intervention in an article 78 proceeding than is provided pursuant to CPLR 1013 in an action, which requires a showing that the proposed intervenor's 'claim or defense and the main action have a common question of law or fact' [citations omitted]. Permission to intervene in an article 78 proceeding may be granted at any point of the proceeding, including after judgment for the purposes of taking an appeal (*id.*)."

Greater New York Health Care Facilities Ass'n v. DeBuono, 91 N.Y.2d 716, 720 (Ct. of Appls 1998).

186. The Second Department has consistently held that intervention in an Article 78 proceeding "should be permitted where the intervenor has a real and substantial interest in the outcome of the proceedings." Bernstein v. Feiner, 43 A.D.3d 1161, 1162, (2nd Dep't 2007) (citing County of Westchester v. Department of Health of State of N.Y., 229 A.D.2d 460, 461 (2nd Dep't 1996). This is the same standard cited by the Second Department for permissive intervention pursuant to CPLR §1013. See Berkoski v. Bd. of Trustees of Inc. Vill. of Southampton, 67 A.D.3d 840, 843 (2nd Dep't 2009); Sieger v. Sieger, 297 A.D.2d 33, 36 (2nd Dep't 2002); Perl v. Aspromonte Realty Corp., 143 A.D.2d 824, 825 (2nd Dep't 1988).

187. Notwithstanding the liberal standard promulgated by the Courts and detailed above, the Motion to Intervene should be denied, as the Proposed Intervenors have been dilatory in seeking intervention without cause.

188. The Proposed Intervenors were fully aware of the instant proceedings, yet did not seek intervention until a mere five (5) days before the initial return date thereof, a full forty-three (43) days after the filing of the instant proceeding. The Proposed Intervenors offer no excuse for their delay.

189. As a litigant in Federal litigation against the Village involving the House of Worship Law (and in light of the publicity engendered by the filing of the instant litigation), OJC was undoubtedly well aware of the filing of the instant proceeding.

DISCOVERY

190. Respondents request, in the event that the Court deny the instant motion to dismiss, that Respondents be granted an order to conduct discovery.

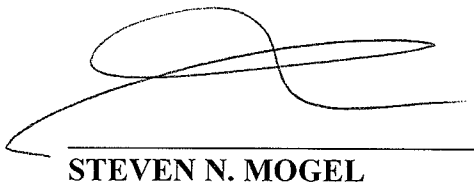
191. The instant matter pertains solely to whether the Respondents fulfilled their statutory obligations in passing the House of Worship Law. Any conceivable discovery sought of Petitioners would not be material or necessary to this inquiry and Respondents' application therefore should be denied. See Voutsinas v. Schenone, 166 A.D.3d 634, 637 (2nd Dep't 2018).

192. It is Petitioners' position that Respondents' request is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure Petitioners.

WHEREFORE, on behalf of the Petitioners-Plaintiffs HILDA KOGUT, ROBERT E. ASSELBERGS and MAGALI DUPUY, I request that the Court deny (a) Respondents' Motion to Dismiss in its entirety; and (b) Proposed Intervenors Congregation Birchas Yitzchok and the

Orthodox Jewish Coalition of Chestnut Ridge Motion for Leave to Intervene in its entirety, along with such other and further relief as, to the Court, may seem just, proper, and equitable.

Dated: May 21, 2019
Monticello, NY



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