

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

**FILED
AND
ENTERED**
ON 12-10 2009
WESTCHESTER
COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - ENVIRONMENTAL CLAIMS PART

-----x
THE VILLAGE OF CHESTNUT RIDGE,
THE VILLAGE OF MONTEBELLO
THE VILLAGE OF POMONA,
THE VILLAGE OF WESLEY HILLS,
MILTON B. SHAPIRO and DR. SONYA SHAPIRO,

Petitioners/Plaintiff,

DECISION.

Index No: 16876-2004

-against-

THE TOWN OF RAMAPO, THE TOWN BOARD
OF THE TOWN OF RAMAPO, THE PLANNING
BOARD OF THE TOWN OF RAMAPO, YESHIVA
CHOFETZ CHAIM OF RADIN, SCENIC
DEVELOPMENT, LLC, THE BOARD OF APPEALS
OF THE TOWN OF RAMAPO and
MOSDOS CHOFETZ CHAIM, INC.

Respondents/Defendants.

-----x
NICOLAI, J.

In this hybrid Article 78 proceeding and declaratory judgment action, petitioners seek (1) to annul and vacate the enactment of the Adult Student Housing Law (ASHL)(Local Law No. 9-2004); (2) to annul and vacate the Negative Declaration pursuant to SEQRA for the ASHL; (3) to annul and vacate any actions taken by any respondents/defendants in reliance upon the Negative Declaration for the ASHL; (4) for declarations that the adoption of the ASHL constitutes impermissible spot zoning, violates the Municipal Home Rule Law, and violates the General Municipal Law and is ultra vires; and (5) to annul and vacate the Negative Declaration for respondent CHOFETZ CHAIM's site plan application for adult student housing on the Nike Site.

In 2004 the Town of Ramapo (hereinafter Town) adopted a Comprehensive Plan setting forth several goals for land use within the Town, including protection of open space and environmental resources while addressing the need to provide diversity of housing opportunities for the Town's growing and changing population, and which recognized "the need for married student housing within the Town" and "that an appropriate solution to this issue needs to be addressed"(Comprehensive Plan at p. C-8).

Thereafter, in 2004, the Town Board authorized the preparation of a new Comprehensive Zoning Law and commenced preparation of a Supplemental Environmental Impact Statement (SEIS). While this was proceeding, the Town Board proposed a local law (Local Law 9-2004) that would amend the existing zoning law to permit adult student housing as a conditional use requiring a special permit. On June 15, 2004, the Town Board issued a Negative Declaration and adopted the ASHL (Local Law 9-2004).

Based on the minimum lot size requirement of four acres set forth in the proposed Local Law 9-2004, the proposed permitted use was expected to be applicable to only four potential sites in the unincorporated area of the Town, excluding sites which were not accessible by a "collector road" (a road which serves local roads), or included wetlands, steep slopes, water bodies, overhead utility lines and flood plains (see Lange affidavit p. 9). One of those sites, the Nike site, is also the subject of this proceeding.

Local Law 9-2004 was then repealed when the Comprehensive Zoning Law was adopted on November 22, 2004, which incorporated the provisions of the Adult Student Housing Law (Local Law 9-2004) with minor modifications not at issue herein (Zoning Law §376-1215).

The ASHL and the subsequent Zoning Law provision which repealed the ASHL and adopted the provision relating to the adult student housing as part of the Comprehensive Zoning Law, permits adult student housing in certain residential zones in the unincorporated area of the Town adjacent to the four villages named as petitioners.

The "Nike site," a former portion of the Nike missile base, was ceded to the Town of Ramapo as part of a settlement of a federal lawsuit brought by Yeshiva Chofetz Chaim against The Village of New Hempstead (*Yeshiva Chofetz Chaim Radin, Inc. v. Village of New Hempstead*, 98 F. Supp. 2d 347 [S.D.N.Y. 2000]). Petitioners in that action, among other claims, challenged the New Hempstead Village Zoning Code as unconstitutional because it failed to provide for fair housing or multi-family dwellings for individuals who must live close to places of worship and schools, and because it contained provisions intended to burden Orthodox Jews. As part of a stipulation of settlement, the 4.7 acre parcel referred to herein as the "Nike site" was ceded to the Town of Ramapo in November 2002 so that the zoning would be within the Town's jurisdiction. The 4.7 acre parcel ceded to the Town had 12 single family houses on it. Respondent Chofetz Chaim acquired that property and the respondent Mosdos is the current owner of this property. The remainder of the former missile base is presently owned by the School District and a school and food preparation facility are located there.

Chofetz Chaim applied to the Planning Board for site plan approval in 2003 and 2004 to permit the construction of adult student housing on the Nike site. These applications were rejected, and the third application which incorporated changes and other information required as to the previous site plans was accepted on or about November 4, 2004. The Planning Board issued a negative declaration with respect to the site plan, thus determining that the proposed development would not have a significant impact on the environment.

The amended petition alleges thirteen causes of action.

The first four causes of action allege that, in adopting the ASHL, the Town failed to comply with the requirements of SEQRA. The fifth and sixth causes of action allege that the Town failed to comply with the requirements of SEQRA in its subsequent adoption of the revised Comprehensive Zoning law. The seventh cause of action alleges that the adult student housing law constitutes impermissible spot zoning. The eighth cause of action alleges violation of Municipal Home Rule Law. The ninth cause of action alleges violation of General Municipal Law. The twelfth cause of action alleges that the adoption of the adult student housing is ultra vires. The thirteenth cause of action alleges that the Planning Board failed to take the “hard look” required by SEQRA in connection with the application for approval of the site plan proposed by Chofetz Chaim for the Nike site.

The tenth and eleventh causes of action which allege certain constitutional violations, have been dismissed for lack of standing (*Matter of Village of Chestnut Ridge v. Town of Ramapo*, 45 AD3d 74, 90 [2d Dep't 2007]).

SEQRA CLAIMS as to THE ADULT STUDENT HOUSING LAW(ASHL)(Local Law 9-2004) - First through Fourth Causes of Action

In April 2004, The Town Board proposed a new zoning law, the Adult Student Housing Law (ASHL)(Local Law 9-2004) to permit adult student multi family housing in single family residential zoning districts in the unincorporated areas of the Town of Ramapo, which would be permitted as an accessory use to post- secondary educational institutions. Petitioners allege that the Town’s Negative Declaration adopted on June 15, 2004, was arbitrary and capricious and an abuse of discretion.

The proposed ASHL was designated a Type I action.

“In reviewing the negative declaration, a court may not substitute its own judgment .. by weighing the desirability of particular actions or by choosing among possible alternatives (cites omitted). Instead, judicial review is strictly limited to whether [respondent] identified the relevant areas of environmental concern, took a ‘hard look’ at them, and made a ‘reasoned elaboration’ of the basis of its determination (cites omitted)” (*Inc. Vill. of Poquott v. Cahill*, 11 A.D.3d 536, 543 [2d Dep't 2004]). “Although an EIS is presumptively required for type I actions (cite omitted) it is not a per se requirement (cite omitted). In reviewing an agency's SEQRA determination, the standard of review is whether the determination was arbitrary and capricious or an abuse of discretion (cites omitted)” (*Cathedral Church of St. John the Divine v. Dormitory Auth.*, 224 A.D.2d 95, 100 [3d Dep't 1996]; see also *Inc. Vill. of Poquott v. Cahill*, 11 A.D.3d 536, 543 [2d Dep't 2004]; *Matter of Barrett v. Dutchess County Legislature*, 38 A.D.3d 651, 656 [2d Dep't 2007]). “An EIS is required if the action may include the potential for even one significant adverse environmental impact” (*Matter of Barrett v. Dutchess County Legislature*, 38 A.D.3d 651, 656 [2d Dep't 2007]).

A long form Environment Assessment Form (EAF) with Narrative was prepared by the Town's consultants. A public hearing was held on June 2, 2004.

The proposed ASHL was submitted to the Rockland County Department of Planning for its review and recommendations, to which the County in its letter dated June 2, 2004, stated "[d]uring the Town's Comprehensive Plan process, the need for adult student housing was raised as a deficiency in the Plan. In the Final Generic Environmental Impact Statement for the Plan, the Town acknowledged the need to find an appropriate solution to this issue. We understand the difficulties that the Town has in trying to accommodate the housing needs of married students living in unincorporated Ramapo and we are encouraged by the board's attempt to establish guidelines for this proposed use."

However, the County expressed "concerns about the proposal" i.e. (1) that the identified parcels may be "assembled" so as to meet the minimum acreage requirement; (2) while supporting the concept of limiting the development of the adult student housing to within a five mile radius to avoid oversaturation, it stated that the 5% figure limiting the total acreage of similar facilities together with a proposed project should be an absolute threshold that cannot be exceeded, and required the Town Board to establish criteria to enable the Planning Board to determine at which point the character of the area will be adversely impacted; (3) that the maximum development coverage for the site could be as high as 65% and that the adult student housing component could occupy more than 50% of the site which is a primary use not a secondary use and stated that the impact on the existing infrastructure must be considered, particularly as to traffic and adequate sewer capacity, and required that the Sewer District must be informed of all proposed adult student housing projects so it can determine if there is adequate capacity and if improvements are necessary; and (4) that adult student housing should not be permitted within 500 feet of low to medium residential districts in an adjacent municipality, as impacts to neighborhoods in adjoining municipalities would be significant and should not be permitted in the immediate proximity of a municipal boundary.

Thereafter, the Town Board made several changes to the proposed ASHL, incorporating these concerns, including (1) adding a requirement that the project must be located on an already existing lot which meets the lot size requirements or be created by subdivision from a large lot and cannot be the result of the combination of existing lots which separately fail to meet the lot size requirements; (2) requiring that all applications must identify similar adult student housing projects within a one-half mile radius measured from the edges of the property, and if the total acreage of similar facilities together with the proposed project exceeds 5 % of the surrounding area, discretion is removed from the Planning Board by requiring that the Planning Board "shall" decline to issue an approval if it determines that the application shall detrimentally impact the character of the area, and provided certain guidelines for this determination; (3) adding a requirement that the students must be married; (4) changing to 30 days from 6 months within which the students must vacate when they are no longer eligible for the housing; (5) adding a limitation on the maximum lot size to 12 acres; (6) adding an occupancy limitation of 6 years; (7) changing the buffer requirements to 500 feet between any

structure and abutting land within a village which is residentially zoned at a density of one dwelling unit per acre or less dense zoning districts; and (8) requiring review and comments from the sewer district on all projects.

The Town Board then issued a negative declaration on June 15, 2004 and adopted the Adult Student Housing Law (Local Law No. 9-2004) which permitted as a conditional use multi-family housing for married adult students in single family residential zones throughout the unincorporated areas of the Town as an “accessory use” to a post-secondary educational institution so long as the educational institution occupies 10% of the site. The minimum lot size would be 4 acres, maximum lot size would be 12 acres, and density was not to exceed 16 units per acre.

Petitioners allege in their first and second causes of action that the issuance of the negative declaration was arbitrary and capricious in that the Town failed to take a hard look at significant potential adverse impacts including community character, water, sewer, infrastructure, and traffic and safety, or propose any mitigation measures for these significant potential environmental impacts.

Petitioners assert that the EAF provided no analysis, did not take a “hard look” at the potential impact on the character of the community (from 39 single family homes to 531 units on 33 acres from the four sites), or the potential traffic impacts on the four known sites, except for an unsupported statement that most students will stay on site, did not consider any potential impacts from the increased demand to the water, sewer and road infrastructure that the Villages share with the Town.

As to the Nike site, it was zoned R-25 (25,000 square foot lots) surrounded by low density single family homes, and according to petitioners, this would permit 75 dwelling units in comparison to the 8 single family homes that could be built on the site under the existing zoning. Petitioners also assert that while the EAF acknowledged that the Nike site had an existing proposal for development in anticipation of the Law, there was no environmental analysis for this proposal or its impacts to the villages and surrounding neighborhoods in the EAF.

The Board’s determination was specifically based on the full Environmental Assessment and plans and reports submitted for the proposed ASHL.

The Town’s consultant completed the checklist on the EAF and prepared a Narrative for Part 3. In the Narrative, the Town’s consultant identified over 100 sites that could meet the Law’s requirements and receive the conditional use permit, but concluded there were only four sites that could potentially be used - the Nike site (4.7 acres), the Patrick Farm site (maximum of 12 acres could be developed), Highview Road Site (11.7 acres) and Spruce Road site (4.8 acres) - and the analysis in the EAF Narrative was limited to these four sites.

The Court's review of the record reveals that the Town Board's determination to issue a negative declaration was neither arbitrary and capricious nor irrational, and that the Town identified the relevant areas of environmental concern, took the required "hard look" and provided a reasoned elaboration for its determination.

The very purpose of an EAF is to assist an agency 'in determining the environmental significance or nonsignificance of actions' (6 NYCRR 617.2 [m]). As the form itself states, '[t]he full EAF is intended to provide a method whereby applicants and agencies can be assured that the determination process has been orderly, comprehensive in nature, yet flexible enough to allow introduction of information to fit a project or action' (6 NYCRR 617.20, appendix A). Part 2 of the EAF allows the lead agency to identify 'the range of possible impacts' and 'whether an impact can be mitigated or reduced' (6 NYCRR 617.20, appendix A). As stated on the required form, '[i]dentifying that an impact will be potentially large ... does not mean that it is also necessarily significant. Any large impact must be evaluated in Part 3 to determine significance. Identifying an impact in column 2 simply asks that it be looked at further.' This highlights the functional difference between an EAF and an Environmental Impact Statement (EIS). While an EAF is used to determine significance or nonsignificance, the purpose of an EIS is to examine the identified potentially significant environmental impacts which may result from a project (cite omitted) (*Merson v. McNally*, 90 N.Y.2d 742, 756 [1997]).

In the EAF including the Narrative, prepared by the Town's consultants, the relevant areas of environmental concern which have been raised by petitioners, including the impacts on traffic, water, sewer, infrastructure and community character were adequately identified and assessed, particularly as any proposed development would be subject to detailed site plan review. Where applicable, the SEQRA review being conducted in connection with the proposed Comprehensive Plan and Comprehensive Zoning Law was referenced.

As to the four identified potential ASHL sites, the Town consultants based their assessment of environmental impact on a worst case scenario based on the maximum allowable number of housing units (See Lange affidavit, p. 10).

As to character of the community, the EAF notes the impact would be "small to moderate," i.e., causing a small to moderate change in the density of land use. The Narrative provides elaboration in noting that density would be limited by the buffer around each site. (except for the Nike site as to which a buffer zone would not be feasible since it is an island site adjacent to the boundary of the Villages of New Hempstead and Wesley Hills), by limitation of density to 16 dwelling units per acre, by the limitation on the total acreage of similar facilities within that buffer of 5% of the total developable land to avoid clustering of the sites together, and by requiring heavy landscaping to shield the perimeter. The Narrative further notes that the density of the parcels qualifying for adult student housing would be the equivalent of R15C

developments, currently existing in residential neighborhoods in the town and will be subject to new architectural standards to enhance the design and appearance of the units. As further explained by the Town's consultant, the adult student housing development will have significantly more open space than if it had been zoned for R15C development, as development coverage for the adult student housing is a maximum of 50% of the developable area, while R15C developments have a maximum coverage of 90% of the developable area (see Lange affidavit, p. 14).

As to sewer capacity, the EAF narrative references meetings with the Rockland County Sewage Authority as to the system's capacity to handle increased flow from the proposed zoning changes, including the subject four sites; and the County advised that the system would have sufficient excess capacity to handle the projected increases.

As to water, the impacts were noted on the EAF to be small to moderate. The narrative concludes that sufficient capacity exists for all four sites based on reports from United Water, the public utility providing water to the Town, the report from the ground water consultant, and the use of groundwater recharge systems which would be required for the adult student housing sites.

Traffic levels for the four identified areas were assessed for adequacy. Traffic analysis was based upon the traffic study conducted by the Town's consultants for the then ongoing environmental review of the Comprehensive Plan, which was based on 2004 existing conditions and 2009 future conditions and evaluated the potential impact during peak roadway and peak traffic generating hours. Worst-case scenario models were used (i.e. assuming the maximum number of units that could be constructed). Off street barrier bus stops were proposed in the Narrative to minimize interruptions with traffic flow. As to the Patrick Farm and the Nike sites, existing traffic level was found to have minimal negative impact and categorized as Level "C" ("desirable levels of traffic with average delays") and as to Highview Road and Spruce Road, it was found that mitigation might be required but would not create a significant impact.

Issues relating to these areas of concern as raised in the County of Rockland's Department of Planning letter dated June 2, 2004 were addressed by the Board and resulted in, inter alia, the incorporation of requirements such as buffer zones, requiring a public water supply and public sewage facilities, limiting the acreage of adult student housing to 5% of the total developable area within that buffer, identifying the four sites which would meet the base criteria, and requiring a complete environmental review as part of the site plan approval process for any specific site.

The record does not support the conclusion that any of the subject areas of environmental concern raised by petitioners would result in a "significant adverse impact" and the statements in the negative declaration concerning the project and the fact that it will not have a significant impact on the environment are sufficient to constitute a "reasoned elaboration" on the part of respondent.

In their third cause of action petitioners allege that the Town improperly delegated its responsibility for SEQRA analysis to its experts, relying solely on the advice of the Town's planning consultant. As lead agency, the Town may not delegate its responsibilities to any other agency. However, the Town may properly consider the advice and assistance received from other agencies, experts and consultants, if the reliance was reasonable under the circumstances, although the final determination must remain with the lead agency principally responsible for approving the project (see *Coca Cola Bottling Co v. Board of Estimate*, 72 N.Y.2d 674, 682 [1988]; *Matter of Penfield Panorama Area Community Inc.v. Town of Penfield Planning Board*, 253 A.D.2d 342, 350 [4th Dept., 1999]). In this case, the Court finds that the Town's reliance was reasonable under the circumstances and that it did not solely rely on the advice of the Town's planning consultant, but considered all information, reports and schedules before it, including the concerns raised by the County Department of Planning's June 2, 2004 letter, and made its own determination of non-significance.

In their fourth cause of action, petitioners allege that the Town improperly segmented its environmental review, in that it failed to undertake a combined specific review of known projects, particularly the pending application by the Yeshiva Chofetz Chaim for a 60-unit housing development on the Nike site. However, the narrative of the Town's Planning Consultant annexed to the EAF reveals that there was a review to the extent possible of the four potential sites as to the issues of traffic, water, sewer, and impact on the character of the community. Under the circumstances, therefore, the Court does not find that there was improper segmentation.

SEQRA CLAIMS as to the COMPREHENSIVE PLAN ZONING LAW - Fifth and Sixth Causes of Action

On January 29, 2004, The Town of Ramapo adopted a Comprehensive plan including recommendations for zoning, and stated that:

The Town recognizes the need for married student housing within the Town and recognizes that an appropriate solution to this issue needs to be addressed. The Town should develop an appropriate approach to address this issue. A specific analysis of how to implement any zoning changes should be undertaken. Providing a proper balance between the need for married student housing and the community's interest in minimizing impacts to neighboring areas would be a critical consideration.
(Comprehensive Plan, at C-8).

This was recognized in the County of Rockland Department of Planning letter dated June 2, 2004, which stated "[w]e understand the difficulties that the Town has in trying to accommodate the housing needs of married students living in unincorporated Ramapo and we are encouraged by the board's attempt to establish guidelines for this proposed use..."

According to petitioners, the Comprehensive Plan proposes a series of zoning changes throughout the unincorporated areas of the Town, primarily involving a rezoning of

residential districts in the Town so as to increase density in the zoning districts bordering the lower density residential village areas.

Full environmental studies and impact statements were prepared for the Comprehensive Plan, including a Draft Generic EIS (DGEIS) and a Final Generic EIS (FGEIS). Respondent Chofetz Chaim submitted a written comment on the DGEIS requesting that the Plan provide for adult student housing for married students and their families while the students continue their post-secondary education. The Town responded that “[T]he Town recognizes the need for married student housing within the Town and recognizes that an appropriate solution to this issue needs to be addressed. The Plan will specifically acknowledge this. It is anticipated, therefore, that an appropriate approach to address this will flow from the Plan. A specific analysis of how to implement any zoning changes will need to be undertaken”(FGEIS at F-53).

After adoption of the Comprehensive Plan, the Town proposed to amend the Zoning Law in accordance with the Plan. A Supplemental EIS (SEIS) and Final SEIS (FSEIS) were prepared as to the Comprehensive Zoning Law under consideration. A public hearing was held on September 27, 2004, at which time comments were received and subsequent written comments were also received by the Town prior to issuance of the Board’s Findings Statement dated November 22, 2004, regarding the Final SEIS. The SEIS review, while limited to the issues of traffic, water and sewer, included review relating to the four identified potential adult student housing sites and also required that “[e]ach individual development will have to provide a water, sewer and traffic study to determine the particular local impacts in detail as part of the normal site plan review process” (FSEIS Findings Statement). Each development would also have to provide analysis of rainwater and groundwater recharge capabilities and implement recharge procedures, undergo architectural review, implement specific traffic improvements, and provide barrier separated off street bus stops to facilitate smooth flow of traffic (SEIS Findings Statement). The FSEIS was accepted on November 10, 2004 as to the proposed Comprehensive Zoning Law. The new Comprehensive Zoning Law was enacted on November 22, 2004, and included codification of the provisions of the ASHL Local Law in the new adult student housing provision in the Zoning Law (Section 376-1215) with minor changes which are not at issue herein.

In the Fifth cause of action, petitioners allege that the SEIS issued for the Comprehensive Zoning Law did not cure or address the prior deficient environmental review of the ASHL, that the Town said the SEIS was not meant to address the ASHL as it had been previously enacted and refused to take or respond to comments as to the SEIS for the adult student housing, that the SEIS only reviewed the general traffic impacts from the four sites and failed to address any of the other potential 96 sites identified as potentially eligible for development under the ASHL, that the Board failed to take a “hard look” at any of the significant potential adverse impacts of the adult student housing, including community character, schools and infrastructure, and that the SEIS constituted improper segmentation as it failed to evaluate the site specific impacts with respect to the now pending application for the Nike site.

In their sixth cause of action, petitioners allege that the Town failed to consider substantive public comments received on the DEIS and to respond to such comments in the FEIS, and failed to hold a public hearing in connection with the DSEIS for the alleged re-adoption of the ASHL.

As set forth above, the environmental review of the former ASHL adequately addressed the issues raised in the EAF prepared for that review. The Executive Summary states “This Supplementary EIS will provide a closer review and will evaluate the impacts of the recommendation in the plan to provide additional housing” (p.12). The four potential adult student housing sites were specifically included in the SEIS review process. Public comments on the potential adult student housing sites were received at the hearing conducted on September 27, 2004, and written comments were subsequently received. Insofar as the SEIS addressed the issues of traffic, water, and sewage facilities, the potential for development of the four identified sites was included in the review. The SEIS review was based on worst case scenario which was based on full development of multifamily developments, and water and sewer capacity were found to be sufficient. Studies conducted by the Town’s water supply consultant found that sufficient water supply existed and would be supplemented by a new ground water recharge program to be instituted by the Town. The Rockland County Sewage District found that there is sufficient capacity to handle all the projected additional sewage flows. Studies conducted by the Town’s traffic consultants found that traffic will increase and that mitigating measures in the form of upgraded design at particular intersections would be required as would barrier-separated bus stops at multi family developments. Further, as stated during the SEIS proceedings, “detailed individual assessments” and separate traffic, water and sewer reports and certifications would be required prior to approval or construction of any project (DSEIS at p. 7).

Further, adult student housing is subject to architectural review pursuant to the Zoning Law, one of the express purposes of which is “To ensure high standards for the visual environment of the Town of Ramapo...to preserve the aesthetic value of natural and man made features and structures and to prevent the harmful effects of potentially unattractive or inappropriate projects and the use of potentially unattractive or inappropriate building materials insofar as they may affect the visual environment.”.(Zoning Law Section 376-100). According to the Town’s consultant, this provides for mitigation of a project’s negative effect on the character of the surrounding neighborhood (see Lange aff at ¶38).

Finally, although some 100 sites were identified, based on minimum and maximum lot size and other restrictions contained in the ASHL as originally enacted and as enacted as part of the new Zoning Law, the selection of the four sites as those to be potentially developed for the subject school and housing was not unreasonable, and the Court finds that there was no improper segmentation.

IMPERMISSIBLE SPOT ZONING - Seventh Cause of Action

In the seventh cause of action, petitioners seek a declaration that the ASHL constitutes impermissible spot zoning. Petitioners allege that the ASHL carves out an exception to the 500 foot buffer requirement as to the Nike site with only the explanation that the Nike site

cannot meet the buffer requirement, which is clearly beneficial to the property owner who would not otherwise be able to apply for this use; and that application of the ASHL to the four specified sites constitutes spot zoning since the use is for the benefit of specific property owners to the detriment of the surrounding single family property owners and is contrary to the Comprehensive Plan.

Defined as the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners (cites omitted), "spot zoning" is the very antithesis of planned zoning. If, therefore, an ordinance is enacted in accordance with a comprehensive zoning plan, it is not "spot zoning," even though it (1) singles out and affects but one small plot (cite omitted) or (2) creates in the center of a large zone small areas or districts devoted to a different use (cites omitted). Thus, the relevant inquiry is not whether the particular zoning under attack consists of areas fixed within larger areas of different use, but whether it was accomplished for the benefit of individual owners rather than pursuant to a comprehensive plan for the general welfare of the community. (*Rodgers v. Tarrytown*, 302 N.Y. 115, 125 (1951)).

"[Z]oning is not invalid per se merely because only a single parcel is involved or benefitted (cite omitted); the real test for spot zoning is whether the change is other than part of a well-considered and comprehensive plan calculated to serve the general welfare of the community (cite omitted). Such a determination, in turn, depends on the reasonableness of the rezoning in relation to neighboring uses..." (*Collard v. Flower Hill*, 52 N.Y.2d 594, 601 (1981)).

"Town Law § 272-a(11) provides that where, as here, a town has adopted a formal comprehensive plan, the town's zoning decisions must be consistent with that plan. Compliance with the statutory requirement is measured, however, in light of the long-standing principle that one who challenges such a legislative act bears a heavy burden (cites omitted). 'If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control' (internal quotations omitted) (cites omitted). Thus, when a plaintiff fails to establish a clear conflict with the comprehensive plan, the zoning classification must be upheld (cites omitted). Zoning decisions must be consonant with a total planning strategy, reflecting consideration of the needs of the community (cite omitted). 'What is mandated is that there be comprehensiveness of planning, rather than special interest, irrational ad hocery. The obligation is support of comprehensive planning, not slavish servitude to any particular comprehensive plan (cites omitted)' (*Infinity Consulting Group, Inc. v. Town of Huntington*, 49 A.D.3d 813, 814 [2d Dep't 2008]).

The Town's Comprehensive Plan states that:

“The Town recognizes the need for married student housing within the Town and recognizes that an appropriate solution to this issue needs to be addressed. The Town should develop an appropriate approach to address this issue. A specific analysis of how to implement any zoning changes should be undertaken. Providing a proper balance between the need for married student housing and the community's interest in minimizing impacts to neighboring areas would be a critical consideration.” (Comprehensive Plan, at C-8).

The Town's Comprehensive Plan (at. B-2) includes the following objectives: (1) “[p]rovide a diversified housing supply that consists of residential development at appropriate densities and in appropriate locations in consideration of proximity to community shopping, community facilities and services, and public transportation, and in consideration of the adequacy of existing infrastructure; (2) [a]llow higher density housing in appropriate areas if such housing meets local needs and is balanced with the objective of maintaining the integrity and appearance of Ramapo's residential neighborhoods; (3) [p]romote a range of rental and home ownership opportunities in varied densities, housing types and prices for Town residents, especially senior citizens, singles and families; and (4) [e]ncourage inclusion of housing to meet identified housing needs in the development of large parcels of land.”

As reflected in the record, the ASHL and the adult student housing provision in the Comprehensive Zoning Law were intended to address the community's needs for diversified housing, which included a recognized housing need for adult married students (see e.g. *Campbell v. Barraud*, 58 A.D.2d 570, 572 [2d Dep't 1977] - “The charge of spot zoning is totally unsupportable. Even accepting the claim that this site qualifies as a "small parcel" in relation to the Moriches Bay area as a whole, any disparity in zoning is not to be condemned where, as here, the rezoning is an effort to satisfy a conceded public need for senior citizen housing, which need is also expressed in the comprehensive master plan”).

The adult student housing, a residential use, is not a “totally different” use (*Rodgers v. Tarrytown*, 302 N.Y. 115, 125 [N.Y. 1951]) from that of the surrounding residential area and petitioners have not demonstrated a “clear conflict” with the Comprehensive Plan (*Infinity Consulting Group, Inc. v. Town of Huntington*, 49 A.D.3d 813, 814 [2d Dep't 2008]). There is no requirement, as petitioners seem to contend, that the adult married student housing must be placed in districts which are zoned for multi-family or high density residential use, and there is no proof that the selection of the four sites was “accomplished for the benefit of individual owners rather than pursuant to a comprehensive plan for the general welfare of the community” (*Rodgers v. Tarrytown*, 302 N.Y. 115, 125 [N.Y. 1951]). Further, although some 100 sites were identified, based on minimum and maximum lot size and other restrictions contained in the ASHL as originally enacted and as enacted as part of the Comprehensive Zoning Law, the selection of the four sites as those to be potentially developed for the subject school and housing was reasonable and there is no proof that these sites were selected for the use and benefit of certain property owners.

VIOLATION OF MUNICIPAL HOME RULE LAW - Eighth Cause of Action

Petitioners allege that the Town enacted the ASHL in violation of the Municipal Home Rule Law §20(4) and §20(5). Section 20(4) provides that no local law shall be passed unless it is in final form and on the desks of the legislative body at least seven calendar days prior to its final passage. Petitioners allege that the ASHL was not in its final form until June 15, 2004, the date the ASHL was adopted. Section 20(5) provides that an additional public hearing must be held on a local law if substantial or material changes are made to the local law following the initial public hearing and petitioners allege that no public hearing was held after the initial public hearing held on June 2, 2004 although substantial changes were made to the ASHL including (i) adding a requirement that students be married; (ii) changing to 30 days from 6 months within which the students must vacate when they are no longer eligible for the housing; (iii) adding a limitation on maximum lot size to 12 acres; (iv) adding a requirement that the project be located on an already existing lot that meets the lot size requirements or be created by subdivision from a larger lot (v) adding an occupancy limitation of 6 years and (vi) changing the buffering requirements. Petitioners further allege that at the public hearing held on September 27, 2004 on the new Comprehensive Zoning Law, the Town failed and refused to allow public comments on the ASHL, and therefore the changes to the ASHL were still not presented for public comment.

Only a departure in substance from the formula prescribed by statute will invalidate a municipal enactment (cites omitted) (*Alscot Investing Corp. v. Laibach*, 65 N.Y.2d 1042, 1044 [1985]).

Where “substantial changes were made by the board of trustees subsequent to a public hearing held on the proposed ordinance and without any new public hearing upon the changes” the zoning ordinance was void (*Mill Neck v. Nolan*, 233 A.D. 248 [2d Dep’t 1931], *aff’d no opinion* 259 N.Y. 596 [1932]).

The changes made to the ASHL prior to adoption in its final form on June 15, 2004, were not substantial, resulted primarily from the comments received from the County Department of Planning and the public hearing, did not change the nature, purpose or scope of the permitted use and were more restrictive than the ASHL as originally proposed.

Under these circumstances, the Court finds no violation of Municipal Home Rule Law §20(4)(see e.g. *Pete Drown, Inc. v. Town Bd. of Ellenburg*, 188 A.D.2d 850, 852 [3d Dep’t 1992] - - the changes in the local law as finally adopted were not substantial and was on the desks for the required seven days. “Substantial compliance with Municipal Home Rule Law § 20 (4) is sufficient (cites omitted). Further, Municipal Home Rule Law § 51 declares that “[t]his chapter shall be liberally construed”), or §20(5) (*Matter of Benson Point Realty Corp. v. Town of E. Hampton*, 62 A.D.3d 989 [2d Dep’t 2009] - “Where changes are made to a proposed zoning amendment following the conclusion of a properly-noticed public hearing, new notice and another public hearing are not required... if the amendment as adopted is not substantially different from the amendment as noticed;” *Caruso v. Town of Oyster Bay*, 250 A.D.2d 639, 640 [2d Dep’t 1998] - where local law “did not differ substantially” from prior local law, the Town was not required to provide new notice, to hold a new public hearing, or to submit the proposed

local law to the Planning Commission prior to its adoption).

VIOLATION OF GENERAL MUNICIPAL LAW - Ninth Cause of Action

In its letter dated June 2, 2004, the Rockland County Department of Planning recommended several modifications to the proposed ASHL. The Planning Board then issued Resolution No. 2004-359 (with attached Schedule A) overriding the General Municipal Review by the Rockland County Planning Department.

Petitioners allege that the Planning Board made substantive or material changes to the ASHL after the County's review and failed to resubmit the revised ASHL to the County for further review in violation of General Municipal Law §239-m(2), and that in overriding the County's review, the Planning Board failed to adequately set forth the reasons for the override (see Resolution No. 2004-359 and attached Schedule A) in violation of General Municipal Law §239-m(6) .

General Municipal Law § 239-m requires that a municipal agency, before taking final action on an application for site plan approval, refer that application to a county or regional planning board for its recommendation...The failure to refer such matters to the county or regional board is a procedural defect rendering any subsequent approval by the municipal agency null and void (cites omitted). ...Although a municipal agency should not be obligated to make multiple references on an application each time a revision is made, where, as here, the revisions are so substantially different from the original proposal, the county or regional board should have the opportunity to review and make recommendations on the new and revised plans. (*Ferrari v. Penfield Planning Bd.*, 181 A.D.2d 149, 152-153 [4th Dep't 1992]).

Unlike the case of *Ferrari v. Penfield Planning Bd.*, id, relied on by petitioners, the changes made to the ASHL were not substantial, and in any event were responsive to the County's comments (see e.g. *Caruso v. Town of Oyster Bay*, 250 A.D.2d 639, 640 [2d Dep't 1998]) and the Planning Board adequately set forth its reasons for the override in the schedule attached to the Resolution. The Court therefore finds no violation of General Municipal Law §239-m(2) or General Municipal Law §239-m(6).

THE TOWN BOARD'S ACTIONS ARE ULTRA VIRES -Twelfth Cause of Action

Petitioners allege that the Town Board's inherent power to enact zoning regulations and exercise its zoning authority arises solely through the State's legislative grant of zoning authority (Town Law, Article 16), and that the Town Board is only empowered to enact zoning regulations pursuant to a comprehensive plan, and for the purpose of promoting the health, safety morals or general welfare of the community.

Specifically, petitioners allege that the ASHL, which permits multi-family housing in any residential zone throughout the Town, is not in accordance with the Town's recently adopted Comprehensive Plan as (1) the Comprehensive Plan adopted in January 2004

establishes certain areas within the Town for multi-family or high density residential use and the ASHL places multi-family housing outside of those designated areas, and immediately adjacent to single-family residential zoning districts; (2) the ASHL prohibits “assembled” lots while allowing the housing in “existing” or subdivided lots, which is not rationally related to, or in furtherance of the health, safety morals or general welfare of the community; (3) the ASHL was adopted in response to pressure of litigation from certain property owners who want to maximize development on their property for economic purposes, as the Town Board expressly stated that the ASHL was being adopted in response to concerns that litigation would be brought pursuant to the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) and was not therefore adopted to protect the health, safety and welfare of its citizens.

The exercise of the zoning power is ultra vires and void where the end sought to be accomplished was not peculiar to the locality's basic land use scheme, but rather related to some general problem, incidental to the community at large (cites omitted) (*Golden v. Planning Bd. of Ramapo*, 30 N.Y.2d 359, 371 [1972]).

A heavy burden falls on one challenging the determination by the local governmental board. (cites omitted). In *Shepard v. Village of Skaneateles* (300 N. Y. 115) we said: "Upon parties who attack an ordinance * * * rests the burden of showing that the regulation assailed is not justified under the police power of the state by any reasonable interpretation of the facts. 'If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.' [Citations omitted.]" (*Bedford v. Mt. Kisco*, 33 N.Y.2d 178, 186 [1973]).

As set forth above, the ASHL was not enacted to address some general problem, incidental to the community at large (cf.e.g. *Golden v. Planning Bd. of Ramapo*, 30 N.Y.2d 359, 371 [1972]), but was enacted to address a housing need which was recognized in the Town's Comprehensive Plan and acknowledged by the Rockland County Department of Planning (see letter dated June 2, 2004). Additionally, the ASHL was enacted in furtherance of the Comprehensive Plan (see e.g. *King Rd. Materials, Inc. v. Garafalo*, 173 A.D.2d 931, 932 [3d Dep't 1991]) and petitioners have not demonstrated that the ASHL “is not justified under the police power of the state by any reasonable interpretation of the facts” (*Bedford v. Mt. Kisco*, 33 N.Y.2d 178, 186 [1973]). “‘If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.’ (Citations omitted)” (id at 186).

SEORA CLAIM AS TO THE APPROVAL OF THE SITE PLAN FOR THE NIKE SITE - Thirteenth Cause of Action

Of the four named petitioner villages, only petitioner Village of Wesley Hills has been found to have standing to assert this claim (*Matter of Village of Chestnut Ridge v. Town of Ramapo*, 45 AD3d 74 [2d Dep't 2007]).

In the thirteenth cause of action, petitioner alleges that the Planning Board's issuance of the Negative Declaration on November 30, 2004 was arbitrary, capricious and an abuse of discretion as it failed to take a "hard look" at potential significant adverse impacts from the site plan application, including but not limited to impacts relating to community character, water, sewer, infrastructure and traffic and safety, that the Planning Board failed to set forth the required reasoned elaboration for its determination of non-significance; that despite the Town's repeated statements that detailed individual assessments would be required for all individual projects under the ASHL, no such detailed assessments or reports were conducted or required for the Nike Site Plan application, and that the Planning Board's failure to require or prepare an EIS for the Nike Site Plan application was arbitrary and capricious.

The Nike site is approximately 4.7 acres on Grandview Avenue. The application for site plan approval submitted on November 4, 2004 was reviewed under the newly adopted Comprehensive Zoning Law by the Planning Board on November 30, 2004, when it issued a negative declaration.

The proposed site plan is for a post-secondary educational facility with 60 units of adult student housing on the site in twelve buildings. Under the current zoning, up to 74 dwelling units would be permitted on the site. A long form EAF with narrative was prepared by the applicant and was submitted to the Planning Board on March 4, 2004. The Planning Board identified the site plan as an Unlisted action, held a public hearing, issued a negative declaration, and approved the site plan on November 30, 2004.

In assessing the significance of a proposed action under SEQRA, the lead agency must "thoroughly analyze the identified relevant areas of environmental concern to determine if the action may have a significant adverse impact on the environment; and * * * set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation" (6 NYCRR 617.7 [b] [3], [4]). Where the lead agency concludes either that "there will be no adverse environmental impacts [from the action] or that the identified adverse environmental impacts will not be significant," the agency may issue a negative declaration thus obviating the EIS requirement (6 NYCRR 617.7 [a] [2]).

Judicial review of a lead agency's negative declaration is restricted to "whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination" (cites omitted)... SEQRA guarantees that agency decisionmakers "will identify and focus attention on any environmental impact of proposed action, that they will balance those consequences against other relevant social and economic considerations, minimize adverse environmental effects to the maximum extent practicable, and then articulate the bases for their choices"(cite omitted) (*N.Y. City Coalition to End Lead Poisoning, Inc. v. Vallone*, 100 N.Y.2d 337, 347-348 [2003]).

As set forth above “[i]n reviewing the negative declaration, a court may not substitute its own judgment...judicial review is strictly limited to whether [respondent] identified the relevant areas of environmental concern, took a ‘hard look’ at them, and made a ‘reasoned elaboration’ of the basis of its determination (cites omitted) (*Inc. Vill. of Poquott v. Cahill*, 11 A.D.3d 536, 543 [2d Dep’t 2004]).

The Court agrees that the negative declaration should be annulled as the Planning Board failed to identify all relevant areas of environmental concern, take the required “hard look” at those areas of environmental concern and make a written “reasoned elaboration” of the basis for its determination.

Despite the Town’s repeated statements during the ASHL review and the supplemental environmental review of the proposed Comprehensive Zoning Law that a detailed analysis, including separate, traffic, water and sewer studies (see e.g. Findings Statement for FSEIS) would be required for any site plan review as to the four sites identified for adult student housing, the Board failed to adequately address relevant potential impacts from the site, in particular, the character of the community and the impact on traffic.

The Board failed to identify or address the potential impact of the site plan and increased density on the character of the surrounding community of low density single family residences, particularly in light of the exemption of the site from the buffer requirements applicable to other sites.

Community character is specifically protected by SEQRA. SEQRA requires the preparation of an environmental impact statement with respect to any action that ‘may have a significant effect on the environment’ (ECL 8-0109[2]). ‘Environment,’ for this purpose, includes, significantly, ‘existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character’ (ECL 8-0105[6]). The criteria by which the significance of a project is determined include ‘the creation of a material conflict with a community’s current plans or goals as officially approved or adopted’ and ‘the impairment of the character or quality of important historical, archeological, architectural, or aesthetic resources or of existing community or neighborhood character’ (6 NYCRR 617.7[c][1][iv], [v]).” “The impact that a project may have on . . . existing community character, with or without a separate impact on the physical environment, is a relevant concern in an environmental analysis’ (Chinese Staff & Workers Ass’n v New York, 68 N.Y.2d 359, 366, 502 N.E.2d 176, 509 N.Y.S.2d 499)” (*Matter of Village of Chestnut Ridge v. Town of Ramapo*, 45 AD3d 74 [2d Dep’t 2007]).

Prior to enactment of the ASHL, this site was zoned as R-25 low density for single family homes and had 12 single family dwelling units on the site. The surrounding area in the Village of Wesley Hills is zoned R-35 and R-50. The site is located on Grandview Avenue, near the intersection of New Hempstead Road (Union Road) and is adjacent to the

Villages of Wesley Hills and New Hempstead. Grandview Avenue forms most of the southern boundary of the Village of Wesley Hills and New Hempstead Road is on the eastern boundary of the Village of Wesley Hills.

The incompatibility of the proposed use of this site with the surrounding community was noted by the County of Rockland Department of Planning in its letter dated November 22, 2004 and its previous letters dated July 3, 2003 and April 15, 2004, issued on prior submissions of the application before enactment of the ASHL. In its November 22, 2004 letter, The Rockland County Department of Planning disapproved the application, noting that the applicant had submitted a plan which did not meet certain minimum bulk requirements and that given the incompatibility of the proposal with the surrounding community and the fact that the site is exempt from the buffer requirement, it must conform to other bulk requirements.

As to traffic impacts, the Board considered a 2003 traffic study prepared by the applicant's consultant which indicated that the level of operation at the intersection at Grandview Avenue and New Hempstead/Union Road was at Level "F" ("failing") during weekday peak a.m. hours, and would continue to operate at this level under a 2008 no build analysis, and that the intersection of Grandview Avenue and Route 306 operated at a Level "C". This study was updated by letter dated November 29, 2004 which indicated that there was no change in these prior findings.

In its letter dated March 29, 2004, the County Department of Highways raised concerns as to the use of slide gates, and possible stacking of vehicles in Grandview Avenue and required a traffic impact study to analyze the proposed entrance and/or possible improvements of turning movements on the site. In its letter dated November 15, 2004, the County Department of Highways stated that "[w]e see no information in the traffic study to assist in this evaluation" and indicated concern with the use of slide gates for entering and exiting the property and possible stacking of vehicles along Grandview Avenue due to cars waiting to enter the facility. The Board did not respond to this comment or consider the issues raised except to refer in the negative declaration to a barrier separated off road bus stop as a mitigating measure.

The Court therefore concludes that the traffic issues raised by the County Department of Highways and by the applicant's consultants' findings as to the existence of at least one Level "F" intersection, were not adequately addressed by the Board.

As to sewer and water, public sewer and water is required for the adult student housing. A letter from the County of Rockland Sewer District dated December 3, 2004 states that the existing sewer system "has adequate capacity at this time to handle the anticipated flow from this site." Water studies prepared for the SEIS indicated adequate water supply is available.

Finally, conclusory statements in the negative declaration as to landscaping and fencing, that the housing units front on a courtyard, and that the proposal for 60 units is less than the maximum of 74 units permitted by the zoning are insufficient to constitute a "reasoned elaboration."

Accordingly, in this Court's view, the Board failed to identify all relevant areas of environmental concern, take a "hard look" at them and make a reasoned elaboration of the basis for its determination. As "SEQRA mandates the preparation of an EIS when the proposed project may include the potential for at least one significant environmental effect (cite omitted)" and "there is a relatively low threshold for the preparation of an EIS' (cites omitted)" the Board "should have issued a positive declaration and prepared an EIS (cites omitted)" (*Uprose v. Power Auth.*, 285 A.D.2d 603, 608 [2d Dep't 2001]). Accordingly, the matter is remitted to the Planning Board for preparation of an EIS (id.).

The Court does not agree with respondent Mosdos' contention that it acquired vested rights in its building permit precluding petitioner's challenge. During the pendency of this proceeding, and after issuance of a preliminary injunction by this Court (Nicolai, J., 6/13/05), which ultimately was vacated because of the individual petitioners' failure to post the required undertaking, Mosdos acquired the property from respondent Chaim Chofetz in December 2005 and commenced construction of the development to 99% completion as of September 2007. It did so at its own risk, with knowledge that petitioners had moved for injunctive relief (see e.g. *Shupak v. Zoning Board of Appeals of Marbeltown*, 31 AD3d 1018 [3d Dep't 2006]; *E & J Sylcox Realty, Inc. v. Town of Newburgh Planning Bd.*, 12 A.D.3d 445 [2d Dep't 2004]); *Vitiello v. City of Yonkers*, 255 A.D.2d 506 [2d Dep't 1998]).

In September 2007, after the Appellate Division granted standing to the petitioner Villages (*Matter of Village of Chestnut Ridge v. Town of Ramapo*, 45 AD3d 74 [2d Dep't 2007]), the Villages sought a preliminary injunction and on September 11, 2007, this Court granted a temporary restraining order prohibiting, inter alia, issuance of any certificate of occupancy as to the already constructed development. This Court subsequently modified the temporary restraining order (Nicolai, J., August 25, 2009 - the modification order) to permit Mosdos to apply for certificates of occupancy for 16 units and the synagogue upon condition that an undertaking is given in the amount of \$75,000. If the condition for an undertaking has been timely complied with (as provided in the modification order and in this Court's order dated October 29, 2009, upon reargument) the modification order shall remain in effect until final determination of this matter (see e.g. *Silvercup Studios, Inc. v. Power Auth.*, 285 A.D.2d 598 [2d Dep't 2001]; *Golden v. Metropolitan Transp. Authority*, 126 A.D.2d 128, 133 [2d Dep't 1987]), subject to further order of this Court or the Appellate Division in the event of an appeal.

Settle judgment in accordance with this decision (22 NYCRR 202.48).

Dated: White Plains, New York
December 8, 2009



FRANCIS A. NICOLAI
J.S.C.

TO:
WILLIAM HENIG, ESQ.
Attorney for Respondent YESHIVA CHOFETZ CHAIM
25 Main Street
Monsey, NY 10952

ZARIN & STEINMETZ, ESQS.
Attorneys for Petitioner WESLEY HILL
81 Main Street, Suite 415
White Plains, NY 10601

JOSEPH J. HASPEL, PLLC
Attorneys for Respondent MOSDOS CHOFETZ CHAIM
40 Matthews Street, Suite 201
Goshen, NY 10924

HOLLAND & KNIGHT, ESQS.
195 Broadway, 24th Floor
New York, NY 10007

RICE & AMON, ESQS.
4 Executive Boulevard
Suffern, NY 10901