

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SUFFOLK

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INCORPORATED VILLAGE OF HEAD OF THE HARBOR; ST. JAMES - HEAD OF THE HARBOR NEIGHBORHOOD PRESERVATION COALITION, INC.; JUDITH OGDEN; GEORGE L. FITZPATRICK; KAREN P. FITZPATRICK; MARA MATKOVIC; NICHOLAS STARK; DAVID KELEMEN; ALYSON HOPE SVATEK; THOMAS JAMES SVATEK; TRISTAN COLE SVATEK; GERALD DUFF; LEONNA DUFF; DAVE KASSAY; LAURINE KASSAY; HARRY POOLE, SCOT VELLA; KATHY VELLA; MICHAEL SASSONE; LOUISE SASSONE; ROSE NAPOLITANO; CHARLES SHUTKA; MARGARET SHUTKA; COLLETTE PORCIELLO; and BENJAMIN ROBINSON,

Index No.

Petitioners,

- against -

TOWN OF SMITHTOWN; TOWN OF SMITHTOWN PLANNING BOARD; BARBARA DESORBE, in her official capacity as Chairperson of the Town of Smithtown Planning Board; WILLIAM MARCHESI, in his official capacity as a member of the Town of Smithtown Planning Board, DESMOND RYAN, in his official capacity as a member of the Town of Smithtown Planning Board, THOMAS UNVERZAGT, in his official capacity as a member of the Town of Smithtown Planning Board, RICK LANESE, in his official capacity as a member of the Town of Smithtown Planning Board; GYRODYNE, LLC; and GYRODYNE COMPANY OF AMERICA, INC.

Respondents.

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**MEMORANDUM OF LAW IN SUPPORT OF ARTICLE 78 PETITION**

**RMF**

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**TABLE OF CONTENTS**

	<b><u>PAGE</u></b>
TABLE OF AUTHORITIES .....	ii
Preliminary Statement.....	1
BACKGROUND AND FACTS .....	2
Gyrodyne Property .....	2
The Proposed Project .....	3
Procedural History .....	4
ARGUMENT .....	4
POINT I     THE PLANNING BOARD FAILED TO UNDERTAKE A HARD LOOK BEFORE APPROVING THE SUBDIVISION BECAUSE IT DID NOT EXAMINE THE IMPACT ON THE CHARACTER OF THE SURROUNDING AREA.....	4
POINT II     RESPONDENTS SHOULD BE DIRECTED TO PREPARE A SUPPLEMENTAL EIS TO ADDRESS OTHER DEFICIENCIES OF THEIR SEQRA REVIEW .....	8
(i)     Outdated Traffic Data .....	8
(ii)    Impact on Stony Brook Harbor.....	9
(iii)   Cumulative Impact.....	10
(iv)    Displacement of Existing Business.....	11
(v)     Historic and Cultural Resources .....	11
(vi)    Open Space .....	12
CONCLUSION.....	12

**TABLE OF AUTHORITIES**

<b><u>CASES</u></b>	<b><u>PAGE</u></b>
<i>Akpan v. Koch</i> , 75 N.Y.2d 561, 555 N.Y.S.2d 16 (1990) .....	4-5
<i>Chinese Staff and Workers Assn. v. City of New York</i> , 68 N.Y.2d 359, 509 N.Y.S.2d 499 (1986) .....	6, 7, 11
<i>Falcon Group Limited Co. v. Town/Village of Harrison Planning Board</i> , 131 A.D.3d 1237, 17 N.Y.S.3d 469 (2d Dep't 2015) .....	5
<i>Glen Head -- Glenwood Landing Civic Council Inc. v Town of Oyster Bay</i> , 88 A.D.2d 484, 453 N.Y.S.2d 732 (2d Dep't 1982) .....	8
<i>Matter of Doremus v. Town of Oyster Bay</i> , 274 A.D.2d 390, 711 N.Y.S.2d 443 (2d Dep't 2000) .....	10
<i>Matter of Green Earth Farms Rockland, LLC v. Town of Haverstraw Planning Bd.</i> , 153 A.D.3d 823, 60 N.Y.S.3d 381 (2d Dep't 2017) .....	9
<i>Matter of Save the Pine Bush, Inc. v. City of Albany</i> , 70 N.Y.2d 193, 518 N.Y.S.2d 943 (1987) .....	10
<i>Matter of Shapiro v. Planning Bd. of the Town of Ramapo</i> , 155 A.D.3d 741, 65 N.Y.S.3d 54 (2d Dep't 2017) .....	8
<i>Matter of Stewart Park and Reserve Coalition v. New York State Department of Transportation</i> , 157 A.D.2d 1, 555 N.Y.S.2d 481 (3d Dep't 1990), <i>aff'd</i> , 77 N.Y.2d 90 (1991) .....	10
<i>Matter of Town of Amsterdam v. Amsterdam Industrial Development Agency</i> , 95 A.D.3d 1539, 945 N.Y.S.2d 434 (3d Dep't 2012) .....	8
<i>Matter of Village of Chestnut Ridge v. Town of Ramapo</i> , 45 A.D.3d 74, 841 N.Y.S.2d 321 (2d Dep't 2007) .....	5, 6
<i>Matter of Wellsville Citizens for Responsible Development, Inc. v. Wal-Mart Stores, Inc.</i> , 140 A.D.3d 1767, 33 N.Y.3d 653 (4th Dep't 2016) .....	7

**STATUTES AND OTHER AUTHORITIES**

Environmental Conservation Law Section 8-0109 .....5

6 N.Y.C.R.R. 617(c)(1).....5

### **Preliminary Statement**

This Article 78 proceeding has been brought against the Town of Smithtown (“Town”), the Town of Smithtown Planning Board (“Planning Board”), and the individual members of the Planning Board in their official capacities, to annul approvals of a findings statement and the subdivision for the property owned by respondents Gyrodyne, LLC and Gyrodyne Company of America, Inc. (collectively “Gyrodyne”), and to require that a Supplemental EIS be prepared. The property which is being subdivided is located in the northeast portion of the Town of Smithtown, along historic Route 25A, and consists of approximately 63 acres of which approximately 48 acres are undeveloped. The subdivision is for the purpose of developing the property to include a hotel, assisted living facility, two office buildings and a sewage treatment plant.

Although this extensive development in this area consisting of open space, historic structures and residential homes has the potential to create inalterable change the character of the area, the environmental review undertaken by respondents utterly failed to examine the impact of the project on the surrounding community. For this reason alone the SEQRA findings statement and subdivision approval must be annulled and a Supplemental EIS prepared.

In addition, when the EIS did examine certain specific impacts, such as the increase in traffic, it did so without complying with SEQRA. For example, in discussing the impact on traffic the EIS relied on outdated traffic data, and made assertions that Gyrodyne experts contradicted in a previous legal proceeding. As explained below, and in the petition, the EIS failed to adequately review a number of topics including the potential cumulative impacts of future developments and the impact on Stony Brook Harbor.

In approving the subdivision the Planning Board undertook no discussion, even though numerous residents, the Supervisor of the Town of Brookhaven and the Mayor of the Village of

Head of the Harbor raised serious concerns about the project. And, as explained below the respondents failed comply with New York law when approving the Findings Statement and subdivision. Accordingly, the approvals of the findings statement and subdivision should be annulled, and a Supplemental EIS ordered.

## BACKGROUND AND FACTS

### Gyrodyne Property

Gyrodyne is a former defense contractor and now describes itself as a publicly owned commercial property owner. *See Website, Exhibit 1 to the Petition.* Initially, Gyrodyne owned land that straddled the border between the Town of Brookhaven and the Town of Smithtown. That land consisted of approximately 308 acres.

In or about 2010, the State of New York took by eminent domain the approximately 245 acres to be included into the SUNY Stony Brook campus. The remaining 63 acres in the Town of Smithtown consists of buildings and improvements, and approximately 48 acres are undeveloped and are commonly referred to as the Flowerfield Fairgrounds.

The parcel is bordered on the north, east and west by New York Route 25A, Stony Brook Road and Mills Pond Road, all two-lane residential country roads with few houses in the area. The south of the property is bordered by property owned by Stony Brook University. Across Route 25A to the north is the Avalon Preserve, a 216 acre preserve that runs to Stony Brook Harbor. West of the property is Mills Pond and Mills Cemetery. A map of the area is attached as Exhibit 2 to the Petition

As mentioned above, to the southeast of the property is SUNY Stony Brook campus, and south of the property is a residential development of single-family homes. Across Route 25A to

the north is the Village of Head of the Harbor, an all residential village. The lot is situated between the hamlet of St. James and the Three Village area in the Town of Brookhaven.

The lot is part of an area that is rural or undeveloped in nature. The lot provides a buffer between the more highly developed hamlet of St. James, and the Three Village area.

### **The Proposed Project**

Gyrodyne has proposed to develop the property by subdividing it into nine lots to accommodate a hotel, assisted living facility, two office buildings and a sewage treatment plant. In 2020, Town of Smithtown Supervisor Edward Wehrheim stated that the project was a concentration of his focus and the development was critical in his opinion. *See* Article, Exhibit 4 to the Petition. The proposed subdivision map is attached as Exhibit 5 to the Petition.

With regard to the proposed lots, Lots 1 and 2 would continue with their existing industrial use buildings. For what is designated Lot 3, Gyrodyne intends to use for overflow parking for the developments on the other lots. On Lot 4, Gyrodyne proposes to build a 150-room hotel with conference space. On Lots 5 and 6, 130,000 square feet of medical office, general office or technical office space is designated to be built. On lots 7 and 8 a 220 unit assisted living facility is proposed.

In connection with the subdivision application, Gyrodyne submitted a Draft Environmental Statement (“DEIS”) dated November 2019 prepared by Cameron Engineering & Associates, LLP. Exhibit 6 to the Petition.. In December 2020 a Final Environmental Impact Statement (“FEIS”) was filed addressing comments made to the DEIS. Exhibit 7 to the Petition. The FEIS and DEIS are sometimes collectively referred to as the EIS.

### **Procedural History**

On March 30, 2022, the Planning Board met and adopted a findings statement under SEQRA (“Findings Statement”). Exhibit 8 to the Petition. The Findings Statement improperly states that the Gyrodyne project should be viewed with more “flexibility” than other projects in the Town. *See* Exhibit 8, Page 7.

On that same date, a public hearing was held on the adoption of the site subdivision. Over thirty residents spoke in opposition to the subdivision, and numerous written comments were submitted to the Planning Board. Among those speaking against the project were the Supervisor of the Town of Brookhaven and the Mayor of the Village of the Head of the Harbor

Immediately at the end of the public comment period, and without any discussion whatsoever, the subdivision was approved. At the end of the meeting, without a motion, the Planning Board then ended the public participation, and upon information and belief, met privately. The Petition is filed within thirty (30) days of the adoption of the Findings Statement and approval of the subdivision.

## **ARGUMENT**

### **POINT I**

#### **THE PLANNING BOARD FAILED TO UNDERTAKE A HARD LOOK BEFORE APPROVING THE SUBDIVISION BECAUSE IT DID NOT EXAMINE THE IMPACT ON THE CHARACTER OF THE SURROUNDING AREA**

Under well-established New York law, prior to undertaking a discretionary determination such as approving a subdivision, a governing body must comply with the requirements of the New York State Environmental Quality Review Act (“SEQRA”). *See e.g. Akpan v. Koch*, 75 N.Y.2d 561, 555 N.Y.S.2d 16 (1990). Environmental concerns are a top priority for any governmental entity considering a discretionary decision, and if a thorough review and a “hard look” at



environmental concerns are not undertaken, a court should annul any action that relies on the faulty review. *See, e.g., Falcon Group Limited Co. v. Town/Village of Harrison Planning Board*, 131 A.D.3d 1237, 17 N.Y.S. 3d 469 (2d Dep't 2015) (subdivision approval annulled because SEQRA Findings Statement was contradicted by scientific and technical analysis, and did not address an alternative less dense development). Here, in addition to the deficiencies outlined in Point II below, respondents failed to take the appropriate hard look by relying on an EIS and subsequent Findings Statement that did not address the impact of the subdivision on the character of the surrounding area.

Pursuant to Environmental Conservation Law Section 8-0109 an EIS must examine any factor which may have a significant effect on the environment. 6 N.Y.C.R.R. 617(c)(1) provides an illustrative list of criteria to be considered when determining whether an action may have a significant adverse impact on the environment, and subsection (v) specifically provides that the impairment of an existing community or neighborhood character is an indicator of significant adverse environmental impact of a proposed action.

Here, the EIS and Findings Statement simply did not examine at all the main environmental concern of the project – the impact of building a hotel, assisted living facility, two office buildings and a sewage treatment plant on a neighborhood of open space, historic structures and residential homes. Instead, the EIS absurdly states that the project will be consistent with the current land use. DEIS Section 12.2. No discussion in any of the SEQRA documents, including the Findings Statement, examine how the subdivision will impact the character of the area, including the character of the adjacent Village of Head of the Harbor.

The Second Department, in *Matter of Village of Chestnut Ridge v. Town of Ramapo*, 45 A.D.3d 74, 94-95, 841 N.Y.S.2d 321, 338-339 (2d Dep't 2007), when upholding the standing of a

village to challenge under SEQRA a zoning change by a town, explained the importance of examining the impact on neighborhood character, stating:

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 Assn. v. City of New York*, 68 N.Y.2d 359, 366, 509 N.Y.S.2d 499, 502 N.E.2d 176).

The power to define the community character is a unique prerogative of a municipality acting in its governmental capacity. All of the other incidents of local government, including its electoral and legislative processes, management policies, and fiscal decisions, are ultimately aimed at determining and maintaining the community that its residents desire. It is the right to continue to exercise that authority which the Villages assert here, in the face of the potential threat posed by the Town’s action with respect to the property along the Villages’ borders. Substantial development in an adjoining municipality can have significant detrimental impact on the character of a community (*see Matter of National Merritt v. Weist*, 41 N.Y.2d 438, 444, 393 N.Y.S.2d 379, 361 N.E.2d 1028; *Matter of Holmes v. Brookhaven Town Planning Bd.*, 137 A.D.2d 601, 604, 524 N.Y.S.2d 492), thereby limiting the ability of the affected municipality to determine its community character in ways far more important than might the traffic concerns at issue in *Village of Port Chester v. City of Rye*, *supra* or the individual variance that was challenged in *Village of East Hills v. Siegel*, *supra* . . .

The determination in the Village of Chestnut Ridge is consistent with well-established law that the review under SEQRA of a proposed action must include an examination of the action on

the character of the surrounding area. As the Court of Appeals, in *Chinese Staff and Workers Assn. v. City of New York*, 68 N.Y.2d 359, 366, 509 N.Y.S.2d 499, 503 (1986), explained:

Thus, the impact that a project may have on population patterns or existing community character, with or without a separate impact on the physical environment, is a relevant concern in an environmental analysis since the statute includes these concerns as elements of the environment. That these factors might generally be regarded as social or economic is irrelevant in view of this explicit definition. By their express terms, therefore, both SEQRA and CEQR require a lead agency to consider more than impacts upon the physical environment in determining whether to require the preparation of an EIS. In sum, population patterns and neighborhood character are physical conditions of the environment under SEQRA and CEQR regardless of whether there is any impact on the physical environment (*see, Ulasewicz, Department of Environmental Conservation and SEQRA: Upholding Its Mandates and Charting Parameters For The Elusive Socio-Economic Assessment*, 46 Alb.L.Rev. 1255, 1266, 1282).

And, in clearly analogous circumstances, the Appellate Division, in *Matter of Wellsville Citizens for Responsible Development, Inc. v. Wal-Mart Stores, Inc.*, 140 A.D.3d 1767, 33 N.Y.3d 653 (4<sup>th</sup> Dep't 2016), held that the impact of a large retail store on the character of a community was required to be reviewed under SEQRA. The Appellate Division went on to hold that the failure to undertake an examination of this impact required that a negative declaration be annulled.

Similarly, here, there is absolutely no analysis of the impact of the subdivision and subsequent development on the neighborhood, including the adjacent Village of Head of the Harbor. Simply put, the respondents just avoided this issue. And, this is not some technical deficiency but goes to the very heart of the environmental issues raised by the subdivision; will building a hotel, assisted living facility, two office buildings, and a sewage treatment plant impact the character of the surrounding area that currently consists of open space, historical structures and residential communities. This failure to examine this concern is reason alone for the approval of the Findings Statement and subdivision to be annulled and a Supplemental EIS ordered.

## POINT II

**RESPONDENTS SHOULD BE DIRECTED TO PREPARE A  
SUPPLEMENTAL EIS TO ADDRESS OTHER  
DEFICIENCIES OF THEIR SEQRA REVIEW**

In determining whether a Supplemental EIS is required, a court must review the record to determine whether the EIS identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its decision. *Matter of Shapiro v. Planning Bd. of the Town of Ramapo*, 155 A.D.3d 741, 65 N.Y.S.3d 54 (2d Dep't 2017). Further, as the Second Department has clearly instructed, in *Glen Head -- Glenwood Landing Civic Council, Inc. v Town of Oyster Bay*, 88 A.D.2d 484, 495, 453 N.Y.S.2d 732, 739 (2d Dep't 1982), there is a "continuing duty to evaluate new information relevant to the environmental impacts[s]" Here, this Court should direct that a Supplemental EIS be undertaken to address those areas where the EIS failed to take a hard look at potential environmental impacts either by reason of relying on out dated information or failing to properly look at certain relevant concerns. *See also Matter of Town of Amsterdam v. Amsterdam Industrial Development Agency*, 95 A.D.3d 1539, 945 N.Y.S.2d 434 (3d Dep't 2012) (Findings statement annulled as arbitrary and capricious because it did not balance relevant environmental impacts with social, economic and other considerations).

**(i) Outdated Traffic Data**

As fully set forth in the Report from Steven Schneider, the data relied upon for the traffic analysis is outdated and could not provide a basis to properly examine the projects impact on traffic. As also set forth in the Schneider Report, the traffic analysis also refers to contingencies but fails to state whether those contingencies were met. Further calling in question the adequacy of the traffic report is its finding as to the additional trips that would be generated is contradicted by Gyrodyne representations in a prior judicial proceeding.

The Planning Board made no explanation as to why they accepted a traffic report that utilized outdated data. Further, there was no discussion in the EIS or Findings Statement as to whether there had been any change in traffic patterns over the last five years. A Supplemental EIS should have been prepared to address these issues, and the Planning Board's failure to do so requires the Findings Statement and subdivision approval be annulled. See *Matter of Green Earth Farms Rockland, LLC v. Town of Haverstraw Planning Bd.*, 153 A.D.3d 823, 60 N.Y.S.3d 381 (2d Dep't 2017).

**(ii) Impact on Stony Brook Harbor**

As set forth in the submissions by the Town of Brookhaven, the EIS did not address the impact of the Sewage Treatment Plant and the medical facilities on Stony Brook Harbor. Further, the Town has made clear that there is an intention to connect piping to transfer waste from the St. James business district to the sewage treatment plant to be built on the Gyrodyne property, but this increase sewage is not addressed. Findings Statement pp. 8-9. No reference is made to a study requiring a 37% decrease in nitrogen traveling to Stony Brook Harbor or that Stony Brook Harbor poorly flushes nitrogen that migrates to it, resulting in a large hypoxic dead zone.

Given the highly environmentally sensitive Stony Brook Harbor, these issues need to be addressed, but are not. In clearly analogous circumstances, the Second Department, in *Matter of County of Orange v. Village of Kiryas Joel*, 44 A.D.3d 765, 768, 844 N.Y.S.2d 57, 61 (2d Dep't 2007), held that the approval of the construction of a waste water treatment plant was properly annulled because "neither the DEIS nor the FEIS fully identified the nature and extent of all of the wetlands that would be disturbed or affected by the construction . . .".

Similarly, here, the Town of Brookhaven identified serious deficiencies in the review of the impact of the project on Stony Brook Harbor. Accordingly, a Supplemental EIS should be

prepared to properly discuss the impact of the subdivision on Stony Brook Harbor. *See also Matter of Doremus v. Town of Oyster Bay*, 274 A.D.2d 390, 711 N.Y.S.2d 443 (2d Dep't 2000) (Supplemental EIS required to address water quality issues).

**(iii) Cumulative Impact**

Section 617.9(b)(5)(iii)(a) of the SEQRA regulations require that all draft environmental impact statements “must include the following elements . . . reasonably related short-term and long-term impacts, cumulative impacts and other associated environmental impacts”. Further, as the Court of Appeals has held “[f]ailure to consider the cumulative impacts of development will result in the invalidation of an environmental impact statement. *Matter of Save the Pine Bush, Inc. v. City of Albany*, 70 N.Y.2d 193, 518 N.Y.S.2d 943 (1987).

Here, although a number of future developments were identified during the SEQRA review process they were simply ignored by the Planning Board. In fact, after the DEIS had been prepared, but prior to the adoption of the Findings Statement, the developer Benchmark Senior Living had met with the Town’s Planning Staff about building an assisted living facility on Bull Run farm immediately west of the property.

Worse yet, to the extent that the EIS is designed as a generic environmental impact statement only underscores the importance of a cumulative impact analysis. *See e.g. Matter of Stewart Park and Reserve Coalition v. New York State Department of Transportation*, 157 A.D.2d 1, 555 N.Y.S.2d 481 (3d Dep't 1990), *aff'd*, 77 N.Y.2d 90 (1991). Further, as set forth in the affidavit of John Pavacic, the Planning Board had sufficient information about potential development in the area, including current zoning and lot sizes, to undertake a cumulative impact study but simply chose not to. *See Exhibit 9*, para 6. A Supplemental EIS should be required to do a proper analysis.

**(iv) Displacement of Existing Business**

A potential environmental concern not addressed in the EIS is the impact on surrounding business districts of the construction of 130,000 feet of additional office space. The EIS references that this office space will be filled by relocating tenants, but there is no discussion of what that will mean to the surrounding area. New York courts have long held that the potential displacement of local businesses is an effect which must be considered under SEQRA. *Chinese Staff & Workers Assn. v. City of New York, supra*, 66 N.Y.2d at 366-367. Accordingly, a Supplemental EIS should be prepared addressing this concern.

**(v) Historic and Cultural Resources**

A significant portion of the Gyrodyne property is located in the Mills Pond Historic District, which is listed in the National Register of Historic Places. In addition, Route 25A has been designated as a Historic Corridor. Further, there are a number of historical structures adjacent to the property. However, the EIS simply relies on a buffer along the property's boundaries to protect these historic buildings.

As set forth in the Pavacic Affidavit, a number of steps can be taken to protect these structures, but none of these steps are discussed or recommended in the Findings Statement. Simple actions such as the preparation of an annual report to monitor the structural health of these buildings are not addressed. Without examining the steps necessary to protect these buildings, the EIS is deficient and a Supplemental EIS should be required.

**(vi) Open Space**

The EIS does not address the fact that the planned development is not consistent with the Town's draft Comprehensive Plan. The Comprehensive Plan envisions that open space be preserved between the local business district and that development be concentrated within those


districts. The proposed development is just the opposite, taking away open space in the area east of the hamlet of St. James. The EIS failure to address this contradiction to the Town's Comprehensive Plan requires that a Supplemental EIS be prepared.

**CONCLUSION**

For the reasons set forth above and in the accompanying Verified Petition, the approval of the Findings Statement and subdivision should be annulled, and respondents directed to prepare a Supplemental EIS.

Dated: Uniondale, New York  
April 25, 2022

RUSKIN MOSCOU FALTISCHEK, P.C.

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