

**WESTCHESTER MUNICIPAL PLANNING FEDERATION
2017 LAND USE LAW INSTITUTE
LAND USE LAW UPDATE**

MEMORANDUM ON SPOT ZONING

**Presented at the Westchester Municipal Planning Federation
Land Use Training Institute – May 17, 2017**

Prepared by:

McCullough, Goldberger and Staudt, LLP
1311 Mamaroneck Avenue, Suite 340
White Plains, New York 10605
(914) 949-6400
L.Whitehead@mgslawyers.com
www.mcculloughgoldberger.com

SPOT ZONING

This memorandum is intended to outline the law on spot zoning, and the analysis that must be applied in order to properly identify spot zoning.

What Is Spot Zoning?

The term “spot zoning” has been 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 said property to the detriment of others.**” *Rodgers v. Village of Tarrytown*, 302 N.Y. 115, (Ct App 1951)(emphasis added); *See also, Boyles v. Town of Board of Town of Bethlehem*, 718 N.Y.S.2d 430 (3d Dep’t 2000); *Yellow Lantern Kampground v. Town of Cortlandville*, 716 N.Y.S.2d 786 (3d Dep’t 2000). “[S]pot zoning is the antithesis of zoning undertaken in accordance with a well-considered plan.” Division of Local Government Services, *Zoning and the Comprehensive Plan*, (2015).

“Spot zoning” is a term of art that is solely applicable to legislative action, i.e. a zoning amendment. Often, members of the public will level charges of “spot zoning” in opposition to variances or special permits that allow one property owner to maintain a use that is inconsistent with the surrounding neighborhood. This is **not** spot zoning. Salkin & Anderson, 1 N.Y. Zoning Law & Prac. § 4:10.

When Does A Zoning Amendment Constitute Spot Zoning?

The Court of Appeals has held that a zoning amendment which is the result of a reasoned and careful consideration as part of a comprehensive land use plan does not constitute illegal spot zoning. *Olish v. Heaney*, 2003 WL 21276342 (Sup. Ct. Suffolk Co. 2003), *citing Asian-Americans for Equality v. Koch*, 72 N.Y.2d 121 (Ct App 1988).

The real key to the analysis is not whether a parcel is being zoned differently from others around it, but whether the proposed zoning is being enacted on the basis of sound land use planning considerations. The fact that a zoning change will have the incidental effect of benefiting a particular land owner does not invalidate the change, as long as its true purpose is to promote the general welfare through sound land planning.

Statutory law requires that where a municipality has adopted a formal comprehensive plan, the municipality’s zoning decisions must be consistent with that plan. However, municipalities are not required to rigidly adhere to the terms of a comprehensive plan. Rather, a legislature should be free to adopt zoning amendments or take other actions that respond to changing conditions in the community, so long as those actions reflect a reasoned, and thought-out planning basis or goal consistent with the general planning goals and fundamental land use policies of the comprehensive plan. *See Matter of Town of Bedford v. Village of Mt. Kisco*, 33 NY2d 178 (Ct App 1973); *Napolitano v. Town of Southeast* (Sup. Ct. Putnam Co. 2016). Spot zoning only occurs when a legislative action is undertaken that conflicts with the fundamental land use policies and

development plans of the community. *Gernatt Asphalt Products, Inc. v Town of Sardinia*, 87 NY2d 668, 685 (Ct App 1996).

What Is The Legal Standard For Court Review?

As noted above, courts are tasked with deciding whether legislative action in question is intended to serve the general welfare of the community, or if it is primarily intended to benefit the landowner(s) pushing for the amendment to the detriment of the community as a whole. The court must determine whether the legislature's action conforms to a well-considered plan. *Udell v. Haas*, 21 NY2d 463 (Ct App 1968).

Presumption In Favor Of Legislature

There is a strong presumption in favor of the legislative body that its actions do not constitute spot zoning. In order to prove spot zoning has occurred, the burden rests on the challenging party to show that the legislature's action was **arbitrary or unreasonable**. Courts have long stated that barring such a showing, the judiciary is not to overturn the decision of the legislature. If the validity of the legislature's actions is at least "debatable", the legislative judgement must be allowed to control, and the court may not substitute its own judgment. Whether the court would have made the same decision as the legislative body is not at issue, so long as the decision was neither arbitrary nor unreasonable.

Property owners have no right to a particular zoning classification, on their own property or surrounding properties. "While stability and regularity are undoubtedly essential to the operation of zoning plans, zoning is by no means static. Changed or changing conditions call for changed plans, and persons who own property in a particular zone or use district enjoy no eternally vested right to that classification if the public interest demands otherwise." *Thomas v Town of Bedford*, 11 NY2d 428, 434 (Ct App 1962). A zoning amendment therefore is not arbitrary nor unreasonable simply because it represents a change from a long-existing classification.

Additionally, a zoning amendment is not spot zoning "to the detriment of others" merely because the amendment in question will lower the property values of surrounding neighbors. "[I]t is not enough for the plaintiff to show that 'he would realize a greater return' under a less restricted use." *McGowan v Cohalan*, 41 NY2d 434, 437-38 (Ct App 1977), citing *Williams v. Town of Oyster Bay*, 32 NY2d 78 (Ct App 1973).

Factors For Court Consideration

When the issue of spot zoning is raised, courts are tasked with deciding whether the zoning amendment in question is intended to serve the general welfare of the community, or if it is primarily intended to benefit the landowner(s) pushing for the amendment to the detriment of others. In reviewing this issue, the court will look at certain factors, including: (i) the size of the area subject to the amendment; (ii) the nature and use of the land surrounding the new classification; (iii) the nature of the use permitted by the amendment; and (iv) the process whereby the legislative decision was reached. Salkin, *supra* § 4:10. No single factor is dispositive. Each of these factors may be considered by the courts as follows:

1. Size of the Area Subject to Amendment

A zoning amendment is not spot zoning simply because it is only applicable to a relatively small area of land, or land controlled by a single owner. *See Rodgers, supra, Zeidler v. Incorporated Village of Farmingdale*, 190 N.Y.S.2d 486 (2d Dep't 1959).

The relevant inquiry is not the size or ownership of the area subject to the amendment, but "whether the zoning was accomplished for the benefit of the individual owner, rather than pursuant to a comprehensive plan for the general welfare of the community." *Greenberg v. City of New Rochelle*, 129 N.Y.S.2d 691, 694 (Sup. Ct. 1954), judgment aff'd, 134 N.Y.S.2d 593 (2d Dep't 1954).

2. Nature of Surrounding Properties

A newly zoned district/area should not be an island surrounded by incompatible restrictions. Rather, it may be a logical projection of an existing district to permit growth or to bring the zoning ordinance into line with changes that have already occurred. *See Salkin & Anderson*, 1 N.Y. Zoning Law & Prac. § 4:12.

Even where the newly zoned area is different from surrounding areas, the key question is whether the newly permitted use(s) will be incompatible or harmful to the surrounding properties. "[T]he 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, supra* at 124. "[Z]oning is not invalid per se merely because only a single parcel is involved or benefited; 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." *Collard v. Inc. Vil. of Flower Hill*, 52 NY2d 594, 600 (Ct. App 1981)(internal citations omitted).

3. Nature of Use Permitted by Amendment

The court will examine the purpose of the change and the relative benefit to the owner and to the public. Spot zoning occurs where a zoning change is put in place to the benefit of a particular landowner and not to the community as a whole.

However, an amendment is not spot zoning simply because it benefits an individual landowner. If said amendment serves the general welfare, and is consistent with a municipality's considered zoning plan, it is not spot zoning. *See Goodrich v. Town of Southampton*, 39 NY2d 1008 (Ct App 1976).

4. Legislative Process

Nearly all cities maintain a professional planning department of some sort, and smaller towns and villages seek professional advice from planning consultants or part time municipal planners. Thus, courts may refer to the planning process when looking at a case alleging spot zoning. In doing so, courts have found valid zoning amendments that have arisen out of property studies or issues raised by members of the public after a municipality has established a comprehensive plan. *See Twenty-One White Plains Corp. v Vil. of Hastings-On-Hudson*, 14 Misc 2d 800, 803 (Sup Ct 1958), affd, 9 AD2d 934 (2d Dept 1959).

In *Goodrich v Town of Southampton* the New York Court of Appeals found that the rezoning of a property was valid, even where it did not match the town's master plan, because the zoning amendment in question was undertaken after the town engaged professional planning consultants and the planning board held public meetings. "[T]he challenged revision was the result of comprehensive planning conducted with expert assistance and in accordance with statutory requirements." *Goodrich*, *supra* at 1009 (Ct App 1976).

Summary

In summary, spot zoning does not arise from the action of a Planning Board or Zoning Board issuing a variance or special permit for a use on a particular property. Spot zoning can only occur through the legislative act of rezoning a property or properties. The basis for a determination of whether such a legislative act constitutes spot zoning relates primarily to whether there was a legitimate planning purpose for the action and whether it was in accordance with the municipality's general land use plan. Good planning results in no spot zoning!

SUPREME COURT : STATE OF NEW YORK
COUNTY OF PUTNAM
HON. PAUL I. MARX, J.S.C.

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.

-----X
Application of KEITH NAPOLITANO, SAMANTHA
JACOBS, LAURA CATALANO and HELEN DORKIN,

Petitioners,

for a judgment pursuant to CPLR Article 78

-against-

TOWN BOARD OF SOUTHEAST, CROSSROADS
312, LLC, JPH DEVELOPMENT CORP., HIGHLANDS
EAST, LLC, ERNA MARIE KOEPKE, ERNA MARIE
KOEPKE and GERALDINE WARM solely in their
capacities as personal representatives for the ESTATES
OF MILDRED WARM and KURT WARM,

Respondents.
-----X

ORDER AND JUDGMENT

Index No: 1030/2015

Return Date: April 25, 2016

The following papers numbered 1 through 20 were read on Petitioners' Article 78 proceeding seeking an order and judgment annulling, vacating and voiding Respondent Town Board of Southeast's ("Town Board") decision (1) to change the zoning designation of certain parcels located at the Route 312/Interstate 84 interchange ("Crossroads project") and its Zoning Code; and (2) to adopt the Environmental Findings Statement conducted pursuant to the State Environmental Quality Review Act ("SEQRA") for the Crossroads project:

Notice of Petition/Verified Petition	1-2
Table of Exhibits (Exhibits 1-25)	3
Affidavit in Support of Helen Dorkin and attachments (photographs)	4
Affidavit in Support of Laura Catalano	5
Affidavit in Support of Samantha Jacobs and attachments (photographs)	6
Affidavit in Support of Keith Napolitano	7
Memorandum of Law in Support of Petition	8
Notice of Amended Verified Petition	9
Amended Verified Petition	10
Verified Answer of Respondent Town Board of the Town of Southeast	11
Verified Answer to Amended Verified Petition of Respondents Crossroads 312, LLC, JPH Development Corp., Highlands East, LLC, Erna Marie Koepke and Geraldine Warm	12

Affidavit in Opposition of Thomas LaPerch	13
Affidavit in Opposition of Elizabeth D. Hudak/Exhibits A-G	14
Affidavit in Opposition of Ashley Ley/Exhibits A-D	15
Affidavit in Opposition of Michael A. Galante/Exhibit A	16
Affidavit in Opposition of Philip E. Doyle/Exhibits A-G	17
Memorandum of Law in Opposition to Amended Verified Petition	18
Certified Record of Proceedings (Flash Drive)	19
Petitioner's Reply Memorandum of Law	20

Upon reading the foregoing papers, it is ORDERED that the Petition, as amended, is disposed as follows:

BACKGROUND

This Article 78 proceeding challenges the Town Board's Resolution¹ enacting Local Law No. 3 of 2015, which changed the zoning classification of five parcels located in the Town of Southeast at the Route 312/Interstate 84 interchange from RC (Rural Commercial) to HC-1 (Highway Commercial) and amended the Town's Zoning Code to reflect the revised zoning designation and other changes. Petitioners also challenge the Town Board's SEQRA determination for the zoning change.

The challenged Town Board decision was made in connection with Respondent Crossroads 312 LLC's Petition, initially filed in June 2009 and amended in November 2013, to change the zoning designation for the parcels at the Route 312/184 interchange and make related changes to the Town Zoning Code. Respondent sought to construct a large-scale retail and hotel development at the site ("Crossroads project"). The Crossroads project "is located on the southern side of Route 312, east of Interstate 84 across from the Highlands West development and is substantially unimproved." Petition [Article 78], Exhibit 8, Crossroads 312 LLC's Amended Petition [for zoning change] dated September 12, 2013 at ¶ 30. The Terravest Office Park is located to the North of the project site. Petitioners' neighborhood is located to the East of the site, across Tonetta Lake.

Petitioners reside within or near the Tonetta Lake neighborhood. As a result, they are likely to be impacted by the Crossroads project. They allege that the project's large retail establishments will be visible across Tonetta Lake, thus spoiling their view of the ridge line across the Lake. They

¹ Resolution No. 10 of 2015.

also allege that they will experience further adverse visual impacts from the bright lights of the development illuminating the sky throughout the night. They claim that the Crossroads project will compound the adverse visual impacts they already experience from the existing Highlands development located across Interstate 84 immediately opposite the Crossroads project site.

Respondents' efforts to rezone the project site have been ongoing since October 1995 when they petitioned the Town to change the zoning designation of the site (and the Highlands site) from Office Professional ("OP") to HC. The Town Planning Board unanimously recommended approval of the requested change.² By resolution dated July 18, 1996, the Town Board conditionally re-zoned the parcels to HC-1. The Town Board noted in its Resolution that "a portion of every major intersection, except for the I-84/Route 312 intersection (which is the subject of the proposed action) is zoned HC-1." Table of Exhibits, Exhibit 3, Town Board Resolution, July 18, 1996 at ¶ 4. The Town Board also stated that "[t]he Town of Southeast lack[ed] any appropriately zoned area for large scale, future retail growth. No appropriately zoned large parcels exist for shopping centers on strategically located interstate highway intersections in the Town. There is a need for additional land to be zoned HC-1 to allow for retail growth into the next century." *Id.* at ¶ 10. No proposed construction accompanied the application. The Resolution required individual site plans to be filed within a certain time frame and review by the Town Planning Board and applicable agencies in order to effectuate the change to HC-1. Respondents contend that these contingencies were met for the site to obtain HC-1 zoning.

In the several years following construction of the Highlands development, the Town engaged in revising its 1992 Comprehensive Plan, finally culminating in the Comprehensive Plan and negative declaration adopted on June 20, 2002. The Town incorporated ridge line protection provisions into the Town Code which require that structures not be visible "to the maximum extent practicable" above the ridge line or above the top of vegetation located within the ridge line area. Town Code § 138-12(I). The Town created a new RC zoning district to replace the OP zoning districts.³ The purpose of the change was to allow for commercial development that would be

² Planning Board Resolution dated January 22, 1996.

³ Respondents contend that the re-zoning of the parcels From OP to RC "was based upon a mistaken premise that the [project site] was then zoned OP-1. In reality, the [project site] was zoned HC-1 ...". Amended Petition at ¶ 27. Respondents contend that the requirements had been met for the site to obtain HC-1 zoning because site applications were timely filed after legal challenges were made which

consistent with the rural character of the Town but effectuate less of an impact on the environment and the traffic network, while still allowing "high-value uses related to the Town's rural character." 2014 Comprehensive Plan Update at 5-21.⁴ The RC designation permits the following uses: "office, restaurant, recreation, kennel" and the following special permit uses: "bed-and-breakfast, cemetery, country inn,¹ conference center, equestrian center, farm use, hotel, institutional, nursery, public utilities, research labs, kennels and animal hospitals." Petition, Exhibit 25, Town of Southeast Commercial Zoning Schedule.

In August 2014, the Town adopted an update to its 2002 Comprehensive Plan. The Update explained that it was undertaken by the Town "in response to a number of factors affecting its quality-of-life, character, and the changing local economy." 2014 Comprehensive Plan Update at 1-1. The Town expressed its vision for its future growth and development as "seek[ing] to balance a healthy economic environment with quality residential and commercial character while protecting the integrity of its natural resources and infrastructure." *Id.* at 1-3. Throughout its recitation of the Town's goals and policies, a desire to maintain its "picturesque rural character" and diversify and grow its economic base was expressed in nearly equal measure. *Id.* at 1-3 to 1-4. The Town's effort to strike a balance between these competing goals was expressed in its stated policy that "[f]uture non-residential uses should be targeted to those areas where they will have minimal impact on water quality, traffic, and community character." *Id.* at 1-4. The Update identified certain "major nodes of commercial development in the Town." *Id.* at 7-1. The Crossroads project falls within one of them.

Against that backdrop, Respondent Crossroad 312's June 26, 2009 Petition requesting the subject zoning change⁵ meandered through the review process on a separate track from the Comprehensive Plan Update. Following completion of a Draft Environmental Impact Statement

extended the filing period. The legal challenges culminated in the Appellate Division, Second Department's affirmance of the dismissal of the challenger's claims. *Id.* at ¶¶ 17-26.

⁴ The Update's pagination begins with numbered page 1-1 and continues; the first number represents the section and the second number represents the page within that section.

⁵ Initially, Respondent sought the designation Focused Highway Commercial (HC-1A), which "would have allowed a total of 514,000 [square feet] comprising a seven story 200 room hotel and multi story mixed use retail/restaurant complex covering about 41 acres of the property with 57,000 sq. ft. of retail use." Petition at ¶ 37.

("/DEIS") pursuant to SEQRA, Respondent amended its Petition for the Crossroads project to request a change to HC-1, which essentially lessened the environmental impact of its proposed development. Table of Exhibits, Exhibit 8, Amended Petition. HC-1 provides for the following uses: "Office; Personal services; Professional services; Restaurant; Recreation" and the following Special permit uses: "Car wash; Large retail establishments; Public utilities; Adult uses, nightclubs, pawnshops; pool or billiard halls, and tattoo parlors; Retail use; and Kennels and animal hospitals." Petition, Exhibit 25, Town of Southeast Commercial Zoning Schedule.

Respondent also requested amendments to the Zoning Code in order to streamline the application process for large retail establishments, which require a Special Use Permit. Respondent requested the Town Board to designate itself as the approval authority for large retail establishments, since it was already the approval authority for Special Use Permits. Respondent also requested that "hotel/motel/conference facility" be added as a permitted use within the HC-1 zoning district. *Id.* at ¶¶ 4-6. Respondent described its proposed project as a "mixed commercial development consisting of a large retail establishment, bank and restaurant". *Id.* at ¶ 9.

The Town Board's "review of the Crossroads 312 project spanned six years and resulted in a vast Record containing thousands of pages of environmental impact statements, studies and reports. Hundreds of hours were committed to a review of this project, the rezoning and its effects. The Town Board heard from the project developer, its consultants, the public at large and Town-engaged professionals ... [who] analyzed the record and rendered engineering and planning assistance to the Town Board." Affidavit of [Town Board Member] Elizabeth D. Hudak in Opposition at ¶ 9. Board Member Hudak further attests that "[t]he Town ... Planning Board also considered the rezoning and recommended its enactment." *Id.*

"With this extensive Record in hand, the Town Board weighed the interests involved in the rezoning, evaluated the desirability of expanding the types of commercial uses that could be placed in an area specified in the Comprehensive Plan Update as 'an important node of economic activity' and serviced by an interstate and state highway, complemented this analysis by a consideration of local planning objectives, examined whether the rezoning was consistent with Town-wide planning goals including those recited in the Comprehensive Plan and Update and examined the impacts associated with the Crossroads 312 project and the measures by which they would be mitigated." *Id.* at ¶ 10. Further, the Town Board "adopted an Environmental Findings Statement ("EFS") at the

conclusion of its SEQRA review, which sets forth its conclusions concerning the rezoning and Crossroads 312 project.” *Id.* at ¶ 11. Both the SEQRA and the legislative record, she declared, support the Town Board’s decision to rezone the site and confirms that it “assiduously followed proper procedure” in doing so. *Id.*

Petitioners contend that the Town Board’s decision does not comply with the 2002 Comprehensive Plan, which designated the subject parcels as RC, or the 2014 Comprehensive Plan Update, which maintained the RC designation of those parcels. Petitioners claim that the Town Board’s decision to re-zone the parcels to HC-1 to allow for large scale retail development is contrary to the municipal planning conducted by the Town over the past 20 years. Petitioners also seek to annul or vacate the Town Board’s adoption of the EFS,⁶ which recommended approval of the Crossroads project.

DISCUSSION

Petitioners allege that the Town Board’s action violated Town Law § 272-a, which requires that “[a]ll town land use regulations must be in accordance with a comprehensive plan adopted pursuant to this section.” Petitioners claim that the re-zoning decision was not in accordance with the Town’s Comprehensive Plan and Comprehensive Plan Update, because it “[i]ncreas[ed] the intensity of use, i.e., large-scale retail, along the Rt. 312 corridor where density was to be reduced under the RC zoning district to preserve community character; ... [a]llow[ed] repetition of the Highlands-style ridgeline development for the last remaining undeveloped ridgeline as viewed from the Tonetta Lake neighborhood in violation of the CP’s recommendation to preserve ridgelines to maintain rural character; ... [a]pprov[ed] ‘auto-centric’ large-scale regional destination retail on lands where they were to be prohibited, and upon land that was limited by the CP and RC zoning to mixed use development with accessory retail only; ... [a]llowed grading, and imposition of impervious cover over the steep slopes and ridgelines [which] were to be preserved pursuant to the duly adopted CP ... [and] ... add[ed] hotel use to the HC-1 zone and allow[ed] an increase in building height from 3 to 4 stories, or 35 to 50 feet, contrary to the existing RC zone.” Amended Verified Petition at ¶ 111.

⁶ Resolution No. 63 of December 18, 2014 .

Petitioners also allege that the Town Board's re-zoning decision violated § 138-46 of the Town of Southeast Code ("Town Code"), which provides for site plans to conform to the purpose and intent of the Comprehensive Plan and any updates or amendments adopted by the Town Planning Board. Petitioners allege further that the Town Board's decision violated § 138(12)(I) of the Town Code, which requires protection of the ridge line to the maximum extent possible. Petitioners assert that the Crossroads 312 project will devalue homes in the Tonetta Lake neighborhood by marring the view of the presently undeveloped ridge line.

Petitioners' remaining claims for relief allege that the Town Board illegally "spot zoned" the Crossroads site to benefit a single corporate entity and that the re-zoning failed to comply with SEQRA. Petitioners request preliminary and permanent injunctive relief to prevent the issuance of building permits and land use approvals to develop the Crossroads site.

Respondents contend that the Town Board's decision was made after a thorough review of the environmental impacts from rezoning the site. They assert that the Town Board's review included an evaluation of the Crossroads project and rezoning request for consistency with the Town's Comprehensive Plan and Comprehensive Plan Update (the "Update"). They contend that the Comprehensive Plan and Update together form a guidance document which is not intended to constrict the Town Board's legislative discretion so that it cannot determine what zoning changes best serve the interests of the community and promote a coherent planning strategy for the Town.

Respondents assert that the Town Board's decision is consistent with the Comprehensive Plan and the Update, which designated the area of the Crossroads project as an area of economic development. Respondents contend that the zoning decision incorporates the expressed policy of retaining the community's rural character by requiring the Crossroads project to comply with certain architectural and landscaping standards and ridge line preservation standards. Respondents argue that the Town Board's legislative action is imbued with a strong presumption of validity and Petitioners bear a heavy burden to show that it was not justified by any reasonable interpretation of the facts.

Town Law § 272-a and Town of Southeast Code § 138-46

Petitioners look to *Lighthouse Pointe Property Associates LLC v New York State Dept. of Environmental Conservation*, 14 NY3d 161, 164 [2010], to provide the standard for review of the Town Board's legislative action. Petitioners argue that "the judicial inquiry requires no deference

to the Town's interpretation 'where the question is one of pure statutory reading and analysis' ..." Petitioners' Memorandum of Law at 34.

Petitioners' reliance on *Lighthouse Pointe Property* appears misplaced. *Lighthouse Pointe Property* involved a challenge to the New York State Department of Environmental Conservation's denial of the plaintiff's request for their property to be included in the agency's Brownfield Cleanup Program. At issue in that case was whether the plaintiff's property came within the statutory definition of a brownfield site. This case involves a very different sort of determination, one which is not aided by the standard of review applicable to an agency's interpretation of the statute it is charged with administering.

This Court is not called upon to parse the words of a statute to divine the proper meaning of a term. The task at hand is to determine whether the Town Board's legislative action to change the zoning designation of the affected parcels "conform[s] to a 'well-considered plan' or 'comprehensive plan'." *Udell v Haas*, 21 NY2d 463, 469 [1968] (citing Standard State Zoning Enabling Act, U.S. Dept. Of Commerce (1926)). The zoning authority must "show that the changes [do] not conflict with the community's basic scheme for land use." *Id.* at 470. In rendering its determination, courts are not restricted to any particular document. *Id.* at 471. Instead, they are charged with "garner[ing] the community's land use policies] from any available source, most especially the master plan of the community, if any has been adopted, the zoning law itself and the zoning map." *Id.* at 472.

In direct contradiction to Petitioners' assertion that no judicial deference need be shown to the Town Board's zoning decision, the Court of Appeals has stated that the "decision as to how a community shall be zoned or rezoned, as to how various properties shall be classified or reclassified, rests with the local legislative body; *its judgment and determination will be conclusive, beyond interference from the courts, unless shown to be arbitrary*, and the burden of establishing such arbitrariness is imposed upon him who asserts it." *Rodgers v Village of Tarrytown*, 302 NY 115, 121 [1951] (emphasis added).

Where a Town Board's decision to change the zoning of an area is challenged under Town Law § 272-a as being inconsistent with the Town's formal comprehensive plan, "[c]ompliance with the statutory requirement is measured ... in light of the long-standing principle that one who challenges such a legislative act bears a heavy burden." *Bergstol v Town of Monroe*, 15 AD3d 324, 325 [2nd Dept 2005] (citing *Matter of Town of Bedford v Village of Mount Kisco*, 33 NY2d 178, 186

[1973]). Petitioners must “establish a clear conflict with the comprehensive plan”. *Id.* (citing *Taylor v Incorporated Vil. Of Head of Harbor*, 104 AD2d 642, 644-645 [2nd Dept 1984]; *Blumberg v City of Yonkers*, 41 AD2d 300, 306-308 [2nd Dept 1973] *app dsmd* 32 NY2d 896 [1973]). Petitioners must show that the zoning change “is not justified under the police power of the state by any reasonable interpretation of the facts.” *Asian Americans for Equality v Koch*, 128 AD2d 99, 101 [1987] (quoting *Shepard v Village of Skaneateles*, 300 NY 115, 118 [1949]). If the Court determines that “the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control”. *Id.* (quoting *Shepard, supra* at 118 (internal quotation marks omitted)).

These principles are well illustrated in *Matter of Town of Bedford v Village of Mount Kisco, supra*. In that case, the Court of Appeals reversed the Appellate Division’s affirmance of the trial court’s decision which held Mount Kisco’s rezoning to be arbitrary and capricious and not in accordance with its comprehensive plan. The Court of Appeals framed the issue as whether the Village Board was authorized, in the face of “drastic intervening changes” in the Village in the 10 years since its comprehensive plan had been adopted, “to follow a new comprehensive planning strategy” without formal amendment of its comprehensive plan. 33 NY2d at 188. In upholding the Village Board of Trustees’ decision to rezone, the Court of Appeals stated that “zoning changes must indeed be consonant with a total planning strategy”, but need not adhere “slavish[ly] to any particular comprehensive plan. Indeed sound planning inherently calls for recognition of the dynamics of change.” *Id.* The changes that had occurred in the village, which the Court of Appeals described as “drastic”, were central to the court’s reasoning that the Village Board need not be bound by its outdated comprehensive plan. In summing up its assessment of the trial court’s decision, the Court of Appeals stated that “[t]he infirmity in the trial court’s disposition was its insistence that the 1968 resolution be tested exclusively against the 1958 plan, with no recognition that the proper standard was Current [sic] comprehensive planning.” *Id.* Continuing on, the high Court stated that there was no precedent requiring that “formal amendment of a comprehensive plan must precede its adaptation to current conditions and planning considerations.” *Id.*

Matter of Town of Bedford reaffirmed the Court of Appeals’ earlier holding in *Udell* that a town’s comprehensive plan is but one of the sources courts must look to in determining whether a Town’s zoning legislation conforms to its planning strategy. Echoing the high Court’s statement in

Matter of Town of Bedford v Village of Mount Kisco, supra, a municipality need not slavishly adhere to its comprehensive plan. Having said that, the Town Board updated its Comprehensive Plan in 2014, within a year or so of the challenged zoning decision. No significant changes occurred in the interim. The Update did not recommend a change to the RC zoning designation for the project site or even signal the changes that ensued. From that vantage point, the HC-1 designation for the project site seems inconsistent with the RC designation maintained in the Update.

However, as *Bergstol v Town of Monroe, supra*, demonstrates, it is not always clear what constitutes a conflict between a zoning ordinance and the municipality's comprehensive plan. In *Bergstol v Town of Monroe*, the Town of Monroe had adopted a comprehensive plan which designated the criteria for multiple-residence use. The plaintiff's property in that case fit the criteria. Four years after adopting its comprehensive plan, the town board enacted a local law which excluded multiple-residence use from the zoning district where plaintiff's property was located. The plaintiff sued, contending that the restriction was inconsistent with the town's comprehensive plan. The Appellate Division upheld the local law, stating that "[a]lthough the Town's comprehensive plan provides that multiple residences may be permitted in certain locations within the Town, including the location of the plaintiff's property, it does not provide that such uses should be permitted in all such locations." 15 AD3d at 326.

"One of the key factors used by our courts in determining whether the statutory requirement [of consistency with the comprehensive plan] has been met is whether forethought has been given to the community's land use problems." *Udell, supra* at 470. As stated above, in this case, the Town Board undertook a thorough and lengthy review of Respondent's zoning application, spanning a six year period and culminating in "a vast Record containing thousands of pages of environmental impact statements, studies and reports." Hudak Affidavit at ¶ 9. The review process included hearings with "the project developer, its consultants, the public at large and Town-engaged professionals ... [who] analyzed the record and rendered engineering and planning assistance to the Town Board." *Id.* The Town "Planning Board also considered the rezoning and recommended its enactment." *Id.* Above all, the Town Board gave considerable forethought to its planning strategy.

Ashley Ley,⁷ Technical Director at AKRF, Inc., planning consultant for the Town, attests that the Comprehensive Plan Committee established to guide preparation of the Update, “purposefully took no position on the [Crossroads project] rezoning as review of this project was already underway by the Town Board when the Committee was formed.” Affidavit of Ashley Ley in Opposition at ¶ 14. The Update and the Town Board’s review of Respondent Crossroad 312’s application proceeded along separate, parallel tracks. “The intent was that the zoning of the Crossroads 312 Site would remain status quo with an RC designation, unless the Town Board decided to rezone it upon the completion of its then ongoing review of the Crossroads 312 development proposal (including finalization of an Environmental Impact Statement pursuant to SEQRA examining the potential impacts of the development and rezoning). The Committee made no recommendation on this subject – either in favor or against.” *Id.* at ¶ 18. “The Comprehensive Plan Update specifically did not include recommendations for the Crossroads 312 Site because that review was being undertaken by the Town Board separately in a process that was already underway [since 2009] when the Comprehensive Plan Update began [in February/March 2013].” *Id.* at ¶ 21.

Thomas LaPerch, Chairman of the Town Planning Board and the Comprehensive Committee, attests that the Comprehensive Plan Committee “specifically left alone any discussion of a recommendation regarding the proposed project ... in a deliberate attempt to have the Town Board, which must adopt all zoning legislation and the Comprehensive Plan, make its determinations as to the future use and development of th[e] very important intersection” where the Crossroads project will be located. LaPerch Affidavit at ¶ 3. Chairman LaPerch explains that “[t]he RC Zoning, adopted a decade earlier, occurred at a time when this property (which abuts New York State Route 312 and is owned by the Respondent Warm Family) had no access to water and sewer infrastructure to service this property.” *Id.* at ¶ 4. He continues, explaining that “[t]en years ago, because there was no sewer service or likelihood of sewer service to what is today the proposed project, rural commercial zoning instead of highway commercial zoning was a more plausible zoning designation for this site.” *Id.* He states that the needed infrastructure is now available to the site, thereby allowing the Town Board the option to consider whether the site could be rezoned to HC-1. *Id.*

⁷ Ms. Ley attests that she was “the principal drafter of the Comprehensive Plan Update adopted by the Town Board on August 21, 2014 and as the Planning Consultant to the Town Board, Planning Board and the Comprehensive Plan Committee”. Ley Affidavit at ¶ 9.

The Town Board's decision was rational and reasonable. It represents sensible planning for the overall community. The prior RC zoning designation represented the balance that was struck at a time when the infrastructure to allow for greater development of the site did not exist and undoubtedly there was concern about straining existing resources. The earlier water quality concerns are addressed by now available infrastructure improvements that provide access to central water and sewer service. Even before the 2002 Comprehensive Plan, the site was given conditional HC-1 zoning. The current change to HC-1 zoning revisits that earlier designation. The decision to reinstate that designation,⁸ although not expressed as such, is consistent with the Comprehensive Plan and the Update insofar as the zoning for the project is in character with the immediate area, which includes a HC-1 zone directly opposite the project site. Both of these areas have been identified in the Update as one of the "major nodes of commercial development in the Town." 2014 Comprehensive Plan Update at 7-1.

The Town Board's decision reflects the goals and policies expressed in the Comprehensive Plan and the Update, which seek to balance economic growth with preservation of the Town's rural character. The Town Board specifically addressed the kinds of visual impacts that are the focus of Petitioners' challenge. In keeping with the goal of preserving the landscape and rural character, albeit in a commercial hub, the project must meet the Town's ridge line protection standards and comply with International Dark-Sky Associations criteria. "[F]ull-cut off LED fixtures" must be used and "plantings are required along the southern edge of the proposed parking area" to mitigate visual impacts. Petition, Exhibit 2, Environmental Findings Statement at 5-6. The thorough process undertaken by the Town Board in rendering its decision is certainly not reflective of the type of "special interest, irrational ad hocery" that the Court of Appeals warned against in *Matter of Town of Bedford, supra* at 188, or "spot zoning".

Notably, the Comprehensive Plan Committee deferred to the Town Board as to the future rezoning of the project site and deliberately declined to make any recommendation as to the site. LaPerch Affidavit at ¶ 3. As a result, the RC designation for the subject parcels was maintained as a matter of deference rather than considered action. The Town Board's considered action came

⁸ Petitioners acknowledge the earlier conditional HC-1 designation for the site, although it was not incorporated into either the 2002 Comprehensive Plan or the Update.

through its review of Crossroads 312's zoning application and its decision, after careful and thorough evaluation, to rezone the parcels and amend its Zoning Code. The Town Board carefully considered the goals and policies expressed in its Comprehensive Plan and Update and imposed measures which are designed to balance economic development and retain the rural character of the Town. The location of the Crossroads project has assisted the Town in striking an appropriate balance between those two opposing objectives. A great deal of forethought and planning is evident throughout the Town Board's review and the zone change and amendments to the Zoning Code are in keeping with zoning for the area and is not radically different from the prior RC designation. *Cf. Udell, supra* at 475.

The Court finds the Town Board decision justified by a reasonable interpretation of the facts and must be upheld.⁹

SEQRA Review

Petitioners charge that the Town Board did not comply with SEQRA's mandate "to carefully review the potential adverse environmental impacts of its actions before taking them." Petitioners' Memorandum of Law at 46. Petitioners urge the Court to apply the "hard look" test espoused in *H.O.M.E.S. v New York State Development Corp.*, 69 AD2d 222 [4th Dept 1979]. They assert that the Court is required to "determine [whether] an agency has met the requirements of SEQRA [by showing] that [it] identified relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination." *Matter of Save the Pine Bush v Planning Bd. of City of Albany*, 96 AD2d 986, 987 [3rd Dept 1983] (citing *H.O.M.E.S.*, *supra* at 232). Petitioners critique of the Town Board's SEQRA review focuses only on "cumulative impacts" in the DEIS, ignoring any specific environmental impacts and declining to consider the Town Board's final determination expressed in the EFS. Petitioners' Memorandum of Law at 48 (quoting comments by Riverkeeper as to the DEIS).

Respondents acknowledge the applicability of the "hard look" standard, as stated in *Environmental Defense Fund v Flacke*, 96 AD2d 862 [2nd Dept 1983] ("[t]he test of SEQRA

⁹ Petitioners' principal concern seems to be one of enforcement. They point to the Highlands development as an example of the Town's failure to enforce the promises made by the developer and lament that the same result may occur at the Crossroads site.

compliance is whether the approving agency has taken a 'hard look' at the relevant areas of environmental concern"). They contend that the Town Board met that standard through its rigorous scrutiny of the Crossroads project and set forth a "reasoned elaboration" in the EFS. Respondents cite a number of Court of Appeals decisions which hold that courts reviewing an agency's environmental assessment of a project must apply a "rule of reason". *Neville v Koch*, 79 NY2d 416, 425 [1992]. Elaborating on that, the Court of Appeals explained that "not every conceivable environmental impact, mitigating measure or alternative, need be addressed in order to meet the agency's responsibility. The degree of detail--the reasonableness of an agency's action--will depend largely on the circumstances surrounding the proposed action." *Id.*

As it is, Petitioners limit their SEQRA challenge to the Town Board's assessment of the cumulative impacts of the project. Petitioners, adopting the Riverkeeper's critique of the DEIS, complain that it "briefly mention[ed] and dismiss[ed] the Putnam Seabury site[, v]acant lots in Terravest Corporate park and, unnamed potential building upgrades [but] d[id] not attempt to identify other planned and/or approved projects in the area and evaluate likely cumulative impacts". Petitioners' Memorandum of Law at 48 (quoting The Riverkeeper's comments); *see also* Philip E. Doyle Affidavit in Opposition, Exhibit K at Growth - 2. Such an evaluation is critical, they assert, because "any development projects in the area are likely to increase impervious surfaces and thereby the risk of transporting pollutants into surface and drinking water resources via increased stormwater runoff ...". *Id.*

Respondents contend that the DEIS, the Final Environmental Impact Statement ("FEIS") and the EFS all contain a section that addresses cumulative impacts. The response contained in the FEIS to the Riverkeeper's comment stated, in relevant part, that "[e]very project within the NYC Watershed is evaluated by NYCDEP [NYC Department of Environmental Protection] and NYSDEC [NYS Department of Environmental Conservation] on its own merits for compliance with the applicable stormwater quality regulations." *Id.* Respondents further explain that "the absence of central water and sewer services [to other sites] necessarily create development limits within the Town of Southeast and these impediments significantly dampen the prospect of cumulative impacts." Petitioners' Memorandum of Law at 20 (citing Doyle Affidavit at ¶ 60). Respondents describe other cumulative impacts addressed in the environmental review, such as traffic impacts and the mitigation measures the Town has requested to improve traffic conditions.

Petitioners' reply papers reiterate their contention that the Town Board failed to consider cumulative impacts but shift away from water quality issues to a more general grievance about other owners of property designated RC who might seek similar rezoning of their property.

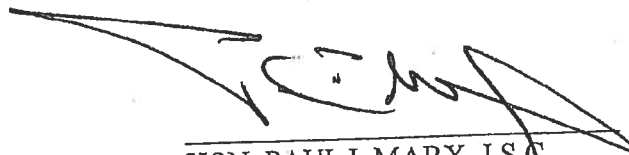
This Court cannot find, based on the record before it, that the Town Board failed to conduct the kind of inquiry required by SEQRA. As the Court of Appeals stated in *Neville v Koch, supra* at 425, "not every conceivable environmental impact, mitigating measure or alternative, need be addressed in order to meet the agency's responsibility." *Id.* The Court is satisfied that the Town Board's legislative process gave careful and rigorous consideration of the zoning change and its ramifications and the "hard look" that SEQRA requires.

Accordingly, the Petition and Amended Petition are dismissed. Petitioners' request for preliminary injunctive relief is denied as moot.

The foregoing constitutes the Order and Judgment of the Court.

Dated: Carmel, New York
September 28, 2016

ENTER,



HON. PAUL I. MARX, J.S.C.

To:

James Bacon, Esq.
Attorney for Petitioners
12 North Chestnut Street
PO Box 575
New Paltz, NY 12561

Willis H. Stephens, Jr., Esq.
The Stephens Law Firm
Attorneys for Respondent Town Board
15 Mt Ebo Road So., Suite 271
Brewster, NY 10509

Richard L. O'Rourke
Keane & Beane, P.C.
*Attorneys for Respondents Crossroads 312, LLC,
JPH Development Corp., Highlands East, LLC,
Erna Marie Koepke and Geraldine Warm*
445 Hamilton Avenue, 15th Floor
White Plains, NY 10601