KEANE & BEANE P.C.
ATTORNEYS AT LAW

Main Office
445 Hamilton Avenue
White Plains, NY 10601
Phone 914.946.4777
Fax 914.946.6868

Mid-Hudson Office
200 Westage Business Center
Fishkill, NY 12524
Phone 845.896.0120

ERIC L. GORDON
Principal Member
egordon@kblaw.com
Also Admitted in CA

August 14, 2018

VIA HAND DELIVERY

Chairman Barry Weprin and
Members of the Zoning Board of Appeals
Village of Mamaroneck
169 Mt Pleasant Avenue
Mamaroneck, New York 10543

Re: Application of East Coast North Properties, LLC
416 Waverly Avenue, Mamaroneck, NY

Dear Chairman Weprin and Members of the Zoning Board of Appeals:

A. Introduction

Keane & Beane, P.C., represents East Coast North Properties, LLC (the "Applicant" or "East Coast"), which owns the property located at 416 Waverly Avenue, Mamaroneck New York (the "Property")[1] on which Murphy Brothers Contracting, Inc. ("MBC") and Mamaroneck Self Storage ("MSS") currently operate businesses. This letter is submitted to supplement the application for variances filed with the Zoning Board of Appeals ("ZBA") on June 20, 2018.

First, attached is a revised Long Environmental Assessment Form with some minor corrections that were discussed during the meeting held on July 12, 2018. This letter also addresses certain additional concerns raised during the July 12, 2018 meeting with respect to the State Environmental Quality Review Act ("SEQRA") analysis.

The ZBA, having now assumed Lead Agency status under SEQRA, must first determine whether the proposed expansion of the existing MSS facility is considered a Type II, Unlisted or Type I action. The Applicant has asserted that the matter should be designated as an Unlisted action because the entire proposed self-storage facility, including the existing building and proposed expansion, is under the 100,000 square foot limit for Type I actions for commercial facilities as set forth in 6 NYCRR § 617.4(b)(6). Counsel for the ZBA has determined, however, that because the current proposal seeks to expand the existing commercial use by more than 50,000 square feet, that pursuant to §617.4(b)(6), the project should be considered a Type I

[1] The address listed for the Property on the GIS Tax Mapper is 560 Fenimore Drive, Mamaroneck, New York. However, the address used for prior applications was 416 Waverly Avenue, which is also the mailing address and the Applicant's business address.

action under SEQRA.[2] Regardless of whether the project is determined to be a Type I or Unlisted action under SEQRA, the Applicant contends that the facts and circumstance in this case support the issuance of a Negative Declaration under SEQRA and that a Full Environmental Impact Statement ("EIS") should not be required.

Merely because the project is designated as a Type I action does not require the Planning Board to issue a Positive Declaration under SEQRA. While there is a presumption that there should be a Positive Declaration and that an EIS should be prepared when a project falls within the Type I action parameters, this presumption is rebutted where no significant adverse environmental impacts are present. Furthermore, where there is a significant level of study, public participation and review by a municipal board and the public, courts have held that a Positive Declaration is not required for a Type I project. For example, in *Chinese Staff v. Burden*, 19 N.Y.3d 922, 924, 950 N.Y.S.2d 503 (2012), the Court of Appeals upheld the New York City Department of Planning's Negative Declaration with respect to a Type I action holding that:

> [i]n making its initial determination, the agency will study many of the same concerns that must be assessed in an EIS, including both long- and short-term environmental effects. Where an agency determines that an EIS is not required, it will issue a "negative declaration" Although the threshold triggering an EIS is relatively low, a negative declaration is properly issued when the agency has made a thorough investigation of the problems involved and reasonably exercised its discretion. (Citations, internal quotation marks and brackets omitted).

The Appellate Division, Fourth Department recently concluded that a Negative Declaration was properly issued by the Town of Tyre Town Board for a massive casino project in upstate New York even though that was a Type I action. *See Casino Free Tyre v. Town Bd. of Town of Tyre*, 51 Misc. 3d 665, 668–69, 27 N.Y.S.3d 350, 354

[2] While the Applicant does not necessarily agree with this interpretation and reserves its rights to object, for the purposes of this application, it is assumed that the proposed action is a Type I action.

(Sup. Ct. Seneca Co.), *aff'd sub nom., Casino Free Tyre v. Town Bd. of Town of Tyre*, 140 A.D.3d 1711, 31 N.Y.S.3d 906 (4th Dep't 2016).

Even more recently, in a similar situation, the Honorable Paul Marx, J.S.C., upheld the determination of the Town of New Castle Zoning Board of Appeals that the proposed expansion of a nursing home facility within a residential zone by over 100,000 square feet would not have any substantial adverse environmental impacts and merited a Negative Declaration under SEQRA even though the expansion was designated a Type I action. In his Decision and Judgement dated May 16, 2018, Judge Marx held that:

> The lead agency has "considerable latitude in evaluating environmental effects," *see Eadie,* 7 NY3d at 319, and has reasonable discretion to decide whether an EIS is required. *See Spitzer* v. *Farrell,* 100 NY2d 186, 190 [2003]. This is true even for a Type I action, which does not require the preparation of an EIS where the lead agency "ha[s] made a thorough investigation of the problems involved and reasonably exercised [its] discretion .. ; ." *Dunk* v. *City of Watertown,* 11 AD3d 1024 [4th Dept. 2004].

Manocherian v. Zoning Board of Appeals of the Town of New Castle, Index Number 66342-2016 (West. Cty. Sup. Ct. May 16, 2018), pp. 20-22.[3] The same situation exists in the present case.

This application involves the expansion of an existing self-storage facility. As a result, the ZBA can determine what, if any, impacts the proposed addition will have by looking at the impacts from the existing facility. East Coast submits that an examination of the minimal impacts resulting from the existing 40,000 square foot self-storage facility confirms that the proposed expansion will similarly not have any significant adverse environmental impacts.

To the extent that the ZBA is concerned about the scope and magnitude of the proposed expansion and size of the variances at issue, this by itself does not make an EIS is mandatory. While the expanded self-storage building will certainly be larger than the existing building, given the minimal impacts that currently exist and the

[3] A copy of the Justice Marx's Decision and Judgment is attached as Exhibit "A".

removal of other more impactful uses from the Property, it would be appropriate for the ZBA to conclude that the expansion will not have a detrimental impact on the environment or the community. Furthermore, there is no hard line rule requiring an EIS for a certain sized project. *Casino Free Tyre*, 51 Misc. 3d at 668–69, 27 N.Y.S.3d at 354.

East Coast is prepared to respond to and address any concerns the ZBA has about potential impacts. However, as discussed in the Applicant's original submission to the ZBA dated June 20, 2018, East Coast has presented substantial evidence that each of the concerns raised in the ZBA's prior Positive Declaration from 2010 have been rebutted, and that the project will not result in any substantial adverse environmental impacts and therefore does not merit a Positive Declaration or require the preparation of an EIS.

Similarly, the mere size of the building does not mean it will result in a substantial adverse environmental impact. In fact, there are other buildings within the Village of Mamaroneck that are of a similar size that are also located on small lots. Submitted herewith are PowerPoint slides showing several other buildings in the Village of Mamaroneck which demonstrate that the expanded building being proposed is not significantly different from or out of character with other existing buildings in the Village.

As a result, East Coast submits that after taking the required hard look at the proposed application, the ZBA should issue Negative Declaration under SEQRA. We look forward to discussing this issue and the enclosed application with the ZBA at its meeting on September 6, 2018.
Thank you for your consideration.

Respectfully submitted,

Eric L. Gordon

ELG/sb
Encls.

cc: Anna L. Georgiou, Esq. (via email)
Lester Steinman, Esq. (via email)
Kim Martelli, Principal KTM Architect, NCARB (via email)
Michael F. Stein, P.E., Hudson Engineering & Consulting, P.C. (via email)
LLC (vial email)
Chris Murphy (via email)
Sean Murphy (via email)
Michael Murphy (via email)

EXHIBIT A

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

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In the Matter of the Application of

CYNTHIA MANOCHERIAN and JEFFREY MANOCHERIAN,

Petitioners-Plaintiffs,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

ZONING BOARD OF APPEALS OF THE TOWN OF NEW CASTLE, et al.,

Respondents-Defendants.

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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.

Index No: 66342/2016

ORDER AND JUDGMENT

Return Date: September 13, 2017

In the Matter of the Application of

LAURA HOUSTON WHITLINGER and DAVID WHITLINGER, LINDA LOWELL, CHARLES L. BRIEANT III, KATIE WASSERMAN and OREN NEIMAN, MARY SAN MARCO, ANNE ATWATER and CHRISTINE SCHUSTER,

Petitioners-Plaintiffs,

For a Judgment Pursuant to Articles 30 and 78 of the Civil Practice Law and Rules,

-against-

ZONING BOARD OF APPEALS OF THE TOWN OF NEW CASTLE, et al.,

Respondents-Defendants.

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Index No: 68775/2016

ORDER AND JUDGMENT

Return Date: September 13, 2017

The following papers numbered 1 through 39 were read on: (1) Petitioners Cynthia Manocherian and Jeffrey Manocherian's (the "Manocherians") Article 78 Petition seeking an order and judgment annulling and vacating (a) variances (the "Variances") and a special permit amendment (the "Special Use Permit") granted to the Sunshine Children's Home and Rehab Center ("Sunshine") by the Zoning Board of Appeals of the Town of North Castle ("ZBA"); and (b) the negative declaration, issued by the ZBA, under the State Environmental Quality Review Act ("SEQRA"); and (2) Petitioners Laura Houston Whitlinger and David Whitlinger, Linda Lowell, Charles L. Brieant III, Katie Wasserman and Oren Neiman, Mary San Marco, Anne Atwater and Christine Schuster's (the "Whitlingers") Article 78 Petition seeking an order and judgment annulling and vacating (a) the Variances and the Special Use Permit granted to Sunshine by the ZBA[1]; and (b) the negative declaration, issued by the ZBA, under SEQRA:

Article 78 Petition of the Manocherians:

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[1] On May 4, 2017, the Hon. Gretchen Walsh, J.S.C., issued an order consolidating both the Manocherians' and the Whitlingers' Article 78 petitions. The consolidated Article 78 petitioners will be referred to as the "Petitioners".

Further, both Article 78 petitions sought a declaratory judgment against the New York State Department of Health confirming the expiration of a related state Department of Health approval. On May 30, 2017, Justice Walsh so ordered the parties' stipulation of voluntary discontinuance against defendant New York State Department of Health ("NYSDOH").

Upon reading the foregoing papers, it is ORDERED that the Petitions are disposed as follows:

PRELIMINARY STATEMENT

On September 28, 2016, after almost eighteen months of analysis, the ZBA issued a Negative Declaration pursuant to SEQRA determining that the proposed expansion of Sunshine would not have any significant adverse impacts on the environment. At that time, the ZBA also granted an Amended Special Use Permit and variances to Sunshine that allows the proposed expansion to proceed, subject to certain conditions. Specifically, the Amended Special Use Permit allows for additional beds and recognizes Sunshine's current treatment of a variety of long term, non-acute medical conditions. The variances resolve: (1) a requirement that nursing homes have direct access to or frontage on a state or county road; and (2) the increase from 88 beds to 122 beds.

In these Article 78 proceedings, the Petitioners challenge the Variances and the Special Use Permit granted to Sunshine by the ZBA, as well as the negative declaration issued by the ZBA under SEQRA. Generally speaking, Petitioners set forth five arguments: (1) Sunshine's facility is not a grand-fathered nonconforming use, but even if it is assumed to be such, its expansion could be authorized only by a use variance; (2) Sunshine's use violated the zoning law's mandatory requirements for and limits on "nursing home" use and the ZBA has no authority to waive such limits and requirements by an area variance; (3) Sunshine has not satisfied the criteria for a grant of an area variance; (4) the ZBA was prohibited from issuing a special permit because of Sunshine's existing violations of the town zoning law; and (5) the ZBA failed to take a hard look at the potential environmental impacts of Sunshine's proposed expansion.

BACKGROUND

Sunshine is a pediatric nursing home located in an R-2A One-Family Residence District of the Town of New Castle (the "Town"), which allows a nursing home as a specially permitted use, subject to certain requirements. The location has been used for pediatric nursing care since the 1960s – under a special permit from the Town – which has been amended from time to time for expansion of the facility. Sunshine is the immediate successor to the St. Mary's Rehabilitation Center for Children (the "St. Mary's Home"), which from 1997 to 2009, under the same original special permit, operated a pediatric nursing home offering the same kinds and levels of care and treatment of children with complex medical conditions as currently provided at Sunshine.

When application was first made to the Zoning Board of Appeals ("ZBA") for special permit approval of the facility, the use was identified as "sanitarium" and "convalescent home for the care and treatment of asthmatic children." The facility has long been a pediatric nursing home – without objection by the Town. This is confirmed by an application submitted to the ZBA in June 1985, by its then owner, the Asthmatic Children's Foundation of New York, Inc., by which the owner expressly applied for an increase in "the number of skilled nursing beds," and described the facility as a pediatric skilled nursing facility. *See* R. at 2834, 2837-38.

Sunshine has been in operation since 2009 under the existing special permit. The Town has never issued a violation to Sunshine regarding any aspect of the existing pediatric nursing home use. Sunshine's initial proposal to NYSDOH was for a different project design, which was much smaller

in scale with many fewer beds, than ultimately approved by NYSDOH and the ZBA. Sunshine and its consultant first began meeting with NYSDOH to discuss facility improvements and additional beds in January 2011. At that time, Sunshine discussed adding only six specialty beds and up to twenty ventilator-dependent beds. The size of the building addition and number of beds were both subsequently increased over the course of the collaborative discussions with NYSDOH. Consequently, in September 2013, Sunshine applied to NYSDOH for a Certificate of Need ("CON") for the expansion of the facility and addition of sixty-eight patient beds, bringing the total to one hundred twenty-two beds. The CON was issued on or about August 11, 2014, after more than three years of discussion.[2]

In on or about December 2014, following receipt of the CON, Sunshine filed an application with the ZBA for an amended special permit to expand the facility to a total of 122 beds. In or about March 2015, Sunshine filed an application for two related area variances from the current requirements of the Zoning Ordinance for special permit nursing home use (collectively the "Applications").[3]

The Town Building Inspector, Respondent William J. Maskiell (the "Building Inspector"), reviewed Sunshine's application for an amended special permit and in the ordinary course of Town operations, issued his determination (the "April 2015 Determination") that in addition to "an Amended Special Use Permit" for a nursing home use, the only variance required for the expansion was for the proposed increase in the number of beds, and not any other variance, including a use variance. *See* R. at 2082.

On September 26, 2016, after a review under the State Environmental Quality Review Act ("SEQRA"), New York Town Law and the Zoning Ordinance, including review and consideration of extensive public hearing testimony, the ZBA, in its capacity as lead agency for review of the Applications under SEQRA, adopted: (i) a twenty-two page Negative Declaration of Environmental

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[2] The CON was not appealed.

[3] Sunshine requested two variances: (1) an area variance from Zoning Ordinance Section 60-430.0(5)(a), which requires new nursing homes in a residential district to have frontage on or direct access to a state or county road; and (2) an area variance increasing the maximum number of beds from 88 to 122. The total number of beds was subsequently reduced from 122 to 118.

Significance (the "Negative Declaration"); and (ii) a corresponding fourteen page resolution approving the Applications (the "Approval").

Thereafter, the Petitioners filed Article 78 Petitions seeking an order and judgment annulling and vacating (a) the Variances and the Special Use Permit granted to Sunshine by the ZBA; and (b) the negative declaration, issued by the ZBA, under SEQRA.

DISCUSSION

I. Sunshine's Use of the Property as a Nursing Home Is a Permitted Use

The Petitioners argue that the ZBA's approval of the Amended Special Use Permit and variances is flawed because Sunshine's current use of the Property is not a permitted use. Petitioners' contention is meritless.

First, when the Building Inspector reviewed Sunshine's applications for an Amended Special Use Permit and variances, he was required to address the threshold question of whether the Nursing Home was a permitted use on the Property or a prior legal non-conforming use that could not be expanded. The Building Inspector issued a determination allowing Sunshine's applications to proceed on the basis that the Nursing Home was a permitted use. *See* R. 2082; Maskiell Aff. at 11. Petitioners, who received a copy of the Building Inspector's determination, never filed an appeal. Pursuant to Town Code § 60-540(E)(1), "[a]n appeal shall be taken within 60 days of filing the order or decision appealed from." Thus, having failed to challenge the Building Inspector's determination, the Petitioners waived any objections with respect to this issue.

Second, the Building Inspector's determination that Sunshine's use was permitted as a "nursing home" was based on a review of the Building Department's files including other permits which had been issued in the past for the operation of a facility to provide care to children with certain long term chronic illnesses.[4]

[4] Among those permits are: (a) the February 5, 1964 Special Use Permit granted to Women's Service for Asthma, Inc. for the operation of a convalescent home for the care and treatment of 30 asthmatic children, *see* R. 2592-2593; (b) the March 26, 1969 a permit granted to the Asthmatic Children's Foundation of New York, Inc. to allow construction of a new building, alterations for the existing building, and to increase the number of beds from 30 to 36, *see* R. 2597-2598; (c) the July 31, 1985 amended Special Use Permit to the Asthmatic Children's Foundation Inc. to allow building renovations and space utilization changes, including the addition of an outside ramp and an increase in the number of beds to 44, *see* R. 2833-2840; and (d) the July 25, 1990 Special Use Permit amendment for the Asthmatic Children's Foundation Inc., to utilize the building formerly used for residential purposes as offices for personnel providing off-site in home health care. *See* Maskiell Aff. at 12; R 2174-2175.

Prior to 1971, the Town Zoning Code (the "Zoning Code") did not include a "nursing home" use. Rather, it allowed "hospital" and "sanitarium" uses by Special Use Permit in an R-2A zone. *See* Maskiell Aff. at 13. Based on the Special Use Permits issued in 1964 and 1969, the facility was considered a "sanitarium" for the treatment of children with chronic, intractable asthma. *Id.*. The pre-1971 Zoning Code did not include a definition of "sanitarium." As noted by the Town Building Inspector, the dictionary definition of "sanitarium" or "sanatorium" includes: (1) "an institution for rest and recuperation (as convalescents);" (2) "an establishment for the treatment of the chronically ill;" and (3) "an institution for the preservation or recovery of health, especially for convalescence, health resort." Maskiell Aff., Exh. B (citing Merriam-Webster Dictionary and www.dictionary.com).

In 1971, the Zoning Code was amended to remove "sanitarium" use and replaced it with a "nursing home" use. Maskiell Aff. at 15. The 1971 amendment added the following definition for "nursing home":

> A proprietary or nonproprietary facility, licensed and regulated by the State of New York for the accommodation of two (2) or more persons, not related by blood or marriage, who are aged, convalescents or other persons not acutely ill and not in need of hospital care and related medical services, which persons are boarded and/or housed for remuneration, and in which facility such nursing care and medical services are prescribed by, or are performed under the general direction of, persons licensed to provide such care or services in accordance with the laws of the State of New York, but not including hospitals or the keeping of patients suffering from any contagious disease, tuberculosis, mental illness, acute alcoholism or drug addiction.

Maskiell Aff., Exh. C. This is the same definition used in the current Zoning Code. Neither Sunshine nor St. Mary's was ever issued a violation or denied a permit for an illegal or unpermitted use after 1971.

Prior to Sunshine taking ownership of the facility, it was operated by St. Mary's Rehabilitation Center for Children ("St. Mary's"). *See* R. 2428. The Building Inspector was familiar with the operations at St. Mary's because he had visited the Property while it was operated by St. Mary's. *See* Maskiell Aff. at 17.

Contrary to Petitioners' assertion that Sunshine is improperly caring for children with acute illnesses, the Building Inspector found that Sunshine does not provide medical services for children

who have "acute" illnesses. Instead, as set forth in his affidavit, all of the children have serious, long term medical disabilities that require continued treatment that would not normally be treated in a hospital. *See* Maskiell Aff. at 21. As a result, the Building Inspector determined that the facility was a permitted nursing home use in the R-2A Zone with a special use permit.

The ZBA reached the same conclusion. In doing so, the ZBA rejected the notion advanced by the Petitioners that merely because Sunshine provides certain medical services for the children at its facility, it cannot qualify as a nursing home. The definition of a "nursing home" in the Zoning Code § 60-210, states that "nursing care and medical services . . . prescribed by, or . . . performed under the general direction of, persons licensed to provide such care or services in accordance with the laws of the State of New York" may be provided in a nursing home. Thus, the ZBA properly interpreted this provision to mean that nursing homes cannot provide medical services to persons who are acutely ill and who are in need of care that is typically provided in a hospital. *See* Cooper Aff. at 21.

The ZBA's determination that Sunshine is not providing the same services as provided in a hospital was based upon firsthand observations as well as information provided by Sunshine. The Chairman and each of the other ZBA members visited Sunshine and were given access to the entire facility. *See* Cooper Aff. at 19. The ZBA personally observed the patients receiving care at Sunshine and were advised about the type of illnesses they had and treatment they were receiving. *Id.* Based on this visit and other information provided during the course of its review, the ZBA was well aware that the children housed at Sunshine have disabilities and illnesses which while serious, are not necessarily "acute." The children at Sunshine all require long term care that would not typically provided in a hospital setting. *See* R. 294-295, 400, 2525-2532.

Sunshine also provides non-medical services, such as education adaptive play and exercise, that typically would not be available in a hospital. *See* R. 294-295, 400, 2531; *see* Video of October 28, 2015 ZBA meeting at https://vimeo.com/144045883, at 2:44:00-2:47:20. "Specific application of a term of the ordinance to a particular property is governed by that body's interpretation, unless unreasonable or irrational." *Conti v. Zoning Bd. of Appeals of Vill. of Ardsley*, 53 AD3d 545, 547 [2nd Dept 2008] (citing *Matter of Frishman v. Schmidt*, 61 NY2d 823, 825 [1984]; *Town of Huntington v. Five Towns Coll. Real Prop. Trust*, 293 AD2d 467, 468 [2nd Dept 2002]). In this case,

it was neither irrational nor unreasonable for the ZBA to conclude that the use of the facility fell within the definition of a nursing home.

The ZBA also properly took into account that the NYSDOH considered Sunshine's facility a "pediatric nursing facility" as set forth in its August 7, 2014 Executive Summary approving the additional beds and expansion of the facility. *See* R 2525. The Executive Summary expressly states that "the Sunshine Center is an existing pediatric nursing facility that specializes in the care and treatment of medically complex children ages birth to 18, who require post-acute medical and rehabilitative services." *Id.*

The ZBA acted well within its discretion in rejecting the Petitioners' allegation that Sunshine's use of the Property is not a permitted "nursing home" use because many of its patients are not ambulatory and require feeding tubes and ventilators. The Zoning Code's definition of "nursing home" does not reference a particular level of treatment, and expressly contemplates that "medical care" may be provided. Merely because certain children who live at Sunshine may have secondary illnesses that could be considered contagious, or may have suffered brain trauma resulting in mental incapacity, as Petitioners allege, does not disqualify Sunshine's use as a "nursing home." *See* Cooper Aff. at 21.

Therefore, the ZBA's interpretation of the Zoning Code's definition of "nursing home" as applied to the facility was rational and reasonable. The ZBA did not abuse its discretion by determining that Sunshine is a permitted nursing home.

II. The Variance from Section 60-430.o(5)(A) Is a Permissible Area Variance

Petitioners contend that the ZBA incorrectly determined that the variance from the requirement in Section 60-430.O(5)(a), which requires nursing homes to have direct access to or frontage on a state or county road, is an area variance (the "Frontage Requirement"). Petitioners' argument is meritless.

Town Law § 274-b and Zoning Code § 60-540.D(2)(d) authorize the ZBA to grant variances from Special Use Permit Standards and Conditions. These provisions specifically state that such variation from Special Use Permit Standards can be accomplished through an area variance – not a use variance as alleged by Petitioners. The Court of Appeals has held that Town Law § 274-b "vests a ZBA with authority to grant an area variance from any requirement in a zoning regulation, including those for a special use permit." *Real Holding Corp. v. Lehigh*, 2 NY3d 297 [2004]. Town

Law § 274-b is the state enabling statute that gives zoning boards the authority to grant special use permits. Subsection 3 of Town Law § 274-b provides in relevant part:

> Application for area variance. Notwithstanding any provision of law to the contrary, where a proposed special use permit contains one or more features which do not comply with the zoning regulations, application may be made to the zoning board of appeals for an area variance pursuant to section two hundred sixty-seven-b of this article, without the necessity of a decision or determination of an administrative official charged with the enforcement of the zoning regulations.

In construing this provision, the Court of Appeals held:

> [S]ubdivision (3) refers to "zoning regulations" without qualification. Nothing in the statute's language suggests that area variances for special use zoning regulations should be treated differently than area variances from general, so-called bulk, zoning requirements. To hold that a ZBA may vary certain zoning provisions only if expressly empowered to do so by the town board overlooks the entire purpose of the ZBA, which is to provide relief in individual cases from the rigid application of zoning regulations enacted by the local legislative body.

Real Holding Corp., 2 NY3d at 301.

Zoning Code § 60-540.D, which governs the jurisdiction of the ZBA, contains a similar provision:

> Variances when subdivision, site plan or special permit applications are involved. Where a proposed site plan contains one or more features which do not comply with the zoning regulations, or where a proposed special permit use contains one or more features which do not comply with the zoning regulations, or where a proposed subdivision plat contains one or more lots which do not comply with the zoning regulations, application may be made to the Board of Appeals for an area variance or variances without the necessity of a decision or determination of an administrative official charged with the enforcement of this chapter or a referral by an approving agency acting pursuant to this chapter.

Mirroring the Town Law language interpreted by the Court of Appeals in *Real Holding Corp.*, the Town Zoning Code refers to "zoning regulations" without qualification. Special Use Permit Standards, such as the Frontage Requirement, are "zoning regulations."

Petitioners allege that the Frontage Requirement is different from other zoning regulations because it is intended to improve public safety and to assure proper exit by emergency vehicles, ambulances, medical staff and firefighting equipment. *See* Pet. Mem. of Law at 18. However, neither Town Law § 274-b(3) nor Zoning Code § 60-540.D(2)(d) contains any such qualification. Thus, no specific express delegation of authority from the Town Board – other than that provided in Section 60-540.D(2)(d) – is required to authorize the ZBA to grant area variances for a special permit use which does not comply with one or more provisions of the Zoning Code – including the Frontage Requirement.

Petitioners' reliance upon case law decided prior to the New York State Legislature's overhaul of the Town Law's provisions governing zoning boards in 1991 – including the addition of Town Law § 274-b(3) – and case law from outside of New York is misplaced. Thus, Petitioners' reliance upon *Holowka v. Zoning Board of Appeals of Town of Greece*, 80 Misc. 2d 738 [Sup Ct. Monroe Co. 1975], is unavailing – as the case was decided prior to the enactment of Town Law § 274-b and is no longer good law. Moreover, the holding in *Holowka* was based upon the absence of an express delegation of authority from the town board to the zoning board of appeals, and not because of any purported "safety requirement." Unlike the local code in *Holowka*, the Town Zoning Code contains specific standards by which variances are to be reviewed and decided. *See* Zoning Code § 60-540.D. Furthermore, unlike in *Holowka*, the New Castle Town Board did not manifest a clear intent through express language in the Zoning Code that it intended to reserve to itself the power to vary or waive the Frontage Requirement. There is no distinction between that requirement and any other condition, standard or requirement within Chapter 60 for which the ZBA has the authority to vary.

The Frontage Requirement here is analogous to is the requirement imposed by Town Law § 280-a that in order for a building permit to be issued for a structure the property must have frontage on a suitably improved, mapped street. *See* Town Law §280-a(1). The purpose of requiring a property to have frontage on a mapped street is to ensure that the property has adequate access for emergency service vehicles. *See* Town Law §280-a(5). Zoning boards of appeals are authorized to issue variances from this "safety" requirement which requires the property to be in a particular location in relation to a particular type of street prior to the issuance of a building permit. *See* Town Law § 280-a[3].

In this case, the Frontage Requirement as set forth in the Zoning Code at Section 60-430.O(5) is not a "safety requirement" – it is a locational requirement for a Nursing Home use which requires the property on which a nursing home is located to have certain physical characteristics in relation to a state or county road. Notably, the Frontage Requirement does not strictly require access to a county or state road. It requires the property to have a location "fronting on or having direct access to a state or county road."

In *Real Holding Corp.*, the Court of Appeals considered locational requirements to be area variances, such as those prohibiting a gas station from being located within one thousand feet of a residentially zoned property or within 2500 feet of another gas station. The Town Law defines "area variance" as the "authorization by the zoning board of appeals for the use of land in a manner which is not allowed by the dimensional or physical requirements of the applicable zoning regulations." Town Law §267(1)(b). In this case, varying the Frontage Requirement through an area variance would permit the use of the Property in a manner which is not allowed by the physical requirements of the applicable zoning regulations. The Frontage Requirement speaks to the physical characteristics of the property, not the use of the property for something which is not permitted in the R-2A District, *i.e.*, a fast food restaurant or a bowling alley. Thus, the Frontage Requirement was properly varied by the ZBA by means of an area variance.

Finally, Petitioners contend that allowing this provision of the Zoning Code to be the subject of an area variance has led to another municipality, the Town of Cortland, allowing a similar development without direct access to a state or county road, as required by the Town of Cortland zoning code. *See* Pet. Mem. of Law at 43-44. What a different municipality did is of no consequence in this matter. Nevertheless, Petitioners fail to mention that the Town of Cortland ZBA made an independent determination that a variance from the Town of Cortland's frontage requirement should also be considered an area variance. *See* Gordon Aff., Exh. A. The Town of Cortland's determination further supports the ZBA's finding that the variance in question was an area variance.

Thus, the Court concludes that the ZBA correctly granted an area variance from the Frontage Requirement as set forth in Zoning Code § 60-430.O(5)(a).

III. The ZBA Properly Approved the Amended Special Use Permit and Variances

Petitioners also contend that the ZBA was precluded from issuing the Amended Special Use Permit and variances because there are existing violations on the Property. *See* Pet. Mem. of Law at 26. Section 60-430(N), states as follows: "Existing violations. No permit shall be issued for a special use for a property where there is an existing violation of this chapter or Chapter 48 of the Code of the Town of New Castle." In this case, there were no violations of either Town Code Chapter 60 (Zoning) or Chapter 48 (Building Construction and Fire Prevention) lodged against Sunshine. *See* Maskiell Aff. at 22. Petitioners' alleged "violations" – the number of beds on the property and the alleged failure to use the property solely to treat children with asthma – are not violations. Rather, they concern non-compliance with certain conditions set forth in the previously issued special use permits. Thus, Zoning Code § 60-430(N) is not applicable. Non-compliance with Special Use Permit Conditions is not a violation of either Chapter 60 or Chapter 48 of the Town Code.

In addition, as set forth in the Building Inspector's affidavit, the Town routinely allows special permit grantees to update outdated permit conditions at the time they seek approvals for expansions or other major improvements. *See* Maskiell Aff. at 30.

IV. The ZBA Properly Granted the Amended Special Use Permit and Area Variances

A. Standard of Review

The Court of Appeals has long recognized the "settled rule" that "in reviewing board actions as to variances or special exceptions the courts . . . restrict themselves to ascertaining whether there has been illegality, arbitrariness, or abuse of discretion.". *Matter of Lemir Realty Corp. v. Larkin*, 11 NY2d 20, 24 [1962]; *see People ex rel. Hudson-Harlem Val. Tit. & Mtge. Co. v. Walker*, 282 NY 400, 405 [1940] (determination of zoning board of appeals "may not be set aside unless it clearly appears to be arbitrary or contrary to law"). The CPLR § 7803(3) standard of review continues to require that substantial deference be afforded to local boards and officials in land use matters. *See Matter of Pecoraro v. Board of Appeals of Town of Hempstead*, 2 NY3d 608, 613 [2004] ("courts may set aside a zoning board determination only where the record reveals that the board acted illegally or arbitrarily, or abused its discretion, or that it merely succumbed to generalized community pressure"); *Matter of Ifrah v. Utschig*, 98 NY2d 304, 308 [2002] ("Local zoning boards

have broad discretion in considering applications for variances, and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary or an abuse of discretion"); *Matter of Cowan v. Kern*, 41 NY2d 591, 599 [1977] ("Where there is a rational basis for the local decision, that decision should be sustained").

B. The ZBA Properly Granted the Amended Special Use Permit

In determining whether to grant Sunshine's application for an amended Special Use Permit, the ZBA carefully examined the general standards applicable to special use permits in accordance with Section 60-430(B)(1)-(5) of the Zoning Code. First, the ZBA found that Sunshine has and will continue to serve an important community need because it provides health care and other services for children with complex medical complex challenges who require post-acute, rehabilitative care. Sunshine presented substantial evidence demonstrating that the expanded facility will continue to provide quality care for an expanding population of children with these needs. *See* R. 8, 2013-2015, 2528-2533.

Next, the ZBA concluded that the location and size of the expanded facility, the nature and intensity of its operations, the size of the site in relation to the building, and the location of the site with respect to surrounding streets, will be in harmony with the appropriate and orderly development of the R-2A Zoning District. The ZBA noted that the proposed expansion was designed to minimize site disturbance, and the size of the expanded facility will be substantially less than is permitted under the Zoning Code. *See* R 8, 298, 2175. In addition, the facility, in one form or another, has existed in its current location in the community for more than fifty years without incident. *See* R. 298, 2174.

The ZBA also determined that the location, nature and height of buildings, walls and fences on the Property are such that the expansion of the facility will not hinder or discourage the appropriate development and use of adjacent land and buildings. The proposed building expansion has been designed in accordance with the bulk and dimensional requirements of the R-2A Zoning District and, due to the existing screening, will not have an adverse visual impact on the adjacent properties. *See* R. 8; Hull Aff. at 43-47.

The ZBA further found that the operations in connection with the expanded facility will not be more objectionable to nearby properties by reason of noise, fumes, vibrations or other characteristics than would be the operations of the permitted uses not requiring a special permit.

Once again, the ZBA was aware that the facility has existed in the community for more than fifty years and there was no persuasive evidence, other than generalized community opposition, that the facility would not continue to operate in a manner that is harmonious with the surrounding land uses. *See* R. 8; Cooper Aff. at 37. The parking facilities for the expanded facility comply with zoning and are adequately sized and screened from adjoining residential uses. The primary entrance and exit driveway is being improved to maximize safety. *See* R 9.

The ZBA rationally concluded that Sunshine satisfied the general requirements for a special use permit as set forth in Section 60-430(B)(1)-(5) of the Zoning Code. The ZBA then considered the specific Special Permit Standards for nursing homes set forth in Section 60-430.O(5) of the Zoning Code. *See* R. 9; Cooper Aff. at 40. Other than the locational requirement included in Section 60-430.O(5)(a) and the density requirement included in Section 60-4340.O(5)(c), for which Sunshine received variances, the evidence demonstrated that the proposed expansion of the facility met or exceeded each of the requirements for a nursing home in the R-2A District. *See* R. 297.

With respect to the requirements under Section 60-430.O(5), the ZBA focused on the following factors: (i) the Property consists of approximately 33.28 acres, which is more than 50% in excess of the twenty acres required under the Zoning Code after expansion; (ii) the proposed lot coverage percentages for the expanded facility are approximately 6.9% for buildings and 19% for buildings, parking and driveways; (iii) all buildings will be set back from adjoining property lines by at least fifty feet, and no parking areas are proposed in any required front yard, nor in any required side or rear yard setback; (iv) 141 parking spaces are required and 144 parking spaces will be provided; (v) a landscaped buffer area of a minimum of 25 feet (and significantly greater in many areas) is being provided along all lot lines adjoining properties in residence districts; and (vi) Sunshine agreed to move the expanded building completely out of the Wetland B wetland buffer. *See* Cooper Aff. at 42.

Based on these factors, the ZBA rationally and reasonably approved the Amended Special Use Permit for a "nursing home" use.

C. The ZBA Correctly Granted the Area Variances

The ZBA also granted Sunshine's requests for a variance from Zoning Code § 60-430.O(5)(a) with respect to the Frontage Requirement, and a second variance from Zoning Code § 60-430(O)(5(c) to allow 122 beds in the facility instead of 83 – as would otherwise be permitted.

In determining whether to grant these area variances, the ZBA properly applied the balancing test in Zoning Code § 60-540(D)(2)(c)(2) – which states that the ZBA shall take into consideration the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant. *See* Cooper Aff. at 46.

The law is clear that: "Local zoning boards are vested with broad discretion in considering applications for area variances, and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary and capricious, or an abuse of discretion." *Celentano v. Bd. of Zoning Appeals of Town of Brookhaven*, 63 AD3d 1156, 1157 [2nd Dept 2009]. Where a zoning board has engaged in the required balancing test and considered the relevant statutory factors, its decision should be affirmed unless it is found to be arbitrary and capricious. *See Goodman v. City of Long Beach*, 128 AD3d 1064, 1065 [2nd Dept 2015]. In this case, the ZBA engaged in the required balancing test and considered five relevant factors when deciding whether to grant the variances. *See* R. 9-11; Cooper Aff. at 47-74.

1. The Variance from the Frontage Requirement Was Properly Granted

The ZBA first analyzed the requested variance from Section 60-430.O(5)(a) of the Zoning Code – which requires nursing homes to be located on lots fronting or having direct access to a state or county road. The ZBA concluded that granting the area variance would not create an undesirable change in the character of the neighborhood because the facility has been successfully operating for more than fifty years without direct access to or frontage on a state or county road. *See* R. 9.

Petitioners' concerns – about traffic and safety due to the lack of frontage and direct access to a state or county road – were analyzed by the Town's traffic consultant, Michael Galante, who reviewed submissions by Sunshine and the Petitioners. Galante concluded that neither construction traffic nor traffic from the expanded facility would result in an unsafe or undesirable condition. *See* R. 2040-2046, 2083, 2128-2135; Galante Aff. at 17, 22, 32.

As noted above, prior to making its determination, the ZBA members personally visited the Property and observed the local road conditions. *See* Cooper Aff. at 19, 51. Based on Galante's analysis and their personal observations, the ZBA concluded that traffic from the expanded facility would not have a significant adverse impact to the neighborhood. Specifically, the ZBA determined that the local roads have sufficient capacity, and that the proximity of NY-9A, a state road, would allow adequate access to the Property during construction and after the expansion is completed. *See*

R. 9; Cooper Aff. at 51. In addition, conditions were included in the September 28, 2016 Resolution to address concerns about lack of frontage. *See* R. 13.

Next, the ZBA determined that the benefit sought through the variance could not be achieved by any other feasible method. *See* R. 9. The use of the Property was legally established in the early 1960s by the ZBA's grant of a special use permit before the frontage requirement for a nursing home was implemented. *See* R. 2592-2593, 2174. Amendments to the special use permit to increase the number of beds and to expand the use of the facility have been issued over the years, notwithstanding lack of frontage on or direct access to a state or county road. *See* R. 2595, 2830-2832.

The ZBA also considered that there is a substantial demand for the type of care and services provided at Sunshine, as confirmed by the NYSDOH's issuance of a Certificate of Need for 122 beds and the existence of a wait list for children requiring Sunshine's services. *See* R. 2529 ("Since 2011, Sunshine Children's Home and Rehabilitation Center's pediatric RHCF occupancy rates have exceeded 99%, with an average stay of 3.1 years per patient. The facility currently has a waiting list of approximately 60 children seeking admission. The wait list does not include only children that may also appear on other pediatric facilities existing wait lists. There are existing wait lists not only due to lack of pediatric beds, but also due to lack of other long-term pediatric care and services in the area").

The ZBA determined that the grant of the variance would permit Sunshine to serve some of the New York State resident pediatric patients currently receiving care out of state, thereby also yielding significant savings to the New York State Medicaid system. *See* R. 2529 ("There are currently 72 pediatric patients receiving long term care and services, including ventilator-dependent care services, in pediatric nursing home facilities outside New York State . . . . In addition, this proposal also supports the efforts of the Medicaid Redesign Team (MRT#68) which calls for repatriation of children currently in out-of-state nursing facilities"); *see also* R. 300, 2013-2015.

The ZBA next determined that the requested variance was not substantial under the circumstances presented because the facility is presently operating without direct access to or frontage on a state or county road. *See* R. 10. The ZBA further found that the absence of impacts to the physical environment had been confirmed during its SEQRA review. *Id.*

Finally, the ZBA concluded that the need for variance relief was not self-created because it resulted from a change in the Town's zoning regulations in 1971, subsequent to the lawful

establishment of the facility. *See* R. 10. In addition, the only alternative to granting variance relief would be relocating the facility to another site, which the ZBA concluded would be unfeasible. *See* R. 1918, 2174-2175. Thus, the ZBA determined that it was not possible for Sunshine to have minimized or reduced the scope of this variance.

Applying the arbitrary and capricious standard to the ZBA's granting of the area variance from Section 60-430.O(5)(a), Petitioners have failed to establish any basis for overturning the ZBA's determination.

2. The ZBA Properly Granted A Variance from Section 60-430.O(5)(c)

The ZBA likewise undertook the required balancing test under Zoning Code § 60-540.D(2)(c)(2) in granting variance relief in connection with the maximum number of beds in the facility. Once again, the ZBA determined that granting variance relief would not result in an undesirable change to the character of the neighborhood. *See* R. 10, 2175. Notably, the ZBA found that the closest residential structure to the proposed area of disturbance is approximately 650 feet from the Property to the north, and more than 75% of the Property will remain wooded and undisturbed – consistent with the Town's Comprehensive Plan. *See* R. 10, 2175.

The ZBA recognized that the increased number of beds would result in an increase in the number of employees, visitors and deliveries to the facility. However, the Town's traffic consultant determined – based upon traffic studies performed by Sunshine – that the additional trips will not result in an undesirable change in the character of the neighborhood. As a result, the ZBA also found that the benefit sought through variance relief :(1) cannot be achieved by any other feasible method, *see* R. 416-417, 1915, 2013-2015, 2529; (2) would not have any substantial adverse impacts to the physical environmental conditions of the neighborhood or zoning district, *see* R. 11; and (3) was not self-created. *See* R. 11. Furthermore, even if the need for variance relief was self-created by Sunshine – this fact alone does not preclude the granting of the variance. *See Sasso v. Osgood*, 86 NY2d 374, 385 [1995].

The ZBA further found that although the requested variance is substantial when measured mathematically, *i.e.*, 46% more beds are being requested than permitted under the current zoning, this did not equate to a significant impact on the character of the surrounding neighborhood. *See* R. 11.

Petitioners argue that by granting a substantial variance: the ZBA has "usurped the authority of the Town Board by allowing Sunshine to eviscerate the density limits by a very substantial order of magnitude." Pet. Mem. of Law at 2. However, merely because a variance is substantial does not require the denial of a variance. *See Goodman*, 128 AD3d at 1065. The ZBA found that the mathematical substantiality of the variance was mitigated by, among other things, (1) the fact that the Property is approximately 33 acres, (2) that the facility is adequately screened from neighboring properties and (3) the increased number of beds will not be discernable from the exterior of the expanded building. *See* R. 11, 2175.

In considering whether the requested variance relief was the minimum amount reasonably necessary, the ZBA considered whether a reduction in the number of beds was appropriate. *See* Cooper Aff. at 73. However, given: (1) the NYSDOH's findings with respect to the need for the additional beds, (2) the fact that the expansion of the building would not have an undesirable change to the character of the community; and (3) that the number of beds was only one factor in determining the ultimate size of the building, *see* R. 416-419, 2525-2533), the ZBA concluded that requiring a reduction in the number of beds was not necessary to preserve and protect the character of the neighborhood and the health, safety and welfare of the community. Finally, the variance could not be mitigated by the purchase of adjacent property. *Sasso*, 86 NY2d at 385 (the zoning board acknowledged that the variances sought were substantial, but concluded that there was no available adjacent land for intervenor to purchase so that he could meet the zoning requirements).

The ZBA properly concluded that the benefits to Sunshine and the community from granting the variance to allow the additional number of beds outweighed any potential detriment to the health, safety and welfare of the neighborhood and community resulting from the granting of this variance. The ZBA's determination is amply supported by substantial evidence and will not be overruled by this Court.

V. The ZBA Properly Issued a Negative Declaration

Finally, Petitioners contend that the ZBA failed to take the requisite "hard look" at the potential environmental impacts of Sunshine's proposed expansion. Their argument is meritless.

A. Standard of Review

Judicial review of a SEQRA determination is limited, and reviewing courts must grant considerable deference and latitude to the determining agency. A negative declaration adopted by

a lead agency can be annulled "only if arbitrary, capacious or unsupported by substantial evidence." *Merson v. McNally*, 90 NY2d 742, 752 [1997]. The reviewing court must look only to whether the determination lacks a rational basis, *i.e.*, whether it is without sound basis in reason and without regard to the facts. *See Pell v. Board of Education*, 34 NY2d 222 [1974]. The limited issue before this Court is whether the ZBA "identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination." *See Riverkeeper, Inc. v. Planning Board of the Town of Southeast*, 9 NY3d 219, 231-32 [2007] (internal quotations and citations omitted); *Jackson v. New York State Dev. Corp.*, 67 NY2d 400, 417 [1986].

Review of a lead agency's determination to issue a negative declaration is limited in two important respects. First, the lead agency's compliance with SEQRA "must be viewed in light of a rule of reason," *Eadie v. Town Bd. of Town of North Greenbush*, 7 NY3d 306, 318 [2006]; *Jackson*, 67 NY2d at 417, which applies not only to "an agency's judgments about the environmental concerns it investigates, but to its decisions about which matters require investigation." *Save the Pine Bush, Inc. v. Common Council of City of Albany*, 13 NY3d 297, 308 [2009]. Not every "conceivable environmental impact, mitigation measure or alternative need be addressed in order to meet the agency's responsibility." *Hells Kitchen Neighborhood Assn. v. City of New York*, 81 AD3d 460, 462 (1st Dept 2011) (quoting *Neville v. Koch*, 79 NY2d 416, 425 [1992]).

Second, reviewing courts "may not substitute their judgment for that of the agency for it is not their role to 'weigh the desirability of any action or [to] choose among alternatives.'" *C/S 12th Ave. LLC v. City of New York*, 32 AD3d 1, 7 [1st Dept 2006] (quoting *Akpan v. Koch*, 75 NY2d 561, 570 [1990]. The lead agency has "considerable latitude in evaluating environmental effects," *see Eadie*, 7 NY3d at 319, and has reasonable discretion to decide whether an EIS is required. *See Spitzer v. Farrell*, 100 NY2d 186, 190 [2003]. This is true even for a Type I action, which does not require the preparation of an EIS where the lead agency "ha[s] made a thorough investigation of the problems involved and reasonably exercised [its] discretion . . . ." *Dunk v. City of Watertown*, 11 AD3d 1024 [4th Dept 2004]. "The lead agency, after all, has the responsibility to comb through reports, analyses and other documents before making a determination; it is not for a reviewing court to duplicate these efforts." *Riverkeeper*, 9 NY3d at 232.

"Where the record establishes that the determination to issue a negative declaration and forego the need for an EIS was neither arbitrary and capricious nor irrational, that determination will

not be disturbed. *Forman v. Trustees of State Univ. of N.Y.*, 303 AD2d 1019 [4th Dept 2003] (internal quotation marks and citation omitted). Here, the record demonstrates the ZBA conducted a comprehensive review, taking the necessary hard look at the potential environmental impacts that may result from the expansion of the facility and ultimately decided to issue a Negative Declaration – a result that certainly was neither arbitrary nor capricious, was more than reasonably supported by substantial evidence in the record, and was not an abuse of discretion. *See Gordon v. Rush*, 100 NY2d 236, 244-45 [2003] (holding that the decision "to issue the negative declaration was not irrational, an abuse of discretion, or arbitrary and capricious and, consequently, should not be disturbed").

As the Petitioners recognize, merely because a project is designated as a Type I Action does not mean a Positive Declaration is required. Where there is a significant level of study, public participation and review by a municipal board and the public, courts have held that a Positive Declaration is not required for a Type I project. For example, in *Chinese Staff v. Burden*, 19 NY3d 922, 924 [2012], the Court of Appeals upheld the New York City Department of Planning's Negative Declaration with respect to a Type I action holding that:

> [i]n making its initial determination, the agency will study many of the same concerns that must be assessed in an EIS, including both long- and short-term environmental effects. Where an agency determines that an EIS is not required, it will issue a "negative declaration" Although the threshold triggering an EIS is relatively low, a negative declaration is properly issued when the agency has made a thorough investigation of the problems involved and reasonably exercised its discretion.

Id. (internal quotation marks and citations omitted).

Petitioners also argue that the scope and magnitude of Sunshine's proposed expansion makes an EIS mandatory. Although there is a relatively low threshold to require an EIS in a Type I action, there is no hard line rule requiring an EIS for a certain sized project. *See Casino Free Tyre v. Town Bd. of Town of Tyre*, 51 Misc. 3d 665, 668-69 (Sup. Ct. Seneca Co.), *aff'd sub nom.*, *Casino Free Tyre v. Town Bd. of Town of Tyre*, 140 AD3d 1711 [4th Dept 2016]. While the expanded building will be significantly larger than the existing building – given the size of the Property compared with the expanded building – the ZBA reasonably concluded that this would not have a detrimental impact on the land or the community. *See* R. 22-23, 2174-2175.

In this case, the ZBA took a "hard look" at each of the identified areas of environmental concern and issued a comprehensive, well-reasoned Resolution examining each of the issues. *See* R. 15-36. The areas of concern examined included: (i) consistency with community character; (ii) impacts on land including steep slopes; (iii) impacts on historical, archeological or geological resources; (iv) impacts on wetlands; (v) impacts on trees; (vi) impacts on surface water and stormwater; (vii) impacts on groundwater; (viii) impacts on noise, odor or air quality; (ix) impacts on plants or animals; (x) impacts on aesthetic resources, open space or recreation areas; (xi) impacts on critical environmental areas; (xii) impacts on transportation and traffic; (xiii) impacts on sewer or human health; (xiv) impacts on parking; and (xv) impacts on energy. While Petitioners recognize that these areas of concern were reviewed, they either disagree with the ZBA's conclusions, or argue that the ZBA's analysis was flawed with respect to certain environmental issues.

B. *The ZBA Took A Hard Look at Issues Relating to Drinking Water and Correctly Determined There Would Not Be Any Significant Adverse Impacts*

Petitioners allege that the ZBA conducted a "blinkered" analysis of the groundwater impacts that fell far short of the "hard look" required by SEQRA. Petitioners' assertions are unfounded.

First, the subject of drinking water was discussed throughout the proceedings. Ground water was the subject of discussions during public hearings, *see* R. 3112, 3145, 3148, 3152-3157, 3166-3167, 3179-3180, was commented on in writing by Petitioners' consultant, *see* R. 2778-2785, 2787-2790, 2796-2805, 2933-236, and Sunshine's consultants, *see* R. 639-642, 1633-1641, 1925-1965, 1975-1976, 1982-1987, 2900-2903, 3051-3056.. As a result, the Town retained William Canavan, a professional hydrogeologist, to consider the technical arguments and determine whether the expansion of the facility may have a potential adverse impact on groundwater. *See* R. 2139-2143, 2148-2149, 2150-2151, 2160-2161, 2166-2171, 2196. As explained in detail in his affidavit, following his initial assessment, Canavan ultimately concluded that the proposed expansion would not have a potential adverse environmental impact on groundwater.

Petitioners also object to the conclusion that the projected water demand could be calculated predicated on the daily average water usage per bed based on historical data. However, Canavan concluded, relying on several letters from the Westchester County Department of Health ("WCDOH"), *see* R. 1628, 1635, 1977, that the WCDOH had determined Sunshine's request for calculation of daily average water usage per bed based on historical data to be acceptable. *See*

Canavan Aff. at 20-21. Canavan also reviewed the data and calculations and concurred with WCDOH's acceptance of the 99 gpd/bed calculation. *See* R. 2167. In response, Petitioners assert that: (1) Canavan's analysis was flawed; (2) the WCDOH never approved the 99 gpd/bed average water demand; and (3) the Court should abide by the determination of their expert who concluded that domestic water usage must be based on peak demand.

Notwithstanding that Petitioners' experts dispute the findings of the ZBA's consultants on whether or not SEQRA was fulfilled, it is well settled that "[a]n agency may rely on consultants to conduct analyses that support their environmental review of the proposed projects . . . [and] the choice between conflicting expert testimony rests in the discretion of the administrative agency." *Matter of Brooklyn Bridge Legal Defense Fund, Inc. v. New York State Urban Devl Corp.*, 50 AD3d 1029, 1031 [2nd Dept 2008]. The ZBA is entitled to rely on the opinions of its experts over others provided that their assumptions had a foundational basis such that they were not arbitrary and capricious. *See Thorne v. Village of Millbrook Planning Bd.*, 83 AD3d 723, 727-728 [2nd Dept 2011]. In this case, Mr. Canavan's confirmation of 99 gpd/bed based on the average historical demand was rational. The ZBA properly relied on his expert opinion that the proposed expansion of the facility would not have a significant adverse impact on groundwater quantity or quality. *See* Canavan Aff. at 56.

Petitioners also assert that impacts of radium in Well #3 were not adequately reviewed by the ZBA. However, this issue was also addressed by the ZBA. Canavan made clear that treating for radium in a bedrock water supply is common in the Hudson Valley and that the documented levels of radium found in Well #3 is an existing condition which would not be impacted by the proposed expansion. *See* Canavan Aff. at 56.

Canavan determined that: (1) treatment will allow Well #3 to be placed in service as the largest producing well for the site, *see* Canavan Aff. at 50, (2) as permitted by the WCDOH, Sunshine could address radium by either blending the water from Well #3 with water from Wells #1 and #2 or installing a new water quality treatment system which would reduce the concentration of radium to acceptable levels and must be approved by the WCDOH; *see id.*, and (3) once installed, the water quality treatment system will be monitored by a New York State certified Class C water operator, and thus Sunshine would be managing its groundwater wells and adding required treatment

technologies and monitoring as directed by the WCDOH which oversees, permits and regulates this water supply system. *See id.*

Accordingly, the ZBA properly determined that the proposed expansion would have no significant adverse impact on ground water quality.

C. The ZBA Rationally Concluded the Proposed Expansion Would Not Adversely Impact Wastewater

Petitioners also assert that the ZBA failed to consider the impacts from peak wastewater generation associated with Sunshine's proposed expansion. Respondents argue that, in addition to the argument being meritless, the Petitioners rely on arguments and information that were never presented to the ZBA and therefore, should not be considered by this Court.

A court may not consider facts and claims that were not presented to an agency at the time it made its decision. *See Montalbano v. Silva*, 204 AD2d 457, 458 [2nd Dept 1994] (a court's review is limited to the record made before the administrative agency); *Matter of Welch v. New York State Division of Housing and Community Renewal*, 287 AD2d 725, 726 [2nd Dept 2001].

The claims relating to wastewater were not raised during the ZBA's review and therefore are not properly before this Court. Here, the only objections presented to the ZBA relating to wastewater were made in a letter submitted by the Town of Ossining (not the Petitioners) after the public hearing had closed. R. 2034-2036. The arguments relating to potential wastewater impacts set forth in the Affidavit of John Cote were never presented to the ZBA.

Even assuming that Cote's allegations are properly before this Court, they do not raise a meritorious issue for the Petitioners. Town Engineer Robert J. Cioli's affidavit reveals that Cote's suppositions are based upon his erroneous assumptions as to the pumping capacity and overall adequacy of Sunshine's sewer infrastructure. *See* Cioli Aff. at 24.

D. The ZBA Took A Hard Look at Alleged Impacts on Wetlands

During the public hearing review process, Petitioners, Sunshine and other members of the public made numerous presentations with respect to the alleged impacts on wetlands. Here, the ZBA considered each of these arguments and instructed Mr. Coleman to review the arguments and evaluate each of the claims asserted. *See* R. 2084-2087, 2113-2116, 2136-2138, 2162-2165.

Petitioners now raise two arguments with respect to wetlands impacts. First, Petitioners argue the ZBA improperly failed to identify what they refer to as "Wetland C" as a wetland due to

"methodological errors." This issue was addressed in detail in the Coleman Affidavit. During the course of the ZBA's review, he considered this argument, conducted field examinations of the Property and ultimately concluded that "Wetland C" was not a wetland protected under the Town's Wetland ordinance. *See* Coleman Aff. at 12-53. The ZBA considered Coleman's recommendations and concluded it was appropriate not to designate "Wetland C" as a wetland. *See* R. 11, 26. The ZBA has the discretion to rely on the determinations of its own expert where there is conflicting expert information. Thus, the Court declines to overturn the ZBA's rational and reasonable determination with respect to the existence of "Wetland C."

Second, Petitioners argue that the ZBA failed to establish an appropriate baseline delineation of Wetland B because it ignored Sunshine's unpermitted disturbance to Wetland B. This argument was also addressed by Coleman – who agreed that there had been some disturbance to Wetland B. *See* Coleman Aff. at 20. However, Coleman also determined that prior to Sunshine's disturbance, Wetland B was not a pristine, high-functioning wetland due to the fact that the Property has served multiple uses for over sixty years that resulted in the conversion of the Wetland B buffer area to typical agricultural and ornamental purposes. These improvements permanently altered the function of the Wetland B buffer.

As Coleman noted, to address the prior disturbance of Wetland B, Sunshine agreed to move the expanded facility completely outside the Wetland B buffer and to provide extensive mitigation measures for Wetland A – a high functioning wetland. *See* Coleman Aff. at 29-33; R. 637-638. Coleman also concluded that these measures provided sufficient mitigation to address the disturbance to Wetland B. *See* Coleman Aff. at 32. The ZBA accepted Coleman's recommendation with respect to Wetland B.

As discussed *supra*, merely because Petitioners' expert disagreed with Coleman's assessment and the ZBA's determination, this disagreement standing alone is not a valid basis for the Court to find that the ZBA failed to take a "hard look" at whether there may be any adverse impacts to wetlands.

E. The ZBA Took A Hard Look at Endangered Species

Petitioners contend that it was improper for the ZBA to rely on a letter from the New York Natural Heritage Program (NYNHP) – dated February 26, 2015 – which states, in relevant part, that "[w]e have no records of rare or state-listed animals or plants, or significant natural communities,

at your site or in its immediate vicinity," R. 278, in order to conclude that there were no potential adverse impacts to endangered species. As set forth at length in the Coleman Affidavit, this argument is without merit. *See* Coleman Aff. at 58-65.

Moreover, during the review of the Wetlands, Steep Slopes, Tree Removal and SWPPP Permit applications pending before the Town Planning Board, Sunshine's consultant performed a bat habitat assessment at the Property. *See* Coleman Aff. at 65. The results of the habitat assessment were submitted to the Planning Board and Coleman reviewed them in his role as a consultant to the Planning Board. The results confirmed that there is no potential impact to bat habitats resulting from Sunshine's proposed facility expansion. *See id.*

F. The ZBA Adequately Addressed Impacts Relating to Fire Safety

Petitioners further argue that the ZBA failed to examine the impact the proposed expansion would have on fire safety. However, there was no indication that there may be a potential adverse impact with respect to fire safety. To the contrary, the record confirms that fire suppression issues were addressed. *See* R. 1666, 3157. Petitioners' reliance on the Building Inspector's statement during one of the public hearings that he had "concerns" relating to fire prevention that were allegedly never addressed does not demonstrate that the ZBA acted in an arbitrary or capricious manner with respect to fire safety.

The Building Inspector has also confirmed that his "concerns" related to the need for Sunshine to specify where fire suppression devices would be located and to ensure that the width of access roads could accommodate emergency vehicles. *See* Maskiell Aff. at 35. Typically, such fire safety details are addressed during the design and building permit review process. *Id.* Thus, fire safety was not overlooked by the ZBA or improperly deferred as Petitioners contend.

The Building Inspector also informed the ZBA that since it was not on a municipal water supply, Sunshine would be required to provide an additional amount of water on site for fire suppression purposes. *See id.* at 33, R. 3157. Here, the specifications for this additional water supply will be finalized during the design and building permit review process stage. *Id.* at 33. Contrary to Petitioners' assertions, the relevant calculations and design work were not required to be completed as part of the ZBA's environmental review.

G. The ZBA Was Not Required To Review The Emergency Radiological Preparedness Plan

In addition, Petitioners argue that the ZBA was required to review and determine how the proposed expansion would impact Sunshine's radiological emergency evacuation preparedness plan concerning Indian Point. As the ZBA properly states – it has no authority or jurisdiction to review this plan or make determinations with respect to its adequacy. As a result, the ZBA's supposed failure to review the emergency evacuation preparedness plan does not constitute a violation of SEQRA.

H. The ZBA Properly Examined Community Character

Finally, Petitioners argue that the ZBA failed to take a hard look at the impacts on community character because the expansion of the facility supposedly conflicts with the goals of the Town's Development Plan ("TDP") and will impair the neighborhood character. Here, the ZBA – based in part on the analysis conducted by the Town Planning Director, *see* R. 2174-2175 – examined community character and found that the proposed expansion was consistent with the TDP and would not impact the neighborhood character. *See* R. 21-24.

The TDP recognizes the incidental open space benefits of private institutional development and calls for the protection of these open space lands "since they contribute significantly to preserving the attractive, low density character of New Castle." Hull Aff. at 24. The ZBA concluded that the continuation of the institutional Nursing Home use on the Property would impact approximately 8.86 acres of the 33.28 acre Property and the remainder of the Property would continue to function as open space. *See* R. 2174.

Petitioners also contest the ZBA's analysis of Sunshine's consistency with the existing community character and allege that the ZBA failed to take a "hard look" at upsurges in patient populations, *i.e.*, that Sunshine staff and traffic would impact the character of the community. However, the ZBA and its consultant considered the proposed expansion in both patient population and traffic – through both its SEQRA review and also its review of the standards which Sunshine was required to meet to receive approval of an Amended Special Use Permit and variances from the ZBA. *See* R. 2040-2046, 2083, 2128-2135; *see generally* Galante Aff.

Moreover, Petitioners' argument fails because the existing Nursing Home is a permitted use in the R-2A District subject to the issuance of a Special Use Permit. Uses authorized by special use permit are allowed subject to requirements legislatively imposed by the Town Board "to assure that

the proposed use is in harmony with such zoning ordinance of local law and will not adversely affect the neighborhood if such requirements are met." Town Law § 274-b.

The inclusion of a special permit use is "tantamount to a legislative finding that [it] is in harmony with the general zoning plan and will not adversely affect the neighborhood." *Frigault v. Town of Richfield Planning Bd.*, 128 AD3d 1232, 1233-34 [3rd Dept 2015] (internal quotation marks and citation omitted); *see Pilato v. Zoning Bd. of Appeals of Town of Mendon*, 155 AD2d 864 [4th Dept 1989] (the rule is well settled "that the inclusion of a use in the ordinance is a per se finding that it is in harmony with the neighborhood").

Therefore, Petitioners' argument that the ZBA failed to take a "hard look" at the impacts on community character because Sunshine's proposed expansion supposedly conflicts with the goals of the TDP and will impair the neighborhood character is without merit.

CONCLUSION

For the reasons stated above, the consolidated Article 78 Petitions are denied in their entirety and are hereby dismissed.

The foregoing constitutes the Order and Judgment of the Court.

Dated: New City, New York
May 16, 2018

ENTER

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

To: All Parties (via ECF)