

April 20, 2016

Village of Nyack Board of Trustees
c/o Walter Sevastian, Village Attorney
Village of Nyack
9 North Broadway
Nyack, NY 10960

Re: WF District Text Amendment

Dear Mayor and Trustees:

This memo to the Nyack Village Board of Trustees (Village Board) responds to comments received at the April 14 discussion with respect to the proposed Negative Declaration on the Environmental Assessment Form (EAF) for the proposed WF District Text Amendment. We have attempted to address and respond to all substantive comments made during the April 14 meeting.

Response to Comments Received on April 14, 2016

At the Village Board meeting on April 14, 2016, the Village Board received a memo submitted by Dan Richmond of Zarin & Steinmetz and heard comments from several speakers. The following is a response to the concerns raised in Mr. Richmond's letter and speakers at the Village Board Meeting.

Public Participation and Stakeholder Outreach

In the introduction to his letter, Mr. Richmond requested that the Village Board make every reasonable effort to include public participation in development of the Text Amendment and review of the EAF. The Village Board has gone to exceptional lengths to keep the public involved and informed.

As noted in the Expanded Part 3 of the EAF, the Village Board began reviewing the WF District zoning text following a petition for a zoning text amendment by TZ Vista, LLC on April 2, 2015. Over the course of several months, the Village Board has solicited comment from a wide range of stakeholders and has made a series of revisions in response to stakeholder feedback and public comment. The Village Board referred the initial petition to the Nyack Planning Board and the Rockland County Department of Planning, both of which provided letters of comment (dated July 9, 2015 and August 19, 2015, respectively) which were addressed by the Village Board. The Village Board also solicited comments from the Village Planning Consultant, Robert Galvin, and the Village's planning consulting firm, BFJ Planning.

On October 1, 2015, the Village Board held a Public Intake Session to receive input from the community. On October 8, 2015, the Village Board decided that it would not proceed on the petition from TZ Vista, LLC. However, the Village Board determined that the existing WF District zoning text did not provide for adequate waterfront access and protections of community character. Rather than consider the petition, the Village Board decided to review the existing text to develop a text amendment that would achieve Village objectives in the event of future development in the WF District.

Following the October 8, 2015 Village Board meeting and in response to stakeholder comments, the Village Board developed the draft WF District Text Amendment based upon recommendations from the Village Planning Board. The Village Board held a public hearing on February 25, 2016, which remained open until March 10, 2016 with additional written comments received until March 20, 2016. The Village also received a letter of comment and support by Scenic Hudson on March 10, 2016.

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At the Village Board meeting on March 24, 2016, Village Planner Robert Galvin suggested seven additional revisions to the proposed Text Amendment based on comment at the public hearing, comment and letters from members of the community, and input from Village representatives such as the Architectural Review Board.

The substantial efforts to involve the public and other stakeholders have helped the Village Board develop a Text Amendment that is responsive to community concerns.

Low Threshold

We take a different view than Mr. Richmond on the question of whether the Text Amendment surpasses “low thresholds” requiring the preparation of an environmental impact statement (EIS). The threshold for an EIS is whether there may be one or more significant adverse impacts resulting from a proposed action. The EAF, including the Expanded Part 3, did not find any significant adverse impacts to the proposed action.

Conformance with the Local Waterfront Revitalization Program

The issue of conformity with the Village’s Local Waterfront Revitalization Program (LWRP) is being addressed separately by Mr. Galvin, the Village Planner.

In his memo of April 14, 2016, Mr. Richmond makes five points. Our responses to these five points are detailed as follows.

1. Village Board should not hastily adopt a negative declaration

With respect to Mr. Richmond’s suggestion that the “Village Board should not hastily adopt a Negative Declaration at the expense of the board’s obligation under SEQRA to make ‘every reasonable effort’ to involve the public in the SEQR process,” we refer to the New York Codes Rules and Regulations (NYCRR) Title 6 Part 617. Section 617.6 (b) (3) (ii) prescribes that

The lead agency must determine the significance of the action within 20 calendar days of its establishment as lead agency, or within 20 calendar days of its receipt of all information it may reasonably need to make the determination of significance, whichever occurs later, and must immediately prepare, file and publish the determination in accordance with section 617.12 of this Part.

We believe that the Village Board has received “all information it may reasonably need to make the determination of significance” as of its receipt of the Expanded Part 3 on April 14, 2016 and therefore is obligated under State law to proceed with a Determination of Significance. Based on the outline of public participation and stakeholder outreach above, we believe that the Village has met the requirements noted by Mr. Richmond to “make every reasonable effort to involve project sponsors, other agencies and the public in the SEQR process.” The Village Board did not act on the Determination of Significance on April 14, 2016 in order to give the public and other stakeholders additional time to review the EAF and provide additional comment. However, the Village Board is also obligated to comply with SEQR by issuing a Determination of Significance within the timeframe required by state law.

2. Preliminary analysis reveals gaps in the EAF

We reiterate with respect to Mr. Richmond’s second point that the Village Board has not forced an abbreviated review period, but rather has provided for a detailed and lengthy process to receive public comment while also adhering to State law. We note that Mr. Richmond has recognized our review of case law, notably *Fisher v. Guiliani*, requiring that the Village Board conduct a review of a “reasonable worst case” scenario which we believe is achieved by the Expanded Part 3. In the Expanded Part 3, we have reviewed an area-wide special permit text change, not a site-specific

application, and as is normal under this scenario, we have reviewed the incremental impacts of the proposed special permit text change. The increment that we reviewed compares hypothetical development under the existing WF District text versus hypothetical development that the Text Amendment would allow.

The increment between potential development scenarios under the existing text and the Text Amendment amounts to a height increase of seven feet, a density increase of two units per acre, and an FAR increase from 0.90 to 1.50. Most reasonable people can conclude that these incremental differences are not significant. Additionally, Mr. Richmond makes an unsubstantiated claim that site-specific impacts need to be reviewed in an area-wide EAF. It is not necessary for an area-wide action to evaluate site-specific circumstances. For example, the NYSDEC EAF Part 2 specifically directs applicants not to fill in site-specific issues for an area-wide change.

We note that the proposed action is a zoning text change that would apply to approximately 14 acres of above-water lands. To attempt to evaluate site-specific impacts resulting from a specific construction project would be speculation. Such speculation is not required under SEQR.

As Mr. Richmond notes, the proposed Text Amendment adds a requirement to the WF District zoning text that a site-specific EAF must be completed in order to receive a special permit. Per the proposed Text Amendment, this site-specific EAF would have to be completed if and when an applicant comes forward. One of the potential development sites within the WF District is currently in the NYSDEC Brownfield Program, which prescribes its own rigorous brownfield cleanup standards. There is no requirement for the Village Board to second-guess future NYSDEC brownfield cleanup requirements for a zoning text change. The current state of this work on the site in question is that the remedial action work plan has received preliminary approval by NYSDEC.

Mr. Richmond cites the mandate for underground parking in the Text Amendment. In this case, Mr. Richmond is confusing environmental review with site plan review. Whether or not underground parking can be constructed on a brownfield site does not need to be known in order to make a determination of significance on the Text Amendment. The Special Permit in the Text Amendment which mandates underground parking is discretionary. An applicant does not have to apply for the Special Permit and the Village Board does not have to grant the special permit if a site-specific EAF for a specific application does not adequately address environmental impacts of a brownfield site or former brownfield site. Because the site in question is currently in the NYSDEC Brownfield Program and any applicant for the Special Permit would be required to produce a site-specific EAF, we do not see an issue with regard to the underground parking requirement that needs to be addressed in an area-wide EAF.

In fact, the Text Amendment mandate for underground parking would have the opposite impact that Mr. Richmond presents. Requiring underground parking on the site of future waterfront development would protect views of the Hudson River and allow for the provision of additional open space on the waterfront. We do not see the potential for the Text Amendment to cause “a substantial adverse change” in this case. If it is determined that a future development application cannot safely build underground parking on a remediated brownfield site, the application will not qualify for the Special Permit—a determination that will be made upon application for the Special Permit including a site-specific EAF. The citing of case law that requires building approvals is not germane here. The proposed action is not a development project on a brownfield site. Rather, the proposed action is a zoning text change that

involves a slight increase in height, density, and FAR in exchange for community benefits such as public waterfront access and design guidelines.

Mr. Richmond further claims that we the Village Board has not done an analysis of other site-specific issues such as access, site lighting, and landscaping. Again, site-specific issues are not required to be evaluated for an area-wide action—and even if they were, these are site plan issues that would normally be dealt with by the Planning Board in normal site plan review for any applicant. SEQR is not meant to replace the Planning Board's detailed site plan review powers over site design issues such as landscaping.

Further, the EAF does undertake the “reasonable worst case” analysis of potential buildout in the WF District. Although the WF District includes a total of 14 above-water acres, there are only two soft sites and both have been analyzed—the so-called TZ Vista site and the Nyack Boat Club site. The other sites within the WF District where the Text Amendment technically could apply in the future include the Village-owned municipal marina site, 1 Main Street (Clermont Condominium), 101 Gedney Street (West Shore Towers), and 103 Gedney Street (Rivercrest Coop). The municipal marina site is controlled by the Village. The sites of the three multi-family buildings are already overbuilt and noncompliant under current zoning and under the proposed Text Amendment. Therefore, infill development on these sites would not be allowed either under current zoning or under the proposed text amendment. In addition, if either of these sites were to be redeveloped in the future, the resulting height and density, and FAR would actually be decreased as compared with their current area and bulk.

We also disagree with Mr. Richmond's assertion that the EAF has not addressed visual impact and community character. The expanded Part 3 of the EAF examines both of these items. Although the increased FAR will allow for larger units, the Text Amendment does not affect existing viewsheds as established in Section 360-4-4B of the Village Code. It would be the responsibility of a potential applicant to demonstrate that any future development preserves viewsheds. The maximum FAR of 1.50 is an upper limit, not an entitlement—an application could not impinge upon viewsheds in order to max-out a project's FAR. Protections for community character would be stronger under the text amendment than they are under the existing permit to the Village Board. The Text Amendment increases requirements for publicly accessible open space, requires building setbacks to reduce the visual impact of building heights, limits façade materials and specifies maximum glazing areas to ensure that building facades are consistent with surrounding architecture, and promotes active uses along the waterfront by requiring retail and water-dependent uses.

3. Amendment surpasses the SEQR thresholds

With respect to the question of whether the proposed action surpasses the “low threshold” triggering the requirement for an EIS, we are in agreement with Mr. Richmond on the description of the SEQR threshold (“SEQRA mandates the preparation of an EIS when the proposed project may include the potential for at least one significant environmental effect”). In the professional opinion of the Village Planner, Mr. Galvin, and outside planning consultant, BFJ Planning, the Text Amendment would have no significant adverse impact on any of the items that Mr. Richmond has identified, including adverse visual, community/neighborhood character, shadows, and open space. In fact, we expect significant benefits to open space impacts if an applicant were to apply for and receive the special permit. We have attached for the Village Board's review the actual SEQR criteria for determining significance (617.7 (c)). Our review of these does not indicate any significant adverse impacts. The Village Board, as lead agency, needs to carefully evaluate these prior to

making your determination of significance. We believe that your careful discussion of issues have covered these twelve items.

In addition, we have reviewed the impact on the road network and sewer infrastructure as requested by Mr. Richmond in his memo. Due to the relatively small increase in density under the Text Amendment (two units per acre), the impact on the road network due to the incremental increase in number of units provided by the Text Amendment would be minor. Sherwood Design Engineers, the consulting engineer on the Comprehensive Plan update, has received information on capacity and daily flow of the Orangetown Wastewater Treatment Plant (WWTP) that serves sites in the WF District. According to the Orangetown Sewer Department, the WWTP is sized for 12.75 million gallons per day (MGD) and current daily flow is 7.9 MGD—well below capacity.

The only documented issues with regard to local sewers documented in the draft of the Infrastructure Chapter of the Comprehensive Plan update is inflow and infiltration (I&I) during heavy rainstorms, which causes backflow and discharge into the Hudson River. I&I is certainly an issue to be addressed in Nyack; however this is also a systemic and area-wide issue that will remain with or without the Text Amendment, with or without future development in the WF District, and with or without any incremental impacts. In fact, the best way to ameliorate I&I impacts is to increase local sewer tax revenue for the sewer district to study and address the issue. Further, redevelopment of waterfront sites offers an opportunity for improvements to existing sewer infrastructure that could address I&I.

4. Failure to find consistency with the Local Waterfront Revitalization Program (LWRP)

With respect to the question of consistency with the Village's LWRP, the Village Planner, Mr. Galvin, is producing a separate memo to address concerns that the proposed Text Amendment is inconsistent with the LWRP.

5. Consistency with the Existing Comprehensive Master Plan

We understand that Mr. Richmond has a minority view with respect to compliance with the existing Comprehensive Master Plan (CMP). His view that the Text Amendment is not compliant with the existing CMP is not held by the Village Planner, the outside consultant producing the Comprehensive Plan update, Scenic Hudson, or the Rockland County Planning Department, who has given two favorable 239m Reviews on this project. In fact, Mr. Richmond has quoted in his memo the exact words of the existing CMP that support this Text Amendment:

“...the existing zoning regulations shall remain in place for these lots with additional design guidelines that promote extension of a riverside walkway.”

The Text Amendment does not involve a remapping of parcels or change in the boundary of a zone and it does not change the basic underlying zoning regulations. What the Text Amendment does is amend the special permit section of the existing text with added design guidelines to not only promote extension of a riverfront walkway but to guarantee it. In so doing, the Text Amendment carries out a key objective of the existing CMP—true waterfront access that is publicly accessible.

We think that Mr. Richmond has misread the intent of the existing CMP. We have a great respect for Mr. Richmond and we are sure he realizes that if this Text Amendment is not deemed in conflict with the existing CMP, the Text Amendment is *per se* not spot zoning.

We have publicly said at previous meetings on this matter that there is no spot zoning involved. There is no new zone being created or mapped and the existing zone is remaining in place. What the Text Amendment does in the existing zone is create a special permit provision that adds design guidelines. The special permit in the Text Amendment could be applied to all 14 acres of above-water land and all 12 parcels in the WF District. No individual parcel is being mapped differently from another or carved out in any manner.

Finally, Mr. Richmond suggests a requirement that the Village Board not entertain the Text Amendment until the Comprehensive Plan update is completed. We note that he cites no case law to support this requirement. In fact, we know of no impediment to moving forward with a zoning text change to an existing zone because a Comprehensive Plan process is underway. For example, the City of New Rochelle has recently adopted a Downtown Overlay Zoning (DOZ) district in the midst of BFJ undertaking a Comprehensive Plan update for the City. John Nolan, head of the Pace Land Use Law Center, wrote a supporting e-mail to the City of New Rochelle on this exact issue saying that he saw no reason that the DOZ could not be adopted while the Comprehensive Plan was being developed.

As a practical matter, if there were any legitimacy to this concept, there are instances where good planning and appropriate zoning changes might be delayed for years—if not indefinitely. One case in point is the City of Mount Vernon, where Zarin & Steinmetz have acted as legal counsel. Six years ago, BFJ Planning prepared the Mount Vernon Comprehensive Plan under a previous mayor. Within months after the plan was completed but before adoption, a new mayor was elected. The new mayor chose not to act on adoption of the Comprehensive Plan and never completed the GEIS. Therefore, if Mount Vernon had not been able to make zoning changes during that period before the plan was adopted, the City would not have seen the significant development proposals that have been approved these past few years.

Additional Public Comment Received on April 14, 2016

In addition to Mr. Richmond's letter, there were other comments made during the Village Board meeting on April 14.

John Lipscomb, a boat captain for Riverkeeper, also raised the I&I issues on sewer lines that lead to discharge during storm events. As described above, I&I is a systemic area-wide issue in the Village of Nyack and throughout Rockland County and the region. The incremental increase of nine units on the two soft sites in the WF District will not cause a significant increase in flow of wastewater and the WWTP has the capacity to treat additional flow. The question is what is the best way to solve I&I problems that already exist in the Orangetown Sewer District? Providing taxable income on a current brownfield site in the WF District would increase the Sewer District's tax revenue substantially, helping Orangetown address systemic I&I problems.

John Gromada, a local resident, raised the suggestion that the Village Board not change the special permit requirements, but rather keep the existing permit to the Village Board while adding provisions for expanded public access and design guidelines. We see this as a policy call for the Village Board. We realize that the Village Board is weighing the benefits of expanded protections for public waterfront access, a riverfront walkway, public park, and design guidelines with slight increases in maximum building height and density. This policy call is up to the Village Board to make.

One question for the Village Board and their legal counsel to consider is whether they could take Mr. Gromada's suggestion—keeping the special permit area and bulk requirements as-is while also requiring private property be deeded to the public—

given the case of Nolan v. California Coastal Commission. In this case, there was a question as to whether the California Coastal Commission could require an easement over the Nolan property along the beachfront. The U.S. Supreme Court ruled that such a requirement would be an impermissible exaction tantamount to a property taking. We leave advice on this to be given by legal counsel to the Village Board.

Sincerely yours,

Frank Fish, FAICP

A handwritten signature in blue ink, appearing to read "Frank Fish".

Simon Kates, AICP, LEED AP

A handwritten signature in blue ink, appearing to read "Simon Kates".

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6 CRR-NY 617.7
NY-CRROFFICIAL COMPILATION OF CODES, RULES AND REGULATIONS OF THE STATE OF NEW YORK
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CHAPTER VI. GENERAL REGULATIONS
PART 617. STATE ENVIRONMENTAL QUALITY REVIEW6 CRR-NY 617.7
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617.7 Determining significance.

- (a) The lead agency must determine the significance of any Type I or Unlisted action in writing in accordance with this section.
- (1) To require an EIS for a proposed action, the lead agency must determine that the action may include the potential for at least one significant adverse environmental impact.
 - (2) To determine that an EIS will not be required for an action, the lead agency must determine either that there will be no adverse environmental impacts or that the identified adverse environmental impacts will not be significant.
- (b) For all Type I and Unlisted actions the lead agency making a determination of significance must:
- (1) consider the action as defined in sections 617.2(b) and 617.3(g) of this Part;
 - (2) review the EAF, the criteria contained in subdivision (c) of this section and any other supporting information to identify the relevant areas of environmental concern;
 - (3) thoroughly analyze the identified relevant areas of environmental concern to determine if the action may have a significant adverse impact on the environment; and
 - (4) set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation.
- (c) Criteria for determining significance:
- (1) To determine whether a proposed Type I or Unlisted action may have a significant adverse impact on the environment, the impacts that may be reasonably expected to result from the proposed action must be compared against the criteria in this subdivision. The following list is illustrative, not exhaustive. These criteria are considered indicators of significant adverse impacts on the environment:
 - (i) a substantial adverse change in existing air quality, ground or surface water quality or quantity, traffic or noise levels; a substantial increase in solid waste production; a substantial increase in potential for erosion, flooding, leaching or drainage problems;
 - (ii) the removal or destruction of large quantities of vegetation or fauna; substantial interference with the movement of any resident or migratory fish or wildlife species; impacts on a significant habitat area; substantial adverse impacts on a threatened or endangered species of animal or plant, or the habitat of such a species; or other significant adverse impacts to natural resources;
 - (iii) the impairment of the environmental characteristics of a critical environmental area as designated pursuant to section 617.14(g) of this Part;
 - (iv) the creation of a material conflict with a community's current plans or goals as officially approved or adopted;
 - (v) the impairment of the character or quality of important historical, archeological, architectural, or aesthetic resources or of existing community or neighborhood character;
 - (vi) a major change in the use of either the quantity or type of energy;
 - (vii) the creation of a hazard to human health;
 - (viii) a substantial change in the use, or intensity of use, of land including agricultural, open space or recreational resources, or in its capacity to support existing uses;

(ix) the encouraging or attracting of a large number of people to a place or places for more than a few days, compared to the number of people who would come to such place absent the action;

(x) the creation of a material demand for other actions that would result in one of the above consequences;

(xi) changes in two or more elements of the environment, no one of which has a significant impact on the environment, but when considered together result in a substantial adverse impact on the environment; or

(xii) two or more related actions undertaken, funded or approved by an agency, none of which has or would have a significant impact on the environment, but when considered cumulatively would meet one or more of the criteria in this subdivision.

(2) For the purpose of determining whether an action may cause one of the consequences listed in paragraph (1) of this subdivision, the lead agency must consider reasonably related long-term, short-term, direct, indirect and cumulative impacts, including other simultaneous or subsequent actions which are:

(i) included in any long-range plan of which the action under consideration is a part;

(ii) likely to be undertaken as a result thereof, or

(iii) dependent thereon.

(3) The significance of a likely consequence (*i.e.*, whether it is material, substantial, large or important) should be assessed in connection with:

(i) its setting (*e.g.*, urban or rural);

(ii) its probability of occurrence;

(iii) its duration;

(iv) its irreversibility;

(v) its geographic scope;

(vi) its magnitude; and

(vii) the number of people affected.

(d) Conditioned negative declarations.

(1) For Unlisted actions involving an applicant, a lead agency may prepare a conditioned negative declaration (CND) provided that it:

(i) has completed a full EAF;

(ii) has completed a coordinated review in accordance with section 617.6(b)(3) of this Part;

(iii) has imposed SEQR conditions pursuant to section 617.3(b) of this Part that have mitigated all significant environmental impacts and are supported by the full EAF and any other documentation;

(iv) has published a notice of a CND in the ENB and a minimum 30-day public comment period has been provided. The notice must state what conditions have been imposed. An agency may also use its own public notice and review procedures, provided the notice states that a CND has been issued, states what conditions have been imposed and allows for a minimum 30-day public comment period; and

(v) has complied with subdivision (b) of this section and section 617.12(a) and (b) of this Part.

(2) A lead agency must rescind the CND and issue a positive declaration requiring the preparation of a draft EIS if it receives substantive comments that identify:

(i) potentially significant adverse environmental impacts that were not previously identified and assessed or were inadequately assessed in the review; or

(ii) a substantial deficiency in the proposed mitigation measures.

(3) The lead agency must require an EIS if requested by the applicant.

(e) Amendment of a negative declaration.

(1) At any time prior to its decision to undertake, fund or approve an action, a lead agency, at its discretion, may amend a negative declaration when substantive:

(i) changes are proposed for the project; or

(ii) new information is discovered; or

(iii) changes in circumstances related to the project arise; that were not previously considered and the lead agency determines that no significant adverse environmental impacts will occur.

(2) The lead agency must prepare, file and publish the amended negative declaration in accordance with section 617.12 of this Part. The amended negative declaration must contain reference to the original negative declaration and discuss the reasons supporting the amended determination.

(f) Rescission of negative declarations.

(1) At any time prior to its decision to undertake, fund or approve an action, a lead agency must rescind a negative declaration when substantive:

(i) changes are proposed for the project; or

(ii) new information is discovered; or

(iii) changes in circumstances related to the project arise; that were not previously considered and the lead agency determines that a significant adverse environmental impact may result.

(2) Prior to any rescission, the lead agency must inform other involved agencies and the project sponsor and must provide a reasonable opportunity for the project sponsor to respond.

(3) If, following reasonable notice to the project sponsor, its determination is the same, the lead agency must prepare, file and publish a positive declaration in accordance with section 617.12 of this Part.

CROSS REFERENCES:

Preparation of environmental impact statement, Environmental Conservation Law § 8-0109.

Rules and regulations, Environmental Conservation Law § 8-0113.

Phased implementation, Environmental Conservation Law § 8-0117.

RESEARCH REFERENCES AND PRACTICE AIDS:

National Environmental Policy Act of 1969, Generally. 42 U.S.C.A. § 4321.

55 NY Jur 2d, Environmental Rights and Remedies §§ 57---62, 64.

61A Am Jur 2d, Pollution Control §§ 46, 47.

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Current through February 29, 2016

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