SHORT FORM ORDER **INDEX NO. 612800/2023**

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

DECISION, ORDER, and JUDGMENT

THE FORT SALONGA PROPERTY OWNERS ASSOCIATION, WILLIAM C. BERG, THOMAS P. CLEERE, MARK C. HENRY, LISA KNOPP, and ANDREW J. RAPIEJKO,

Petitioners,

-against-

THE PLANNING BOARD OF THE TOWN OF HUNTINGTON, THE PRESERVE AT INDIAN HILLS, LLC, THE NORTHWIND GROUP, LLC, FORT SLONGO, LLC, THE MAUDE D. ROBERG REVOCABLE LIVING TRUST, MICHAEL J. CAHILL, TRUSTEE, and BRUCE ROBERG,

Respondents.

ORIG. RETURN DATE: 08/10/23
FINAL SUBMISSION DATE: 08/10/23
MTN. SEQ. # 001 - MD
 # 002 - MD
 # 003 - MG
 # 004 - MG

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SELF-REPRESENTED RESPONDENT:
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Upon the e-filed documents numbered 1 through 81, it is

ORDERED that the Article 78 petition by the Fort Salonga Property Owners Association, William C. Berg, Thomas P. Cleere, Mark C. Henry, Lisa Knopp, and Andrew J. Rapiejko and all relief requested therein is denied, in accordance with the following decision, order, and judgment; it is further

ORDERED that the motion (#002) by the petitioners for an order granting them leave to extend their time to serve the respondent Bruce Roberg is denied, as moot, in accordance with the following decision, order, and judgment; it is further

ORDERED that the motion (#003) by the respondents the Preserve at Indian Hills, LLC, the Northwind Group, LLC, and Fort Slongo LLC for, *inter alia*, an order and judgment dismissing the petition as asserted against them, pursuant to CPLR 3211 (1), (5), and (7) and CPLR 7804, is granted, in accordance with the following decision, order, and judgment; it is further

ORDERED the motion (#004) by the respondent the Planning Board of the Town of Huntington for an order and judgment dismissing the petition as asserted against it, pursuant to CPLR 3211 (1), (5), and (7) and CPLR 7804, is granted, in accordance with the following decision, order, and judgment; and it is further

ADJUDGED that this proceeding is dismissed.

MEMORANDUM:

The instant matter challenges the actions of the respondent the Planning Board of the Town of Huntington ("the Planning Board"). It is a companion matter to another Article 78 proceeding filed by the same petitioners to challenge the actions and decisions of the Zoning Board of Appeals for the Town of Huntington ("ZBA") as to the development of the Indian Hills golf course property located in Fort Salonga, New York, bearing index number 601109/2023 in Supreme Court, Suffolk County. The proceeding challenging the actions of the ZBA is determined in a companion decision, order, and judgment, which has been issued simultaneously herewith.

In the instant proceeding, the petitioners seek to annul and vacate the actions of the Planning Board of the Town of Huntington ("the Planning Board") as to the same property. Both petitions concern a project for the development of the property comprising the Indian Hills Golf Club. The petitioners name both the municipal entities

herein, as well as the several entities comprising the private developers and private landowners as respondents to both petitions. Except for the substitution of the Planning Board for the Zoning Board of Appeals, the parties are identical in both special proceedings.

The litigation history in opposition to this project is long and storied, and the community opposition to this project is significant. The community opposition comprises ecological and public safety concerns to the adjoining landowners, as well as to the surrounding community, all of whom will be affected by the proposed changes in pursuit of the development of this unique property.

The Parties

The petitioners herein are the Fort Salonga Property Owners Association ("FSPOA"); William C. Berg ("Berg"); Thomas P. Cleere ("Cleere"); Mark C. Henry ("Henry"); Lisa Knopp ("Knopp"); and Andrew J. Rapiejko ("Rapiejko").

The respondents are the Planning Board; the Preserve at Indian Hills, LLC, the Northwind Group, LLC; Fort Slongo, LLC (collectively referred to as "the Indian Hills Development Group" or "IHDG"); the Maude D. Roberg Revocable Living Trust ("the Roberg Trust"); Michael J. Cahill, Trustee ("Trustee Cahill"); and Bruce Roberg ("Roberg").

The Record

In rendering its decision, order, and judgment, the Court has considered each of the exhibits submitted by counsel, and has fully reviewed each document in conjunction with the submissions of the petitioners and the respondents in accordance with the following schedule:

> Motion Sequence #001, NYSCEF Document Numbers 1 through 42
> Motion Sequence #002, NYSCEF Document Numbers 43 through 45
> Motion Sequence #003, NYSCEF Document Numbers 46 through 59, 71 through 75, and 80
> Motion Sequence #004, NYSCEF Document Numbers 60 through 70, and 77 through 79

Given the interrelationship of the petition and motions, the Court hereby consolidates the four pending applications for determination.

The Petition

The petitioners proffer three causes of action, as set forth herein below:

FIRST CAUSE OF ACTION

The Planning Board failed to hold a duly noticed public hearing prior to granting conditional final approval to the final maps for the Indian Hills Development, in violation of New York's Public Officers Law § 103 (e) and § 2-2 of the Huntington Town Code.

SECOND CAUSE OF ACTION

The Planning Board unlawfully approved the Indian Hills Development, in violation of Huntington Town Code §§ 198-14 and 114, and New York Town Law § 278 (3)(b).

THIRD CAUSE OF ACTION

The Planning Board failed to comply with State Environmental Quality Review Act (SEQRA) obligations, in violation of 22 NYCRR Article 6, § 617 *et seq.*

Motions Before the Court

The Indian Hills Development Group move (Motion Sequence #003), and the Planning Board also moves (Motion Sequence #004), for an order and judgment dismissing the petition in its entirety, pursuant to CPLR 3211 (1), (5), and (7), as well as CPLR 7804.

For the reasons that follow, the Court finds that the petition has been brought long after the Planning Board's decision-making process had concluded and the time to commence any legal challenge had expired. The petitioners' failure to file a timely action against the preliminary site plan approval or the final environmental impact statement (FEIS) is an undisputed fact, on which issue the case law is clear and unambiguous.

Indian Hills Development Group ("IHDG") Motion to Dismiss (Motion Sequence #003) Theories

On May 19, 2023, the petitioners commenced this special proceeding against the Planning Board. IHDG alleges that the petition is untimely, as the petitioners failed to commence the proceeding within the thirty (30) day statute of limitations, as set forth by Huntington Town Law § 282. On April 18, 2023, the Planning Board filed its final approval of the subdivision map that is the subject of the instant proceeding. As a result, in order to contest the April 18, 2023 resolution, the instant petition was required to be filed no later than May 18, 2023. However, the record before the Court indicates that the petition was not properly filed in Suffolk County until May 19, 2023, which is undisputed by the parties. The petitioners proffer the excuse that, on the last day to file timely, the matter was filed in the New York State Supreme Court in Sullivan County.

Nevertheless, given the type of proceeding, this matter was required to be filed in Suffolk County, where the subject property is located. Although possibly inadvertent, the filing in error was a nullity.

IHDG further argues that, even if the untimeliness of the petition can somehow be excused with respect to the April 18, 2023 Planning Board resolution, the instant petition suffers from the same problem as that of the January 14, 2023 Petition against the ZBA, bearing index number 601109/2023: the claims the petitioners now raise, challenging the SEQRA process for the subdivision and the approval of the subdivision itself, should have been brought over 2 years ago when the Planning Board filed its preliminary approval for the clustered subdivision on May 18, 2021. Under established New York law, any claims challenging a subdivision approval must be raised in an Article 78 proceeding against the Planning Board commenced no more than 30 days after the Planning Board files its preliminary approval of a proposed project (*see* ***Matter of Long Is. Pine Barrens Socy. v Planning Bd. of Town of Brookhaven***, 78 NY2d 608, 578 NYS2d 466 [1991]).

IHDG argues, and the record shows, that, instead of bringing a timely Article 78 Petition against the May 18, 2021 approval, the petitioners waited over two years to bring the instant Article 78 proceeding, and they did so challenging only the final subdivision approval. The petitioners do not proffer any legal citation contradicting or sufficiently differentiating the controlling Court of Appeals authority as set forth in the *Matter of Long Is. Pine Barrens Socy. v Planning Bd. of Town of Brookhaven*, *supra*.

IHDG further argues that, even if the Court could consider the petitioners' twice untimely claims, such claims lack substantive merit, and as such, they should be dismissed. IHDG states that, upon their review of the petition, despite being over 200 paragraphs and 54 pages in length, the petitioners bring only three causes of action:

a. they first raise trivial complaints about compliance with the Public Officers' Law, which do not rise to level of vacating the Indian Hills subdivision approval;

b. they then raise, now for the third time, a faulty claim that the Planning Board was not permitted to consider the cluster zoning, despite the fact that this Court, (Luft, J.) already opined that any such argument would be "spurious" (*see* prior action, ***Berg v Cahill***, bearing index number 621195/2016, Supreme Court, Suffolk County; related Appellate Division, Second Department decision, ***Berg v Cahill***, 213 AD3d 725, 184 NYS3d 357 [2d Dept 2023]); and

c. finally, the petition nitpicks the expansive and thorough SEQRA process undertaken with respect to the application, which spanned over three

years, involved input from numerous entities and stakeholders, and involved thousands of pages of information, as part of their continued attempt to derail the Indian Hills project.

Planning Board's Motion to Dismiss (Motion Sequence #004) Theories

Statute of Limitations

I. "Unless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner . . . . (*see* CPLR 217 [1]). Correspondingly, Town Law § 282 sets forth, in relevant part, any person or persons, jointly or severally aggrieved by any decision of the planning board concerning such plat or the changing of the zoning regulations of such land, . . . , may have the decision reviewed by a special term of the supreme court in the manner provided by article seventy-eight of the civil practice law and rules provided the proceeding is commenced within thirty days after the filing of the decision in the office of the town clerk. Moreover, the Court of Appeals has held that this statute places the burden upon the aggrieved party to ascertain when the board's decision was filed with the town clerk (*see* ***Matter of King v Chmielewski***, 76 NY2d 182, 186, 556 NYS2d 996 [1990] [internal citations omitted]).

Jurisdiction of the Planning Board

II. The Planning Board had authority to approve IHDG's clustered subdivision

The petitioners continue to argue here, as they do in the companion case brought against the ZBA, that the Planning Board lacked authority to approve the application for a change of zone and approve the cluster subdivision. However, the Court finds that the petitioners are incorrect.

Pursuant to Huntington Town Code § 198-114, in relevant part, as to cluster developments, the Planning Board is empowered to act pursuant to § 276 of the Town Law, such board may make any reasonable modification of the zoning regulations applicable to the land so platted as authorized by § 278 of the Town Law and as specified in this article. The Town of Huntington has chosen to delegate both the general power to approve subdivisions and the specific power to approve cluster subdivisions to the Planning Board.

Both the New York Supreme Court and Appellate Division have ruled on the issue of cluster developments, as well as whether a planning board has the authority to

make such approvals. In *Matter of Bates v Planning Bd. of Town of Huntington*, the Appellate Division, Second Department affirmed the order and judgment of Judge Oliver, who opined, "Huntington Town Code § 198-114 provides that it applies to all lands authorized by Town Law § 278 and Town Law § 278 incorporates all zoning districts listed in Town Law § 262. As such, the Huntington Town Code section is specific, and it is not void (*see* Motion Sequence #004, Exhibit G, Short Form Order, Index No. 17085/2000, Sup Ct, Suffolk County 2001), annexed to the Napolitano Affirmation; ***Matter of Bates v Planning Bd. of Town of Huntington***, 297 AD2d 806, 747 NYS2d 807 [2d Dept 2002], *cert denied* 99 NY2d 506, 755 NYS2d 713 [2003]).

In a prior litigation by the petitioner Berg against the Planning Board as to an easement on Breeze Hill Road, the Court noted in footnote 1:

> "The court cannot help but note that the statutory construction argument raised by plaintiffs to the effect that the very creation of the Residence-Open Space Cluster District in Town Code § 198-21.3 over-rode the Town's authority to consider residential cluster development pursuant to Town Code § 198-114 is utterly spurious. There is nothing in either the legislative intent nor the language of the Code provision itself that indicates any such limitation" (*see* Motion Sequence #004, Exhibit H, Short Form Order, ***Berg v Cahill***, Index No. 621195/2016 [Sup Ct, Suffolk County 2019) [Luft, J.], annexed to the Napolitano Affirmation).

After review and due deliberation, the undersigned agrees, concurs, and independently finds that Huntington Town Code § 198-21.3 does not in any way preclude, prohibit, or amend residential cluster development pursuant to Town Code § 198-114.

The Planning Board further argues that the Town of Huntington delegated authority to it as to subdivisions and lot creation, pursuant to Huntington Town Code § 198-118, specifically § 198-118 (A) and (B), which state, in relevant part:

> "A. Subdivision approval required. every person or business entity, whether or not incorporated, who engages in the subdivision or resubdivision of real property in any zoning district within the Town of Huntington shall be required to obtain . . . approval from the Planning Board . . .
>
> B. Authority of the Planning Board. In accordance with Town Law § 276 the Planning Board shall be authorized to approve, with or without conditions, preliminary and final plats showing lots, blocks or sites . . . "

Additionally, Huntington Town Code § 198-144, Cluster Developments, sets

forth:

> "Simultaneously with the approval of any plat upon which the Planning Board is empowered to act pursuant to § 276 of the Town Law, such Board may make any reasonable modification of the zoning regulations applicable to the land so platted as authorized by § 278 of the Town Law...[a]ny such modification of the zoning regulations shall be made to provide an alternative permitted method for the layout, configuration and design of lots, buildings and structures..."

It is quite evident that the Petitioners' arguments that the Planning Board had no authority to approve IHDG's application are both specious and disingenuous. These arguments fail in light of the Huntington Town Code and relevant court decisions.

Both IHDG and the Planning Board correctly argue the Planning Board's authority to rule upon subdivision applications as exist herein. Therefore, the petitioners' second cause of action is dismissed, as a matter of law.

SEQRA

The Planning Board addresses the timeliness issue concerning SEQRA, citing *Matter of Haggerty v Planning Bd. of Town of Sand Lake*, wherein the Court opined that, in applying the shorter statute of limitations to cases involving SEQRA determinations, "the courts are often confronted with the question of when the Statute of Limitations began to run" (***Matter of Haggerty v Planning Bd. of Town of Sand Lake***, 166 AD2d 791, 792, 563 NYS2d 151 [3d Dept 1990] [internal citations omitted]).

In *Haggerty*, the Court set forth the applicable limitations period in SEQRA matters such as these:

> "We recently explained that 'in order to determine what event triggered the running of the Statute of Limitations, we must first ascertain what administrative decision petitioner is actually seeking to review and then find the point when that decision became final and binding and thus had an impact upon petitioner.' This assessment becomes more difficult when an ongoing planning and approval process exists, and no permit or certificate of approval is to be issued (*see* ***Matter of Haggerty v Planning Bd. of Town of Sand Lake***, *supra*).

Here, the Planning Board was designated as the lead agency for SEQRA. As lead agency, it conducted a coordinated review with the requisite agencies, including the ZBA, which was an involved agency for purposes of SEQRA. An "involved" agency is defined by SEQRA as an agency with discretionary jurisdiction "to fund, approve or directly undertake" some aspect of the project (*see* 6 NYCRR § 617.2 [t]). To avoid

duplication of effort, only one "involved" agency will be named "lead agency" to coordinate the efforts of all others (*see* 6 NYCRR § 617.6). A challenge may only be commenced by another "involved" agency (*see* 6 NYCRR § 617.6 [e]) to remove, forthwith, a residential sleeping area in the club facility that had been constructed without approval (*see* ***Matter of King v County of Saratoga Indus. Dev. Agency***, 208 AD2d 194, 201, 622 NYS2d 339 [3d Dept 1995], emphasis added).

SEQRA Timeline

On March 28, 2018, the Planning Board, by resolution, "established itself as Lead Agency, classified the project as a Type I Action and issued a Positive Declaration pursuant to SEQRA . . ." (*see* Motion Sequence #004, Exhibit C, April 7, 2021 Huntington Town Planning Board Resolution, filed with the Town Clerk on April 13, 2021). IHDG filed its draft environmental impact statement (DEIS), which was accepted by the Planning Board on August 21, 2019, and a public hearing on the DEIS was held on September 18, 2019. On August 6, 2020, IHDG then filed their FEIS, revised it on December 11, 2020, and again on January 29, 2021. On April 7, 2021, the Planning Board, at its regular meeting, adopted the FEIS and directed that the Town's Department of Planning and Environment file the Findings Statement with the appropriate agencies. The Planning Board alleges that it undertook a detailed, prolonged, and hard look at the potential environmental impacts of the project, as set forth at its May 12, 2021 meeting and codified in the resolution filed with the Town Clerk on May 18, 2021 (*see* Motion Sequence #004, Exhibit D).

The Planning Board, likewise, cites to *Matter of Long Is. Pine Barrens Socy. v Planning Bd. of Town of Brookhaven*, as it relates to a challenge based on the environmental review procedure:

> "Town Law § 276 establishes a two-stage (preliminary and final) subdivision plat approval procedure. Town Law § 282 states that '[a]ny person...aggrieved by any decision of the planning board concerning such plat...may have the decision [judicially] reviewed...provided the proceeding is commenced within thirty days after the filing of the decision.' The question in the petitioners' appeal is whether the time for commencing a proceeding under section 282 begins to run upon the filing of the preliminary plat approval or the final approval decision when the challenge to the plat is solely on environmental grounds and the environmental review procedure is completed prior to the filing of the decision approving the preliminary plat. we hold that under such circumstances, petitioners were required to commence their challenge within 30 days of the filing of the preliminary, not the final, plat approval decision (***Matter of Long Is. Pine Barrens Socy. v Planning Bd. of Town of Brookhaven***, *supra*, at 610).
>
> Accordingly, any challenge to SEQRA had to be filed by May 13, 2021. Here, the

petitioners' SEQRA challenge comes approximately twenty-five (25) months after the Planning Board's approval of the FEIS on April 7, 2021, the resolution memorializing such FEIS approval filed on April 13, 2021, the Planning Board's grant of preliminary approval on May 12, 2021, and the resolution memorializing such preliminary approval filed on May 18, 2021.

Petitioners' SEIS Argument

The petitioners further argue that a supplemental environmental impact statement ("SEIS") should have been required by the Planning Board. In *Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, 9 N.Y.3d 219 (2007) the Court of Appeals held that "[t]he lead agency has the discretion to weigh and evaluate the credibility of the reports and comments submitted to it and must assess environmental concerns in conjunction with other economic and social planning goals" (***Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast***, 9 NY3d 219, 231, 851 NYS2d 76 [2007] [internal citations omitted]). The Court specifically stated that "[i]t is not the province of the courts to second-guess thoughtful agency decision making ... [t]he 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" (***Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast***, *supra*, at 292).

Accordingly, as the Petitioners' SEQRA challenge is untimely, their third cause of action is dismissed.

Planning Board's Public Meetings Law Arguments

As to the first cause of action, the Planning Board submits it resolution, filed in the Town Clerk's Office on April 18, 2023, showing that the Planning Board held ten (10) public hearings on IHDG's application (see Motion Sequence #003, Exhibit B). In each case, the Planning Board complied with the public hearing notice requirements, and moreover, the Town of Huntington's requirements, at least twenty-four (24) hours prior to any hearing, and it posted the agenda and relevant applications/documents to be discussed at each meeting on its website (*see eg*, Town of Huntington website for upcoming July 19, 2023 Planning Board meeting at https://huntingtonny.granicus.com/GeneratedAgendaViewer.php?view_id=3&event_id=1777).

Additionally, the Planning Board joins and supports the arguments set forth in Point V of the Northwind respondents' memorandum of law in support of their motion to dismiss. The Court notes that the petitioners concede that the Planning Board extended the time period for public comment on the project. The Appellate Division, Second Department, in the *Matter of Peehl v Village of Cold Spring*, dismissed the

claims premised on alleged violations by the ZBA of the Open Meetings Law, Public Officers Law § 100 *et seq.*, stating, although "courts are empowered, in their discretion and upon good cause shown, to declare void any action taken by a public body in violation of the [the Open Meetings Law]," "not every breach of the [Open Meetings Law] automatically triggers its enforcement sanctions (***Matter of Peehl v Village of Cold Spring***, 129 AD3d 844, 845, 12 NYS3d 139 [2d Dept 2015] [internal citations omitted]; *see also* ***Matter of New York Univ. v Whalen***, 46 NY2d 734, 735, 413 NYS2d 637 [1978] [internal citations omitted]). Here, the Court finds that there is no factual support in this record for a finding sufficient to void the actions of the Planning Board.

Petitioners' Opposition to Respondents' Motions

Planning Board versus Town Board Jurisdiction

The petitioners argue that the 1995 Special Use Permit specifically prohibited the existence of residential facilities within the authorized Golf Course, and ordered the Indian Hills Country Club to remove the sleeping facilities. Further, the petitioners argue that 1995 Special Use Permit makes clear that residential use of the subject property is forbidden, writing that "[v]irtually no provision for such quarters is contained in the Town Code and the argument that same is non-conforming is unavailing. Once this residential structure was converted to a club facility its prior use as a residence was terminated in the eyes of zoning law." From this limited ruling as to sleeping quarters, the petitioners wish this Court to conclude that any residential cluster density application must either be made to the Town Board as a change of zone, or, alternatively, that, because the ZBA dealt with the elimination of sleeping quarters in the golf course clubhouse, the ZBA now has either original or some other limited jurisdiction over any residential application of any type on the golf course property. However, no legislative support for this contention is offered, other than the conclusion itself. In contrast, and dispositive of this issue, the Town Code specifically grants the Planning Board jurisdiction over cluster density development, without limitation as to type or classification of zone (*see* Huntington Town Code § 198-114). Further, in its resolution, the Planning Board made specific reference to the ZBA's input regarding the Special Use Permit as it concerned the Golf Course component of the project.

The petitioners further allege that, as currently configured, the Indian Hills Development would greatly exceed the maximum allowable yield permitted in an R-40 Residence District under the terms of Town Law § 278 (3)(b), and it fails to comply with the yield requirements mandated by the Suffolk County Department of Health Services (SCDHS) in its "General Guidance Memorandum #17 for Agricultural and Golf Course Density," issued on May 13, 2002.

As to the SCDHS, it has yet to rule on this application, and the parties have not provided any update concerning the Health Department application, other than a representation that the Health Department has notified the applicant that the application

was incomplete. The point is well taken that the Suffolk County Department of Health does not normally take acreage dedicated to two different purposes into consideration when performing their density calculations under General Guidance Memorandum #17, i.e. combined and simultaneous golf course use and residential use, and, according to the rule for density calculation, it is one or the other use, but not both.

As to the maximum allowable yield question as to cluster density, there has been no offer of any calculation by the petitioners, nor as a cause of action as a violation of law by their petition. Accordingly, the Court will not speculate as to the silence of the parties in this regard.

The Planning Board has the statutorily conferred power to act with respect to cluster density without limitation as to zone type, and there has been no citation of any restriction to the contrary.

Petitioners' SEQRA Arguments

One of the main underpinnings of the petitioners' challenges to both the Planning Board approvals concerning the preliminary site plan and the ZBA's approval of the Special Use Permit is the petitioners' opinion that the ZBA, rather than the Planning Board, should have been the lead agency for SEQRA review purposes. However, the Court finds that there is no legal basis offered for this assertion, other than the apparent belief that the historical nature of the ZBA's involvement with the Golf Course-related structures would give the ZBA the primary authority of review and approval for the density cluster development proposed by IHDG. Other than this subjective opinion, the Court finds that there is no legal basis for such an assertion.

This theory may very well be born of the fact that the petitioners failed to timely commence an Article 78 proceeding to challenge the Planning Board's preliminary site plan approval or the SEQRA decision. As outlined above and in the companion decision issued herewith, the Court of Appeals has ruled squarely on these issues. The time to challenge the Planning Board's actions had passed prior to the filing of any petition herein. Nevertheless, the Court notes that its decisions rendered as to the Planning Board and the ZBA are not a grant of *carte blanche* to the IHGD or the property owners moving forward.

The petitioners' environmental concerns merit noting and discussion. As the petitioners suggest, the lack of a graphical depiction of vertical and horizontal groundwater flows or the technical bases for the conclusions concerning water flows is an area that may require further study. Also of concern is the equivocation and conditional opinion set forth in the AECOM report. The conclusion contained therein that 120 feet *may* be enough of a buffer *provided* the hydrology and shoreline conditions outside the Coastal Erosion Hazard Line *do not change* is cause for concern going forward, based upon the history and evolution of the conditions of the property in

terms of significant natural changes. There is uncertainty concerning the stability of the area to be developed ,which resulted in AECOM's recommendation that subdivision approval plans prior to ground-breaking should include *detailed* slope stability and drainage calculations to be submitted for review to the Town of Huntington. The Court does not find a detailed study in the record.

In response to this recommendation, the Northwind respondents withdrew and removed 12 of the planned units in proximity to the Coastal Erosion Hazard Area, but the 12 units may be relocated to some other area on the property. How such an action will impact cluster density and Suffolk County Health Department density concerns remains to be seen. However, the study recommendations of AECOM, according to the record before the Court, have not been undertaken, nor were they required by the Planning Board.

Of further concern is the fact that 24 of the proposed units are 120 feet distant from the Coastal Erosion Hazard Area. Additionally, the proposed roadway leading to those 24 units is even closer to the Coastal Erosion Hazard Area as proposed. The Court is unable to find a reference in either the subdivision application or SEQRA supporting documentation as to the construction of the roadway, or its use during the construction process within the 120-foot distance of the Coastal Erosion Hazard Area. Nor can the Court find any examination by the Planning Board staff or consultants in this regard. These issues relating to the roadway, as stated in the Planning Board Resolution, asserts continuing and ongoing jurisdiction of the agencies and departments of the Town of Huntington and the County of Suffolk in relation to this development project. This is not a project miles inland where these concerns would not be an issue. This is a unique property and a unique location that presents rare and consequential planning, engineering, development, and construction challenges.

Planning Board's Reference to the ZBA

On May 12, 2021, the Planning Board approved a written resolution, which it subsequently filed with the Town Clerk on May 18, 2021, that resolved to grant preliminary approval to the Northwind respondents' "Preliminary Maps" for the Indian Hills Development, subject to the satisfaction of certain conditions ("the May 12, 2021 Resolution").

The second of the six delineated conditions was:

> "2. The applicant shall provide an interpretation from the Zoning Board of Appeals that the proposed site plan does not require a hearing or any additional review by the Zoning Board pursuant to Huntington Town Code, including but not limited to Chapter 198-109(I) and 198- 110(C)(5), or the applicant shall provide other written correspondence from the Zoning Board of Appeals with

respect to the proposed site plan."

Huntington Town Code § 198-109 (I) states:

> "The Zoning Board of Appeals shall have continuing jurisdiction over expansions, alterations or modifications to properties where special use permits have previously been granted by the Board."

Huntington Town Code § 198-110 (C)(5) relates to golf courses and the issuance of special permits.

Petitioners Claim Concerning Requirement of ZBA Approval for the Development Project

The petitioners claim that the Planning Board's May 12, 2021 Resolution explicitly conditioned its grant of preliminary approval to the Northwind respondents' "Preliminary Maps" on the condition that they obtain a favorable determination from the ZBA approving such development plans. However, the Court finds that was not the language used in the resolution as to the ZBA's involvement in the process. The resolution directed the applicant to provide an interpretation regarding the site plan, and it did not require a hearing or additional review by the ZBA. As an alternative, the applicant was given the option to provide written correspondence from the ZBA regarding the proposed site plan. In addition, specific reference was made to Huntington Town Code §§ 198-109 (I) and 198-110 (c)(5). The Court finds that there was no additional participation sought by the Planning Board other than that which the ZBA chose, in its discretion, to provide, as requested by the Planning Board.

The petitioners' interpretation of this condition is that separate approval of the site plan by the ZBA was required. As set forth in the companion decision and order issued herewith, the ZBA, in its discretion, chose to undertake the review of the Special Use Permit concerning the golf course and the improvements thereto relating to the club house, maintenance shack, and the attendant golf course activities in the context of the existing Special Use Permit. In the companion decision issued herewith, the undersigned holds that:

> "As set forth in the Resolution, the Planning Board required a statement of the ZBA that the proposed site plan does not require a hearing or any additional review by the ZBA or other written correspondence from the ZBA concerning the site plan. The language of the Resolution does not constitute a requirement that the ZBA duplicate or supplement the approval of the Planning Board. Its plain reading states that, if the ZBA does not require any additional fact finding on the site plan or approval of

> their own for the site plan for the overall cluster zoning development, that will be communicated by the applicant to the Planning Board. The applicant was directed in the disjunctive to either provide an interpretation from the ZBA, or the applicant can provide written correspondence from the ZBA. The independence of the ZBA and whether and to what extent the ZBA chose to exercise its discretion is within the exclusive purview of the ZBA."
> (see companion decision, order, and judgment of even date herewith under Index No. 601109/2023, page 9)

The Planning Board made specific reference to Huntington Town Code sections related to Special Use Permits previously issued and Special Use Permits related to golf courses. The Court finds that the ZBA exercised the jurisdiction and discretion it deemed appropriate in the circumstances. In addition, the petitioners make reference to a Special Use Permit, which they allege governs the Indian Hills Golf Course, called Special Use Permit #15018, issued on June 22, 1995 ("the 1995 Special Use Permit"). However, the Court finds that the petitioners seek to procedurally commandeer the Special Use Permit, and, by extrapolation, seek to confer powers and responsibilities upon the ZBA, which the ZBA has rejected.

Accordingly, the respondents' motions are granted as stated above, and the petition is hereby dismissed in its entirety. Moreover, the petitioners' unopposed motion for leave to extend their time to serve the respondent Bruce Roberg with the petition is denied, as moot.

The foregoing constitutes the decision, order, and judgment of this Court.

Dated: November 14 , 2023

HON. JOSEPH FARNETI
Acting Justice of the Supreme Court

__X__ FINAL DISPOSITION **_____ NON-FINAL DISPOSITION**