SHORT FORM ORDER **INDEX NO. 601109/2023**

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 ZONING BOARD OF APPEALS 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: 08/24/23
FINAL SUBMISSION DATE: 08/24/23
MTN. SEQ. # 001 - MD
 # 002 - MG
 # 003 - MG
 # 004 - MD

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SELF-REPRESENTED RESPONDENT:
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Upon the e-filed documents numbered 1 through 45, 46 through 56, 57 through 78, 79 through 97, and 103 through 120, 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 respondents the Preserve at Indian Hills, LLC, the Northwind Group, LLC, and Fort Slongo LLC for, *inter alia*, an order dismissing the petition as asserted against them, pursuant to CPLR 3211 (a)(1), (5), and (7), as well as CPLR 7804, is granted, in accordance with the following decision, order, and judgment; it is further

ORDERED that the motion (#003) by the respondent the Zoning Board of Appeals of the Town of Huntington for, *inter alia*, an order dismissing the petition as asserted against it, pursuant to CPLR 3211 (a)(7), is granted, in accordance with the following decision, order, and judgment; it is further

ORDERED that the motion (#004) by the petitioners for, *inter alia*, a preliminary and permanent injunction against the respondents the Preserve at Indian Hills, LLC, the Northwind Group, LLC, and Fort Slongo LLC enjoining them from engaging in certain activities is denied; and it is further

ADJUDGED that the proceeding is dismissed.

MEMORANDUM:

Before the Court is a CPLR Article 78 proceeding, whereby the petitioners seek an order and judgment, pursuant to CPLR 7803 (3), annulling, vacating, and setting aside purported decisions of the respondent Zoning Board of Appeals of the Town of Huntington ("the ZBA") on the grounds that said decisions were issued in violation of lawful procedure, were affected by an error of law, were arbitrary and capricious, and were an abuse of the ZBA's discretion. More particularly, the petitioners seek a judgment:

(1) finding that the December 15, 2022 vote legally resulted in a denial of the application by the respondents the Northwind Group, LLC, the Preserve at Indian Hills, LLC, Fort Slongo, LLC, the Maude D. Roberg Revocable Living Trust, Michael J. Cahill, Trustee, and Bruce Roberg ("the Northwind respondents"), and instructing the ZBA to reflect that all three subparts of the Omnibus Motion, which purported to "adopt[] the findings statement of the Zoning Board of Appeals pursuant to 617.11", "decid[e] and determin[e] that the Application by the Preserve at Indian Hills for a cluster development pursuant to Town Code 198-114 to the Planning Board was in an appropriate forum", and to grant the Northwind respondents' request for a modified special use permit to operate golf course in a residential area, have been denied;

(2) annulling, vacating, and setting aside the December 15, 2022 actions of the ZBA, which purported to "adopt[] the findings statement of the Zoning Board of Appeals pursuant to 617.11," "decid[e] and determin[e] that the application by the Preserve at Indian Hills for a cluster development pursuant to Town Code 198-114 to the Planning Board was in an appropriate forum," and to grant the Applicant's request for a special use permit to operate a golf course in a residential area, subject to certain conditions;

(3) annulling, vacating, and setting aside the ZBA's statement through its special counsel that the December 15, 2022 vote resulted in approval of the application;

(4) preliminarily and permanently enjoining the ZBA from taking any further actions in reliance on the purported December 15, 2022 vote concerning the Indian Hills Development; and

(5) preliminarily and permanently enjoining the Northwind respondents from taking any further actions in reliance on the purported December 15, 2022 vote concerning the Indian Hills Development.

The Court also notes that the petitioners in this special proceeding have commenced another Article 78 proceeding against the Planning Board of the Town of Huntington ("Planning Board"), as well as the same respondents in this proceeding, save the ZBA, which is also in this Part's inventory. In that proceeding, bearing index number 612800/2023, the petitioners are challenging the actions of the Planning Board of the Town of Huntington, and that challenge is determined by a contemporaneous decision, order, and judgment of this Court, issued herewith.

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 ZBA; 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 Property

The parcel proposed for development and improvement is the Island Hills Country Club ("IHCC") golf course, which is located in Fort Salonga, Town of Huntington, Suffolk County, New York. The ZBA has jurisdiction of the Special Use Permit required for the operation of a golf course in the Town of Huntington. This matter involves the IHDG application for modification of the existing Special Use Permit.

The Petition

The petition sets forth certain alleged infirmities of both a procedural and substantive nature, and the parties have each supplemented their submissions with a thorough and complete record of the actions taken by the ZBA, as well as the history of the improvements and additions to the IHCC property. The parties have submitted a significant number of documents relating to the processes undertaken by the ZBA and the participation of the petitioners in those processes and proceedings.

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 Nos. 1 through 45
Motion Sequence #002, NYSCEF Document Nos. 57 through 78, and 80 through 89
Motion Sequence #003, NYSCEF Document Nos. 46 through 56, 79, and 90 through 97
Motion Sequence #004, NYSCEF Document Nos. 103 through 120

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

Standing

Organizational Standing

The FSPOA, as an entity, has standing to petition this court for the relief requested, as it satisfies the requirements as outlined in *Matter of Douglaston Civic*

Assn. v Galvin, 36 NY2d 1, 364 NYS2d 830 [1974]. The affidavit of FSPOA President Thomas John Hayes (see Motion Sequence #002, Exhibit 1, NYSCEF Doc. No. 81), the demonstrated participation of FSPOA members and their counsel in this proceeding, as well as the companion proceeding, demonstrates its capacity to assume an adversary position, the size and composition reflecting a position fairly representative of the community interests sought to be protected, and the adverse effect of the decision sought to be protected on the group represented by the organization, is within the zone of interests sought to be protected, and there are no limitations on full participating membership, as it is open to all residents and property owners in the relevant neighborhood (*see* ***Matter of Douglaston Civic Assn. v Galvin***, *supra*, at 7-8 [internal citations omitted]). The Court's analysis as to standing relates to the Special Use Permit application process concerning the operation of a golf course and the attendant proposed modifications and improvements. The opposition to the Special Use Permit application is a subset of the FSPOA's overarching purpose of opposing the overall development of the golf course property. The Court finds that, under the circumstances presented in its opposition to and in the context of the Special Use Permit application, the FSPOA has satisfied the *Douglaston* test.

Individual Standing

The individual petitioners provide their affidavits, to wit, Berg, Cleere, Henry, Knopp, and Rapiejko, and each assert standing to challenge the actions of the ZBA in their own right for the purpose of prosecuting this proceeding. An examination of their individual affidavits reveals that it is primarily the cluster development aspect of the project that they oppose. The affidavits of Berg (*see* Motion Sequence #002, Exhibit 2, NYSCEF Doc. No. 82), Henry (see Motion Sequence #002, Exhibit 4, NYSCEF Doc. No. 84), and Knopp (*see* Motion Sequence #002, Exhibit 5, NYSCEF Doc. No. 85) offer no comment concerning the Special Use Permit application concerning the operation of the golf course or the attendant proposed modifications and improvements regarding the matter before the ZBA.

By his affidavit, Cleere states, at paragraph 11, "[s]ince the plans for the proposed 'Preserve at Indian Hills Development' call for the Indian Hills Country Club golf course club house to be significantly expanded in size so that it can host more catered events with larger numbers of guests, the total amount of noise and traffic along on [sic] Breeze Hill Road in our neighborhood will dramatically increase as a direct result of the proposed development. Cleere resides at 16 Breeze Hill Road, Northport, Huntington (*see* Motion Sequence #002, Exhibit 3, NYSCEF Doc. No. 83). Although his is the only affidavit that specifically mentions the proposed expansion of the club house, the harms he alleges are generalized harms concerning traffic in the neighborhood. The assertions do not comprise particularized harm other than what may be encountered by the public at large.

By his affidavit, Rapiejko, at paragraphs 17 through 20 (*see* Motion Sequence

#002, Exhibit 6, NYSCEF Doc. No. 86), sets forth specific information concerning the maintenance facility at the golf course and violations as to its operation, which allegedly violate the current Special Use Permit. The Rapiejko property, located at 15 Thornton Drive, Northport, Huntington, is directly adjacent to the maintenance facility. The Court notes that, within the current application approved by the ZBA, the use of the maintenance facility and the number of anticipated employees was to increase with respect to the operation of the golf course.

Although Rapiejko has sufficiently demonstrated entitlement to individual standing in this proceeding, Cleere, Berg, Henry, and Knopp have not.

The FSPOA and Individual Petition (Motion Sequence #1)
Indian Hills Development Group Motion to Dismiss (Motion Sequence #002)
Town of Huntington Zoning Board of Appeals Motion to Dismiss (Motion Sequence #003)

FIRST AND SECOND CAUSES OF ACTION

The first cause of action alleges that the ZBA committed an error of law by allowing an unqualified alternate to cast a tie-breaking vote, in violation of Section 198-112 (I) of the Huntington Town Code. The second cause of action, which is closely related to the first, seeks to have the Court declare the application was erroneously approved by what is alleged to be a tie vote, in violation of Section 198-112 (I) of the Huntington Town Code and Town Law § 267-a. The petitioners' assertion presupposes the applicability of the code section to the circumstances herein.

The ZBA asserts that the petitioners' first and second causes of action fail to allege actionable claims under Section 198-112 (I) of the Huntington Town Code and Town Law § 267-a.

In correspondence to the ZBA, Planning Board, and other officials of the Town of Huntington, dated December 19, 2022, Huth Reynolds LLP, by attorney Carl Huth, advised that ZBA Board Member James Basso was appointed after the January 13, 2022 hearing, that Mr. Basso was the deciding vote in a 4-3 approval of the applicant's special permit, and that Mr. Basso was required to visit the site by Town Code § 198-112 (I), as well as to review the minutes of the public comment board meeting. Mr. Huth asserts that the ZBA itself was required to notice and conduct another public comment meeting affording either or both the applicant and the public an opportunity to comment in the presence of the new board member. Mr. Huth averred that the failure to do so negated any action taken by the ZBA, including the special permit approval, the Planning Board's requirement of a ZBA findings statement concerning the project, and the interpretive opinion proffered as to the Town Code § 198-114 zoning issue (*see* Petitioners' Exhibit Q, NYSCEF Doc. No. 19).

By correspondence dated December 23, 2022, Huntington Town Attorney John C. Bennett explained the Town's perspective as to the history and purpose of the alternate member code section, as well as the facts and circumstances surrounding the actions of the ZBA (*see* Petitioners' Exhibit R, NYSCEF Doc No. 20). Mr. Bennett further states that the plain language of the code section does not support the conclusion that Mr. Basso, a duly appointed zoning board alternate, would be precluded from voting on the Indian Hills application on December 15, 2022, and this Court agrees. On December 15, 2022, the ZBA had a majority, with seven (7) members voting.

The code section proffered by the petitioners was enacted prior to its revision, permitting the Zoning Board to have alternate members. A careful reading of Town Code § 198-112 (I), pursuant to which the petitioners move, clearly establishes that the section is only triggered when two separate events have occurred:

1. Less than seven members shall have voted; *and*

2. There is a tie vote or a failure to obtain a majority.

As Mr. Bennett correctly states in the December 23, 2022 correspondence, as neither of the two necessary predicate events occurred here, there was no impediment to Mr. Basso voting. The ZBA approved the special permit, issued the required finding statement, and the question of interpretive relief. As the necessary predicate events had not occurred for the purpose of triggering the section, there was no error of law. This Court finds no infirmity with the actions of the ZBA in the discharge of their responsibility as to a lawful vote. The actions of an administrative entity are accorded a presumption of regularity, and, in the absence of a clear revelation that the entity failed to exercise independent judgment, its determination will be upheld (*see* ***Matter of Taub v Pirnie***, 3 NY2d 188, 193-195, 165 NYS2d 1 [1957] [internal citations omitted])

In addition, the affidavit of board member Mr. Basso, dated May 5, 2023, is unequivocal, and it provides, at paragraph 11, that, "[he] watched, on a live video feed, the entire five-(5) hour January 13, 2022 hearing. Thereafter, [he] visited the site at least three (3) times, reviewed the entire application submitted to the ZBA, and prior to the December 15, 2022 hearing, [he] once again viewed the entire January 13, 2022 hearing" (see ZBA's Motion, Motion Sequence #003, Exhibit A, NYSCEF Doc. No 96). The Court finds that the petitioners' statutory construction arguments are misguided. The content of Town Code § 198-112 provides for the prerequisites and conditions under which the section would apply, which do not exist here. The record before the Court establishes that Mr. Basso was a duly appointed alternate member of the ZBA and that he was authorized to discharge the duties of that office at the time of the December 15, 2022 vote of the ZBA.

§ 198-109 (B) of the Huntington Town Code, states:

> "Alternate Membership: There shall be two (2) alternate members of the Zoning Board of Appeals. Said alternates shall be appointed by resolution of the Huntington Town Board for a term of two (2) years . . . Whenever it appears that a member of the Zoning Board is unable to participate in an application due to a conflict of interest or disability, the Chairman of the Zoning Board may substitute such member with an alternate member for the purpose of deciding the application. Once designated, the alternate member shall possess all of the powers and responsibilities of such member of the Board."

Here, the Court finds that Mr. Basso's participation in the December 15, 2022 proceedings was lawful and in compliance with the Town Code, as well as relevant case law (*see* ***Matter of Bruso v Clinton County***, 139 AD3d 1169, 1171, 31 NYS3d 277 [3d Dept 2016] [internal citations omitted]).

Planning Board Resolution

The petitioners' Exhibit I (NYSCEF Doc. No. 10) is the Huntington Town Planning Board Resolution, filed with the Town Clerk on May 18, 2021. The ZBA is mentioned in the Planning Board Resolution as follows:

> "W H E R E A S, in addition, the applicant proposes to convert the existing golf shop building to a fitness center to be owned and maintained by the HOA, depicted as Lot 77 on the maps, and to maintain the existing structures on Lot 75, subject to further review by the Zoning Board of Appeals as the subject property (40 & 42 Makamah Road) which included 3.44 acres, proposes the existing structures be maintained on 2.23 acres." (Petitioner's Exhibit I, NYSCEF Doc. No. 10, page 3)

As condition number two of the Resolution the Planning Board provided:

> 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.
> (Petitioners' Exhibit I, NYSCEF Doc. No. 10, page 4, paragraph 2)

The Planning Board also required the applicant to:

> IV. Add the following note to the Final Map: The Golf Course Association (GCA) site plan application shall be subject to any and

> all requirements and conditions established by the Town of Huntington Planning Board and any and all requirements and conditions established by the Town of Huntington Zoning Board of Appeals.
> (Petitioners' Exhibit I, NYSCEF Doc. No. 10, page 4, paragraph IV)

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 generally* ***Matter of Real Holding Corp. v Lehigh***, 2 NY3d 297, 302, 778 NYS2d 438 [1984] [internal citations omitted]; ***Matter of Commco, Inc. v Amelkin***, 62 NY2d 260, 263, 476 NYS2d 775 [2004]).

The ZBA, in the exercise of its discretion, limited its actions to the special use permit for the golf course and the related improvements, and it did not require any other issues already decided by the Planning Board to be addressed.

The Court finds that the petitioners' conflation of the ZBA's actions with the actions of the Planning Board is a blatant attempt to extend the time within which to object to the Planning Board's approval of the site plan. The Planning Board and the ZBA are independent entities with independent processes and responsibilities. The ZBA decides if and when it exercises its jurisdiction over issues, which they did not do here, and the petitioners' attempts to compel them to revisit and re-decide issues already ruled upon by the Planning Board is without basis in law. Once again, the Court finds that the actions of the ZBA were lawful.

Accordingly, the first cause of action is hereby denied and dismissed, and the request in the second cause of action is hereby dismissed.

THIRD CAUSE OF ACTION

The petitioners' third cause of action accuses the ZBA of usurping the lawful zoning authority of the Huntington Town Board. In addition, the petitioners claim that Indian Hills was required to obtain a formal change of zone from the existing R-40 to R-OSC, which can only be done by the Huntington Town Board. The IHDG Respondents assert that the petitioners' third cause of action is based on a misunderstanding of the

Town's Zoning Code and the fundamental nature of cluster zoning, and thus, should be dismissed. The only decision-making engaged in by the ZBA concerned the special use permit, and the Court finds that there is no relationship or overlap between a special permit application and a change of zone. The Court finds that the petitioners' attempts to mischaracterize and expand upon what the ZBA actually considered and determined does not equate to a rezoning, which could, under the correct circumstances, be considered an action by the ZBA which caused them to suffer a concrete injury (*see* ***Matter of Eadie v Town Bd. of Town of N. Greenbush***, 7 NY3d 306, 316, 821 NYS2d 142 [2006]). In addition, the Court finds that the ZBA properly restricted itself to its charge of deciding the special use permit issues only.

As such, this Court concludes, as it has in the companion decision issued herewith, that if the petitioners wished to challenge the allowance of a cluster subdivision and residential development on the subject site, they would have been well advised to do so by challenging the actions of the Planning Board's May 2021 decision in a timely manner. However, the petitioners failed to do so. The Court finds that the golf course special permit application is not and can not be a zoning change application or a cluster density application. Further, the Court finds that the petitioners' attempt to make a collateral challenge to the Planning Board's actions is without basis in law.

The Court finds that the ZBA did not contradict the Planning Board, nor could it, as the approval of the project rested solely with the Planning Board. In addition, the Court finds that the Indian Hills Respondents were not required to seek and obtain a zone change from the Town Board prior to the Planning Board's approval of the subdivision application with the clustered residential units, under Town Law § 278 and Town Code § 198-114. The cluster zoning powers belong to the Planning Board, without restriction as to which zoning districts in which it may be applied. As a matter of law, there is no reading of Town Law and/or Town Code which would support the petitioners' argument of any such limitation.

As the ZBA correctly argues, the petitioners' third cause of action fails to allege an actionable claim pursuant to any provision of the Huntington Town Code. The Court finds that the third cause of action erroneously attempts to conflate the approval of cluster developments as a change of zone, and it ignores well-settled principles of law. More importantly, it is not the ZBA who gave approval for the site plan, but the Planning Board. The Court finds that the petitioners' suggestion that the ZBA, rather than the Planning Board, made a determination with respect to cluster density development is not only misplaced, but, at this juncture, borders on frivolous. The petitioners' effort to attempt to somehow extend the time within which they could lawfully raise objections to the Planning Board's actions by asserting they were actually the actions of the ZBA is a desperate attempt to remedy an error not redressable in the current context.

Pursuant to Town Code § 198-114, the Planning Board is empowered, under

Town Law § 276, with the authority to make modifications to zoning regulations to provide "an alternative permitted method for the layout, configuration and design of lots." For this reason, Town Law § 278 (2)(b) provides that "[t]he purpose of a cluster development shall be to enable and encourage flexibility of design and development of land in such a manner as to preserve the natural and scenic qualities of open space." In addition, '[c]luster development is an optional planning technique permitting Planning Boards to exercise greater flexibility in subdivision approval for the purpose of achieving more efficient use of land containing unusual features (e.g., the wetlands and steep slopes in petitioner's land), for facilitating economical provision for streets and utilities, as well as for preserving the natural and scenic qualities of open lands...' " (***Matter of Bayswater Realty & Capital Corp. v Planning Bd. of Town of Lewisboro***, 76 NY2d 460, 467, [1990] [internal citations omitted]; ***Matter of Bates v Planning Bd. of Town of Huntington***, 297 AD2d 806, 747 NYS2d 807 [2d Dept 2002], *cert denied* 99 NY2d 506 [2003] [internal citations omitted], upholding jurisdiction of Planning Board to approve cluster development).

Furthermore, the petitioners' contentions as to the Planning Board are more properly addressed in the companion action, which the Court has determined by separate decision, order, and judgment. The petitioners seem to be asking this Court to agree with their assertion that the Town Board, and not the Planning Board, should exercise jurisdiction over a cluster density application. However, that is not an issue currently before this Court in this matter, as this proceeding concerns the propriety of the actions of the ZBA.

In light of the foregoing, the petitioners' third cause of action is dismissed, as a matter or law, for failure to state a cause of action upon which relief may be granted (*see* CPLR 3211 [a][7]).

FOURTH CAUSE OF ACTION

By their fourth cause of action, the Petitioners allege that the ZBA failed to make reasoned findings as to the five factors required by sections 198-110 and 198-66 of the Huntington Town Code, and, therefore, must be annulled. However, the petitioners' assertion is contradicted by the transcript of the ZBA meeting on December 15, 2022 and the March 10, 2023 "long form" decision, which was comprehensive in its statement of facts and information supporting the five factors, as well as the history of the application. The ZBA's limited jurisdiction, as well as a response to the claims made by the petitioners in balancing of the factors, was rational in all respects.

Matter of Wenz v Bd. of Zoning Appeals of Vill. of Lloyd Harbor, speaks to the issue of the practice followed by the ZBA herein:

"In any event, respondent Board did attach a copy of the "long form" decision

> disclosing its findings to its answer and return in this proceeding. The Board's procedure is analogous to an enduring practice engaged in by zoning boards in numerous municipalities who wait to draft their findings until such time as their determination is challenged via an article 78 proceeding. Such practice, while not condoned, is acceptable and does not serve as a basis for a reversal of the Board's decision." (***Matter of Wenz v Bd. of Zoning Appeals of Vill. of Lloyd Harbor***, 2009 NY Slip Op 31783 [U], Sup Ct Suffolk County, 2009 [internal citations omitted]).

The Courts finds that the petitioners' application for an order compelling the ZBA to exercise its authority beyond the Special Use Permit golf course issue has no basis in law. The petitioners' request is tantamount to pitting the ZBA against the Planning Board in the hope that the former will disagree with a decision already made by the latter. The petitioners' assertion that the IHDG limited the review of the ZBA to the Special Use Permit is a curious theory. However, it is the ZBA, not the applicants before it, who determine how the ZBA chooses to discharge its duties.

The former Chairman of the ZBA, John Posillico, submitted a document that he labeled a dissenting opinion (*see* Petitioner's Exhibit 7, NYSCEF Doc. No. 87, Motion Sequence #002). Although not in the form of an affidavit, the former chairman offered his view of the IHDG's ZBA application. In addition, Mr. Posillico made known his views concerning the application. The attempt to characterize the April 12, 2023 actions of the Planning Board as the temporal starting point for the challenge to the Planning Board's resolution is incorrect as a matter of law. This Court appreciates former chairman Posillico's turn of a phrase concerning "a pile of odoriferous municipal refuse." It is obvious that his missive was directed to the Court for consideration, and not in the form of a dissenting opinion of a member of the ZBA. Despite the shortcomings and legal infirmities of Mr. Posillico's "dissent," given the serious nature of the issues before this Court, the undersigned has carefully reviewed this submission. Contrary to Mr. Posillico's statement, the Planning Board's status as lead agency is well-documented. The interpretive relief regarding cluster density in an R-40 zone is not prohibited, and the former chairman conceded the "murky" nature of the issue.

Further, the writer of this statement acknowledges that the ZBA is an independent entity. A disagreement with the wisdom of a 4-3 decision does not invalidate that decision, however unwise the dissenter might perceive it to be. Mr. Posillico's frustration is as palpable as his obvious sincerity. The arguments he makes are the arguments put forth by the petitioners' very able and experienced counsel. However, this disagreement and difference of opinion should have been brought before the Planning Board in a timely manner. The Court appreciates the former chair's obvious conviction regarding these matters. The legal framework and the processes undertaken by the Planning Board and the ZBA, in their respective exercise of independent judgment, leaves the parties where they are. The ZBA fulfilled its obligations and made reasoned findings, as required in the exercise of their discretion.

While the Court may not, and the surrounding citizenry certainly does not, agree with the wisdom of their respective conclusions, that is not the standard of review and analysis imposed by law upon this Court.

As such, the petitioners' fourth cause of action is dismissed.

FIFTH CAUSE OF ACTION

By their fifth cause of action, the petitioners allege that the ZBA failed to address and disregarded their September 2019 request for interpretive relief, which was filed under Huntington Town Code § 198-109 (B).

Contrary to the petitioners' assertions, the ZBA offered its opinion in the filed written decision, wherein the ZBA specifically addressed the request for interpretive relief. In addition, at the December 15, 2022 hearing, when providing the requested interpretative opinion, the Chairman relied upon an email by the former Town Attorney Nicholas Ciappetta, which provided, in sum and substance, that a cluster development is an "alternative method for the layout, configuration and design of lots, buildings and new structures" and "[a] cluster development serves a completely different function than a change of zone application." The Board concurred, and it adopted Mr. Ciappetta's conclusion that the Planning Board did not exceed its jurisdiction with respect to the R-OSC. A zoning board determination should not be set aside unless there is a showing of illegality, arbitrariness, or abuse of discretion (*see* ***Conley v Town of Brookhaven Zoning Bd. of Appeals***, 40 NY2d 309, 314, 386 NYS2d 681 [1976] [internal citations omitted]).

Here, the petitioners wish to answer their own questions and do not agree with the interpretation of the ZBA. The petitioners are of the opinion and assert that a cluster density zoning is the sole prerogative of the Town Board because they allege it is a change of zone. However, the petitioners acknowledge that it is the Planning Board that has authority to approve cluster developments by citing the statute conferring such authority upon it. The petitioners then state that it is not the Planning Board that has such authority, but the Town Board. The petitioners then seem to argue that, if the cluster development does not exceed the allowable number of residential units which would have been available under the R-40 zone designation, *in the Planning Board's judgment,* then the Planning Board does have jurisdiction. This circular argument begs the question: does the plan approved by the Planning Board satisfy the number of units maximum limitation set forth in the statute? This is a question which falls under the purview of the Planning Board, not the ZBA. The Planning Board granted its approval and it duly filed the Resolution.

In light of the foregoing, the petitioners' fifth cause of action is dismissed, as a matter of law.

SIXTH CAUSE OF ACTION

Improperly Defining the Scope of the ZBA's Review and Relying on the Inadequate Consultant's Report

The Petitioners next assert that the ZBA had the authority to make an assessment of the broader impact that Northwind's Indian Hills Development would have on the environment or on the local community as a whole. The petitioners claim that the long-standing nature of the ZBA's assertion of jurisdiction over the IHDG Special Use Permit compels them to exercise jurisdiction over the subdivision issues, a responsibility already squarely accepted and acted upon by the Planning Board. Other than the petitioners wishing it were so, there is no legal authority for such an assertion.

Here, the Planning Board was designated as the lead agency for under the State Environment Quality Review Act (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).

Here, the petitioners are challenging the Planning Board declaring itself as "lead agency" to review the site plan under SEQRA. However, a challenge to lead agency status may only be commenced by another involved agency, not private litigants (*see* ***Matter of Hart v Town of Guilderland***, 196 AD3d 900, 902-903, 151 NYS3d 700 [3d Dept 2021] [internal citations and quotations omitted]). Accordingly, the petitioners lack standing to make such a challenge.

Further, by their sixth cause of action, the petitioners complain that the scope of the ZBA's review was improperly limited. IHDG argues that this assertion ignores that the ZBA's jurisdiction was limited by law to the golf course and related improvements in the context of the Special Use Permit application. The petitioners' circular argument and compound error concerning the scope of the ZBA's Special Use Permit also claims their reliance on the H2M report was arbitrary and capricious. However, this report pertained to the Special Use Permit, and the ZBA was engaged in the review of the application process for it. The arbitrary or capricious test chiefly relates to whether a particular action should have been taken or is justified, and whether the administrative action is without foundation in fact (*see* CPLR 7803 [3]; ***Matter of Pell v Board of***

Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 231, 356 NYS2d 833 [1974] [internal citations omitted]). Accordingly, the Court finds that the ZBA's reliance on this report for the purpose it was ordered was reasonable under the circumstances, and thus, such reliance was neither arbitrary nor capricious (*see* CPLR 7803 [3]; ***Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County***, *supra*).

Moreover, the overall development of the golf course property was not before the ZBA. The Special Use Permit was considered by the ZBA, and the reports requested were sufficient for the purpose that they were required. Likewise, the petitioners' issues with SEQRA findings could have and should have been raised with the Planning Board within the applicable thirty-day period of repose, if the petitioners were so inclined (*see* CPLR 217 [1]; Town Law § 282; ***Matter of King v Chmielewski***, 76 NY2d 182, 186, 556 NYS2d 996 [1990] [internal citations omitted]). Attempting to raise the issues for the first time over a year after the fact with a different agency is without legal basis. As it concerns the SEQRA issues, the law does not provide a legal vehicle for the ZBA to substitute itself as the lead agency (*see* ***Matter of Hart v Town of Guilderland***, *supra*; ***Troy Sand & Gravel Co., Inc. v Town of Nassau***, 125 AD3d 1170, 1172, 4 NYS3d 613 [3d Dept 2015] [internal citations omitted]).

Here, the ZBA considered the Consultant's report that it had requested in reaching its decision on the Special Use Permit. H2M Architects and Engineers were retained by the ZBA, and a report was issued on July 11, 2022. There had been questions posed by members of the ZBA. A prior report had been issued by Nelson and Pope. The scope of the H2M report concerned the criteria for the Special Use Permit and addressed the factors as set forth in Town Code § 198-66 (A). The petitioners seem to make arguments that should have been addressed in the SEQRA review before the Planning Board. An involved agency does not begin the SEQRA process anew. As the lead agency, the Planning Board was responsible for the review, which they undertook and ruled upon. There is no legal basis for the petitioners' claim that the ZBA must somehow conduct an independent *de novo* review in this regard. Similar to the failure to file a timely Article 78 proceeding as to the Planning Board's resolution, the lack of a timely challenge to the Planning Board's lead agency SEQRA status results in a similar fate (*see* ***Matter of Gordon v Rush***, 100 NY2d 236, 244-245, 762 NYS2d 18 [2003] [internal citations omitted]).

As such, the petitioners' sixth cause of action is dismissed, as a matter of law.

SEVENTH CAUSE OF ACTION

The petitioners' seventh cause of action alleges that the ZBA failed to comply with its SEQRA obligation. However, as the record clearly shows, the ZBA was not the

lead agency during the SEQRA review of the cluster density application, and, as such, it lacks jurisdiction over the subdivision and residential development (*see* ***Matter of Hart v Town of Guilderland***, *supra*; ***Troy Sand & Gravel Co., Inc. v Town of Nassau***, *supra*; ***Matter of King v County of Saratoga Indus. Dev. Agency***, *supra*). Once again, the petitioners' seventh cause of action appears to be a collateral attack on the Planning Board's SEQRA process.

The petitioners seem to assert that the ZBA was required to conduct an independent SEQRA process, *de novo*. However, there was a Final Environmental Impact Statement (FEIS) issued by the Planning Board. For the petitioners to suggest the ZBA countermand and nullify the SEQRA findings of the Planning Board, which went unchallenged for over eighteen months, is not supported by statute or case law. Again, the petitioners confuse the possible authority to perform an act with an obligation to perform such an act. The ZBA, as was its right, reviewed the Special Use Permit application and refrained from accepting the petitioners' invitation to broaden its review of the subdivision and cluster density issues, which were already determined by the Planning Board in exercising its cluster-density jurisdiction conferred by statute, as well as its SEQRA function as lead agency. There is no legal compulsion for the ZBA to take any other action; its discretion is exactly that. The petitioners' attempts to interpret *Troy Sand & Gravel Co. v Town of Nassau* as stating otherwise is tortured logic. The petitioners make an argument that is not sustainable upon the record. The ZBA is limited to the record established during SEQRA by the lead agency, and to suggest otherwise is contrary to law, and to suggest that the ZBA was obligated to do so is a misstatement of the law (*see* ***Matter of Hart v Town of Guilderland***, *supra*; ***Troy Sand & Gravel Co., Inc. v Town of Nassau***, *supra*; ***Matter of King v County of Saratoga Indus. Dev. Agency***, *supra*).

Accordingly, the petitioners' seventh cause of action is dismissed, as a matter of law.

EIGHTH CAUSE OF ACTION

By their eighth cause of action, the petitioners aver that the ZBA was obligated to hold the application in abeyance, pursuant to Section 198-112 (H) of the Huntington Town Code, which provides:

> "The Zoning Board shall hold a pending application in abeyance, if, in the course of processing such application, it becomes necessary to rescind, modify, vary, or interpret a covenant or restriction imposed by the Town Board."

The ZBA takes the position that § 198-112 (H) of the Huntington Town Code is inapplicable. The petitioners argue that the ZBA was required to hold its determination in abeyance. However, the Court finds such argument to be another attempt to

collaterally attack the Planning Board's prior determination. The Town's adoption of the Crab Meadow Watershed study does not suspend or otherwise override the Board's SEQRA process, deliberations, conclusions, and/or findings concerning the IHCC project. The applicability of Town Code § 198-112 (H) is limited to covenants or restrictions imposed by the Town Board. The only required Covenants and Restrictions within the Resolution pertain to the age 55 and older restriction, preservation of the depicted open space in perpetuity, the prohibition against future subdivision, and that all roads shall remain private (*see* Petitioners' Exhibit I, NYSCEF Doc. No. 10, page 5, paragraph A). Here, the Planning Board did not impose a covenant or restriction relating to the Crab Meadow Watershed study.

The facts herein do not support the petitioners' argument. The acceptance of a study is neither a covenant nor a restriction, as it does not constitute a statute or regulation. The Court finds that the petitioners' arguments are misplaced (see ***Matter of County of Orange v Village of Kiryas Joel***, 44 AD3d 765, 768-69). The Town Board has not imposed such a covenant or a restriction affecting the IHDG project, as the study is advisory and does not have the force of law. Until the Town Board takes formal action and specifically records a particular covenant or restriction against a parcel of land, there is no impediment as a matter of law, as suggested by the petitioners (*see* ***Matter of Friends of Shawangunks v Knowlton***, 64 NY2d 387, 391, 487 NYS2d 543 [1985] internal citations omitted]).

As such, the petitioners' eighth cause of action is dismissed, as a matter of law.

NINTH AND TENTH CAUSES OF ACTION

Failing To Disclose Records and Premature Closing of Public Hearing, in Violation of New York's Public Officers Law § 103 (e)

By the petitioners' ninth cause of action, they allege that the ZBA failed to disclose records, in violation of Public Officers Law § 103 (e). However, the Court finds such allegation to be misplaced.

The record which should have been disclosed to the petitioners by the ZBA is the H2M report, which was commissioned by the ZBA, not the applicant for the Special Use Permit. The *Cilla* case cited by the petitioners involved a substantive submission by the applicant (*see* ***Cilla v Mansi***, 2002 NY Slip Op 50208 [U] [Sup Ct, Suffolk County 2002]). However, the Court is unaware that a receipt of such a report from a consultant, such as H2M, requires an additional public hearing, pursuant to the Public Officers Law. Although not required, the ZBA did, in fact, provide for a ten-day comment period, wherein the petitioners submitted written comments as to the H2M report in question, SEQRA, and the Special Use Permit, which was all included in the public record of the Board's proceedings (*see* Petitioners' Exhibit L, NYSCEF Doc. No. 13) .

The petitioners further allege, after the January 13, 2022 hearing, that the respondent Northwind Group, LLC ("Northwind") made several lengthy, post-hearing written submissions to the ZBA responding to questions posed by ZBA board members regarding a wide array of issues. The petitioners also allege that Northwind also made material changes to the construction plans for its proposed Indian Hills Development, including by filing an entirely new set of grading plans, cut/fill plans, and drainage plans. The ZBA also received the consultant's report in that time, and it restricted its consideration to the Special Use Permit. The Court finds that all information pertinent to the Special Use Permit was disclosed, the record was kept open for the purpose of receiving relevant comment, and the views of concerned parties were received, all of which helped form the basis of the ZBA decision.

As such, the petitioners' ninth cause of action is dismissed, as a matter of law.

By their tenth cause of action, the Petitioners allege that the ZBA prematurely closed the public hearing, in violation of New York's Public Officers Law § 103 (e). The ZBA argues that the petitioners' ninth and tenth causes of action fail, as the public hearing was not closed, and all documents received by the ZBA were posted on the Town's website for review.

The petitioners allege that the ZBA violated Public Officer's Law § 103 (e) because it failed to disclose all post-hearing correspondence, and/or to hold another hearing to allow the public the opportunity to comment on H2M's report (*see* Petitioner's Memorandum of Law, paragraphs 17 through 20, Petition paragraphs 290 through 296). The petitioners further allege that the applicant "was permitted to continue making additions to the record – and even significantly change its plans for the development – without the public being given another chance to participate in the hearing to address this new information" (*see* Petition, paragraph 100). However, the Court finds that the petitioners misstate the record. At the December 2022 hearing, Chairman W. Gerard Asher addressed this issue, advising that the record would be reopened to afford all interested parties the ability to comment on the H2M report. Nevertheless, the only comments received related to SEQRA issues, which were addressed by the Planning Board (*see* Petitioner's Exhibit 4, lines 14:6 through 15:8).

The petitioners further allege that there were documents received by the ZBA in August 2022 that had not been accessible to the public (*see* Petition, paragraph 102, Exhibit N). Again, the petitioners misrepresent the record.

First, Exhibit N to the petition is a response to a Freedom of Information Law (FOIL) request made by Rapiejko. Second, by email dated seven days before the January 13, 2022 hearing, the Assistant Town Attorney indicated that "Sharepoint was not providing access to one of the folders within the 'Preserve at Indian Hills folder' but that the technical problem had been resolved and all records could be accessed." Accordingly, access to these records was provided timely, in accordance with Public

Officers Law § 103 (e). The Court finds the petitioners' claims to be ultimately nothing more than an erroneous statement of the Town's obligations under Public Officers Law § 103 (e) in an effort to resurrect objections to the Planning Board's SEQRA determinations, which they failed to timely challenge.

As such, the petitioners' tenth cause of action is dismissed, as a matter of law.

Based upon the foregoing, and taken in its totality, the petitioners seek to have the ZBA duplicate the efforts and analysis of the Planning Board for the purpose of the ZBA coming to a different conclusion. The Planning Board has jurisdiction for the purpose of cluster density determinations in the Town of Huntington. The Planning Board is the lead agency for SEQRA purposes. The petitioners are not entitled to an additional attempt to defeat this development project. Notwithstanding the Court's feelings as to the appropriateness of a project of this magnitude on a property of such sensitive ecological significance, the Planning Board and the ZBA have exercised their respective jurisdictional prerogatives and discretion, and they have come to their findings and conclusions.

Despite the voluminous submissions of the petitioners and the extensive legal memoranda submitted, there is a single overarching concern that undermines the attempts to attack the Planning Board's actions by a desperate challenge to the ZBA's limited action concerning only the Special Use Permit. As more fully set forth in the companion decision and order issued contemporaneously herewith, *Matter of Long Is. Pine Barrens Socy. v Planning Bd. of Town of Brookhaven*, 78 NY2d 608, 578 NYS2d 466 (1991), is the controlling case law as to the timeliness of any challenge to the actions of the Planning Board.

The Court is mindful of the consequence of this failure to timely challenge the actions of the Planning Board, but is nonetheless bound by the foursquare holding in the *Long Island Pine Barrens* case. Although, ordinarily, a proceeding pursuant to CPLR Article 78 must be commenced within four months after the determination to be reviewed becomes final and binding on the petitioner, any claims challenging a subdivision approval must be raised in such a proceeding against the Planning Board, and no more than 30 days after the Planning Board files its preliminary approval of a proposed project (*see* CPLR 217 [1], 7801 [2]; ***Matter of Long Is. Pine Barrens Socy. v Planning Bd. of Town of Brookhaven***, *supra*). Further, a determination becomes "final and binding" upon the petitioner when the petitioner receives notice that the agency has reached a definitive position on the issue that inflicts actual, concrete injury and the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the petitioner (*see* CPLR 7801 [2]; ***Matter of Fiondella v Town of E. Hampton Architectural Review Bd.***, 212 AD3d 811, 811-812, 182 NYS3d 204 [2d Dept 2023] [internal citations omitted]).

Here, there is no circumventing the fact that a preliminary subdivision approval was filed so as to constitute a final administrative determination subject to judicial review (*see* CPLR 7801 [2]; ***Matter of Long Is. Pine Barrens Socy. v Planning Bd. of Town of Brookhaven***, *supra*; ***Matter of Fiondella v Town of E. Hampton Architectural Review Bd.***, *supra*). The reasoning set forth concerned the legal effect of the components of the proposed subdivision, and there were no further administrative proceedings available, which is the instant proceeding in a nutshell. The Court finds that it was the Planning Board's actions in May 2021 by which the petitioners became aggrieved, and that the case law is clear: the application of the statute is consistent and compulsory, and this Court is bound by the Statute of Limitations imposed by law (*see* ***Matter of Long Is. Pine Barrens Socy. v Planning Bd. of Town of Brookhaven***, *supra*; ***Matter of Fiondella v Town of E. Hampton Architectural Review Bd.***, supra).

As to SEQRA review, the lead agency record serves as the basis for any involved agency determination, should they choose to render one. No reopening or supplemental record is permitted by statute or regulation, and likewise, an involved agency is without authority to overrule, amend, or supplement a lead agency's record, findings, or conclusions. Once again, a timely challenge to the Planning Board's determination was the recourse available to the petitioners as to SEQRA issues.

After a review of all the documents in this file (NYSCEF Document Numbers 1 through 120, inclusive), the Court reaches its conclusions and findings set forth in these consolidated decisions and orders. The Court recognizes and acknowledges the eleventh hour attempt to somehow salvage an issue of administrative review by filing a "Notice of Appeal" with the ZBA on August 24, 2023 regarding building permits issued by the Building and Housing Division of the Town's Engineering Services Department, and the undersigned is not swayed by the petitioners' counsel's affirmation or correspondence.

The Application Form of Thomas John Hayes and Mark C. Henry has likewise been reviewed. The petitioners' counsel correctly cites Town Law § 282, but ignores the pertinent part concerning a timely challenge, *to wit,* "provided the proceeding is commenced within thirty days after the filing of the decision in the office of the town clerk...[c]ommencement of the proceeding shall stay proceedings upon the decision appealed from." As more fully set forth in the companion decision herewith, there was no such timely filing.

Petitioners' Motion for Preliminary and Permanent Injunction (Motion Sequence #004)

The motion by the petitioners seeks injunctive relief enjoining and restraining the Northwind respondents from engaging in any further construction, demolition or preparatory work, including any tree clearing, excavation, or earthmoving-relating to the

proposed "Preserve at Indian Hills" development ("the Development"), including, but not limited to, enjoining any further construction, demolition, or preparatory work relating to the proposed "model unit" for the Development, for which construction, demolition, or preparatory work has already begun at the Indian Hills Country Club golf course site, pursuant to a building permit allegedly unlawfully issued by the Town of Huntington on or about July 20, 2023.

The petitioners also seek a directive that the IHDG respondents be compelled to communicate and disclose to the petitioners any and all notice relating to the proposed development upon receiving any additional local government approvals relating to such development, including, but not limited to, any additional building permits issued by the Town of Huntington, and/or any approvals from the Suffolk County Department of Health Services.

Given the Court's decision, order, and judgment in the three related motions (Motion Sequences #001, #002, and #003), this application has been rendered moot, as there is no underlying legal basis for the injunctive and notice relief requested by the petitioners.

As such, the injunctive and declaratory relief requested by the petitioners is denied, as academic.

Accordingly, each of the petitioners' prayers for relief are denied, and the proceeding is dismissed in its entirety.

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**