SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

Present:

Hon. Maria G. Rosa, Justice

FRIENDS OF THE FISHKILL SUPPLY DEPOT; WILLIAM M. MCEWING JR. BRENDA J. MCEWING, TIMOTHY WALSHJAMIN and AMANDA WALSHJAMIN,

Petitioners,

-against-

GLD3, LLC, THE TOWN OF FISHKILL PLANNING BOARD and SNOOK-9 REALTY, INC.,

Respondents.

DECISION, ORDER AND JUDGMENT

Index No. 51889/19

The following papers were read on this petition pursuant to Article 78 of the CPLR.

AMENDED VERIFIED PETITION
EXHIBITS A - R
AFFIDAVIT OF IAN BURROW
AFFIDAVIT OF DANA LINCK
EXHIBITS A - C
AFFIDAVIT OF DOUGLAS MACKEY
AFFIDAVIT OF ROBERT SELIG
AFFIDAVIT OF PENNY STEYER
EXHIBITS A - G

VERIFIED ANSWER
CERTIFIED RECORD
EXHIBITS 1 - 108
AFFIRMATION IN OPPOSITION
MEMORANDUM OF LAW IN OPPOSITION

REPLY AFFIRMATION
EXHIBIT A
REPLY MEMORANDUM OF LAW
EXHIBIT A

This is an Article 78 proceeding in which Petitioners challenge a December 12, 2019 decision of the Town of Fishkill Planning Board to issue an amended negative declaration under the State Environmental Quality Review Act ("SEQRA"). The proceeding arises from the proposed commercial development on a 10.47 acre parcel located on the corner of Route 9 and Snook Road in the Town of Fishkill. Respondents GLD3, LLC and Snook-9 Realty, Inc. ("Respondents") are the owner and developer of the property. The project, entitled the Continental Commons, first came

before the Planning Board in 2015. Respondents proposed constructing a hotel, two retail buildings with approximately 15,720 square feet of retail space, a visitor center and a restaurant. They asserted they would design the buildings with a consistent architectural theme reflecting the character of historic buildings in the Town and region in a village-style layout connected by pedestrian walkways. The proposal further stated it would preserve and provide public access to a Revolutionary-era burial ground located on the site, construct replica Revolutionary-era army barracks and incorporate educational and interpretive features about the history of the Fishkill Supply Depot.

Petitioner Friends of Fishkill Supply Depot, Inc. ("FOFSD") is a not-for-profit corporation which advocates for the preservation and study of the Revolutionary-era Fishkill Supply Depot. FOFSD alleges that the proposed project lies within a 74 acre area that constituted the Fishkill Supply Depot, a military supply hub for the Continental Army in the Revolutionary War. It asserts that the Supply Depot was part of a larger military supply hub that also included the Village of Fishkill and Fishkill Landing which is now known as Beacon. In 1974 the Fishkill Supply Depot was entered into the National Register of Historic Places. Petitioners maintain that in adopting a negative declaration the Planning Board failed to take a hard look at the impact the development would have on the archeological resources and historic integrity of the site. They further assert that the Planning Board failed to include the Village of Fishkill as a necessary involved agency, failed to consider the development's inconsistency with the Town's comprehensive plan, and failed to take a hard look at the environmental impacts to an on-site stream and aquifer below the site. Petitioners also claim that the Planning Board was biased, failed to consider standards set forth in the Town's Zoning Code and violated their procedural due process rights.

This court's review of a Planning Board's determination is limited to whether the determination was made in violation of lawful procedure, was affected by an error of law, was arbitrary and capricious or an abuse of discretion. CPLR §7803(3); Kahn v. Pasnik, 90 NY2d 569 (1997). A determination is arbitrary if it is made without sound basis or reason and without regard to the facts. Matter of Pell v. Board of Education, 34 NY2d 222 (1974). In reviewing the action of a municipal agency, this court may not substitute its judgment for that of the agency. The court's role is not to weigh the desirability of any action or choose among alternatives, but rather only to determine whether the agency's determination was lawful, based on reason and not indicative of bad faith. See Matter of Cowan v. Kern, 41 NY2d 591 (1977).

A lead agency must prepare an Environmental Impact Statement ("EIS") for any action that "may have a significant effect on the environment." Matter of Jackson v. NYS Urban Dev. Corp., 67 NY2d 400 (1986); ECL §8-0109(2)(2). An EIS is not required for an action only if a lead agency determines "either that there will be no adverse environmental impacts or that the identified adverse environmental impacts will not be significant." 6 NYCRR 617.7(a)(2). To determine whether a proposed action may have a significant adverse impact on the environment, a lead agency must consider the criteria set forth in 6 NYCRR 617.7(c)(1). Listed among such criteria and relevant to Petitioners' claims are whether the proposed action will have a substantial adverse change in existing ground or surface water quality, will significantly conflict with a community's adopted development

plans or impair the character or quality of important historical and archeological resources. Thus, a lead agency may issue a negative declaration and not prepare an EIS only if the agency determines that the action will have no adverse environmental impacts or that any identified adverse impacts will not be significant. 6 NYCRR 617.7(a)(2). This court's review of an agency's determination to issue a negative declaration is limited "to whether the agency identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination." Matter of Jackson v. NYS Urban Dev. Corp., 67 NY2d at 417. If the agency failed to take the required hard look or set forth a reasoned elaboration for its determination, its action must be annulled as arbitrary and capricious.

Petitioners' first contention is that the Planning Board failed to take a hard look at the impact the proposed development would have on historic and archeological resources. FOFSD began providing information to the Planning Board about the history and archeology of the Fishkill Supply Depot prior to Respondents even submitting an application for a special use permit. FOFSD notified the Planning Board that it had received a 2014 grant from the National Park Service American Battle Field Protection Program to study and issue a comprehensive report on the Fishkill Supply Depot's archeological features. Over the next four years a substantial amount of information was presented to the Planning Board about whether the proposed project would have an impact on the historic and archeological integrity of the site. This included professionally prepared reports and expert testimony about the history and archeological significance of the greater Fishkill Supply Depot. Much, but not all, of this information centered around the history, scope and boundaries of a burial ground discovered at the southern portion of the parcel. Prior to 2015, there were at least 13 archeological investigations on the site of varying degrees of quality and scope. The most recent investigations were conducted by Hartgen Archeological Associates in 2012 and 2013. Those studies ultimately concluded that the potential of the site to produce additional archeological data was limited based upon agricultural use of the property subsequent to the Revolutionary War, previous archeological excavations and disturbances to the physical integrity of the property. They concluded that additional investigations were likely to provide only limited quantities of redundant data likely originating from post-Revolutionary War agricultural activities. In response to these assertions, FOFSD emphasized the Fishkill Supply Depot's classification on the National Register of Historic Places, and the comments from the New York State Department of Parks, Recreation and Historic Preservation ("NYSPRHP") and submitted a comprehensive report prepared by Hunter Research as a result of the 2014 National Park Service grant. That report concluded that the Fishkill Supply Depot and surrounding Fishkill area possesses an extraordinarily rich heritage of historic sites and archeological resources pertaining to the American Revolution, and that the project had the potential to negatively impact the Fishkill Supply Depot. The report acknowledged that much of the archeological potential of the Fishkill Supply Depot had already been severely compromised, if not destroyed, by the construction of Route I-84, the Dutchess Mall and commercial development along the US Route 9 corridor. It found, however, that land between Raiche Run and the Van Wyck Homestead, which is on the Continental Commons property, holds considerable archeological potential.

Based on a recommendation of the Dutchess County Department of Planning and

Development, the Planning Board retained an independent archeological firm PaleoWest to assist with its SEQRA review of the impact of the proposed development's impact on historic and archeological resources. PaleoWest delivered its initial report to the Planning Board on April 10, 2017. The report concluded that an EIS was not warranted provided measures were taken to protect areas in the vicinity of the burial grounds and the developer had a construction monitoring plan and employed construction techniques to address any unanticipated archeological discoveries. The report noted that the proposed project was "Phase 3" of a three-phase development that came before the Planning Board in 1997. The Planning Board granted site plan approval for the gas station adjacent to the site in 1997. At that time, the gas station parcel was subdivided from Respondents' property. In 1999, the Planning Board granted site plan approval and a special use permit for the construction of a three-story hotel behind the gas station in the vicinity of where the Respondents' proposed hotel would be constructed. The report noted that both prior approvals were made after the Planning Board adopted negative declarations and declared the proposals "Type I" actions under SEQRA. The negative declaration for the gas station included a determination that its construction was consistent with community character in the area, which included Interstate 84, US Route 9, two other gas stations, the Dutchess Mall and numerous fast food restaurants. The negative declaration also found that the architectural design and landscaping of the gas station would not impair the character or quality of historical or aesthetic resources, and referenced prior archeological investigations in support of its determination that the project would not degrade the character or quality of archeological resources. The Board received numerous comments from the developer and the public about the PaleoWest report. Petitioners contended the report was deficient, that it took statements out of context and failed to critically analyze prior archeological reports. In August 2018 PaleoWest provided an amended report entitled "Final Report, Corrections and Responses to Comments."

During the four year period the application was before the Planning Board, there were three 90-day periods in which the public was permitted to submit written comments on the project. The last public comment period ended on September 25, 2017. On that date, FOFSD sent the Planning Board correspondence setting forth claimed deficiencies in the PaleoWest report and reiterating its contention that the site had the potential to yield important historical and archeological discoveries. In March 2018 the respondents' engineer presented to the Planning Board detailed responses to the public comments. At its April 11, 2019 meeting the Planning Board adopted a negative declaration. The Planning Board subsequently conducted a second site visit and a public hearing was held on June 13, 2019. At the hearing dozens of members of the public spoke both for and against the project. The majority of the public that spoke was against the development project. In August 2019 Respondents' engineer submitted written responses to the comments at the public hearing and reiterated contentions that mitigation measures would minimize the development's impact, if any, on historic and archeological resources on the site. Following the submission of additional information by the applicant about the proposed development plans, the Board issued an amended negative declaration in December 2019 and this proceeding followed.

In determining that the project would not adversely impact the site as an archeological resource, the Planning Board's amended negative declaration incorporated PaleoWest's 2018 final report. The Board's written decision noted that the property and its immediate surroundings had

been the subject of numerous archeological investigations prior to the submission of the application. The decision cited investigatory work of Hartgen Archeological Associates from 2019 finding that a 115 x 15 foot area of land on the northside of Snook Road had been previously disturbed and no cultural resources were present. It further noted that in November 2019 soil samples taken from fifteen tests holes revealed no materials of archeological interest. The Board relied on previous surveys, particularly Hartgen's 2012 and 2013 surveys finding that the burial area on the subject property was confined to the .4 acre area located south of Raiche Run in the southwest corner of the property. It also cited a January 2016 NYSPRHP letter indicating that there was no evidence at that time to suggest grave shafts or human remains located in the project area north of Raiche Run. The Board noted that the 6.85 acre area of disturbance on the site was located entirely outside the burial area, and that the applicant had agreed to place restrictions or a conservation easement on that area to preclude any future development of it. The Board directly addressed the April 21, 2016 letter from the NYSPRHP stating that the ground disturbing activity on the site had the potential to directly impact archeological resources. It noted that the letter and other letters from NYSPRHP recommended that mitigation measures, including a mechanical soil stripping plan and construction monitoring for unanticipated discoveries, would mitigate any potential negative impacts. It expressly cited a June 2016 NYSPRHP letter stating that the concept and recommendations described from the project engineer "meet or exceed the preservation measures outlined in our April 21, 2016 letter." The determination discusses archeological research concluding that any evidence presented from stables that may have existed on the property had been destroyed, and that the overall integrity of the Continental Commons site was destroyed long ago. In support of this conclusion the Board cited activities over the past 200 years such as agriculture, plowing, looting and construction. The determination mentioned the more than one dozen professional archeological investigations of the property conducted between 1968 and 2013, and that approximately 25% of the 6.85 acre portion of the lot to be developed had already been archeologically investigated. Finally, the determination noted that there would be no negative visual impact to the historic Van Wyck house based on the development's historical design and proposed mitigation measures.

The foregoing is sufficient to demonstrate that the Planning Board took the requisite hard look at the potential adverse impacts the development may have on historic and archeological resources. Petitioners adamantly disagree with this conclusion. They cite the Hunter report and its conclusion that the Fishkill Supply Depot offers exceptional opportunities for historic landscape interpretation and has potential to yield archeological information. They further rely on language from letters submitted by the NYSPHRP. They contend that the Planning Board failed to consider comments from members of the public, including experienced archeologists, failed to allow public comments on two new archeological reports submitted after the initial April 2019 negative declaration was adopted and contend that the PaleoWest report fails to accurately characterize and summarize previous archeological activities on the site.

While the record contains conflicting opinions about whether the proposed development would have adverse effects on historic and archeological resources, it was within the province of the Planning Board to determine which expert testimony to accept. (Friends of P.S., Inc. V. Jewish Home Life Care, 146 AD3d 576, 577 [1st Dept. 1027]). The PaleoWest and Hunter reports reached

different conclusions on the issue. However, the Planning Board also heard from archeologist Joel Klein. Klein provided a detailed history of prior archeological surveys of the property and the significance, or lack thereof, of its placement on the National Register of Historic Places. His conclusions were fairly consistent with those reached by PaleoWest. He opined that prior archeological activities demonstrated that the location of any burial site was limited to the .4 acres of the property that was scheduled to be preserved. He contended that the proposed mitigation measures would adequately address any potential for archeological disturbance. He further reviewed correspondence from the NYSPHRP and contended that the proposed mechanical soil stripping plan, construction monitoring and unanticipated discovery plan sufficiently mitigated the potential for any adverse impacts.

It is not this court's function to substitute its judgment of the facts and alternatives for that of an administrative agency. See Keil v. Greenway Heritage Conservancy, 184 AD3d 1048 (3rd Dept 2020). Nor does SEQRA require an agency to impose every conceivable mitigation measure. See UCL 8-0109 (8). In arriving at a final determination, an agency may rely on the findings of professional consultants. It lies within the province of an administrative agency to choose between conflicting expert testimony. See Friends of P.S., Inc. v. Jewish Home Lifecare, 146 AD3d 576, 577 (1st Dept 2017). Here, the Planning Board had a plethora of information about the history and archeology of the proposed site and surrounding areas. Ultimately, it chose to credit experts who opined that the archeological potential of the site had been exhausted and that the proposed development would not have a significant adverse impact on the larger Fishkill Supply Depot. There was ample evidence before the Planing Board supporting this determination. It heard opinions and was presented with documentary evidence questioning whether the proposed development site was ever part of the Fishkill Supply Depot and whether archeological finds on the property were even related to Revolutionary War activity. While Petitioners presented evidence to the Planning Board disputing these opinions, the court's role is not to make an independent determination about the wisdom of allowing the proposed commercial construction on the site. The court must merely ensure that the Planning Board took a "hard look" at the development's potential adverse impact and that there were reasonable grounds supporting its determination. On this record, the Planning Board has met that standard. The Planning Board heard and considered conflicting evidence and opinions about whether the proposed development could have an adverse impact on historic or archeological resources. The record reflects that it took the requisite hard look at that issue, and there is ample support in the record for its ultimate determination. Moreover, the Planning Board's amended negative declaration adequately sets forth the basis for its conclusion. Based on the foregoing, it is

ORDERED that Petitioners' application to annul the Board's determination based on Petitioners' claim that the Planning Board failed to take a hard look at the proposed development's impact on archeological resources and the historic integrity of the site is denied.

Petitioners also claim that the Planning Board failed to take a hard look at the effect of the project's impact on the aquifer below the site and an on-site stream. In issuing a negative declaration, the Planning Board considered that the property was directly above the Sprout Creek-Fishkill Creek Primary Water Supply Aquifer. The Board's EAF form cited the project's potential

to pollute the aquifer and recognized it was in an area the Town deemed critical for aquifer protection. The Planning Board's determination, however, discussed and relied upon the applicants' Storm Water Pollution Prevention Plan ("SWPPP") reviewed by the Town's engineers and hydrogeologists. The plan detailed the topography, soils and groundwater on the site. It further looked at rainfall data, the proposed construction sequence and detailed control measures to prevent erosion and sediment control both during construction and on a permanent basis. The plan encompassed establishing permanent vegetation, installing rock outlet protections, and measures to control solid and liquid waste disposal, sanitary facility waste and non-storm water discharge. The Board's amended negative declaration referenced these measures and the proposed storm water collection system with underground infiltration components. It found the majority of storm water run-off will be retained on site during normal storm events, and mentioned measures designed to address increased volume during large storms. The Board's decision further acknowledged the SWPPP's plans to reduce contamination from sediments, particulate matter and chloride. It acknowledged the prohibition on the use of salt, a central monitoring well program, and snow removal and deicing measures designed to protect the runoff and the underlying aquifer. The determination stated that the final SWPPP not only complied with the standards of the New York State Storm Water Design manual, but included measures that exceeded the manual's minimum requirements for infiltration practices and protection of ground water. It then recounted the plan to use infiltrators and underground chambers. The foregoing demonstrates that the Planning Board took a hard look at the project's potential to impact the underlying aquifer and that there was a rational basis for its ultimate determination that it would not adversely impact ground water or the underlying aquifer.

The record also reflects that the Planning Board took the requisite hard look at the project's impact on the on-site stream Raiche Run. The Planning Board's decision acknowledges Raiche Run is a class C stream not regulated by the New York State Department of Environmental Conservation. The proposed project complied with the 50-foot buffer required under the Town Code for all contributory branches of Fishkill Creek. Respondents presented numerous measures designed to minimize any adverse impact on the stream. Documentation Respondents submitted revealed that the existing stream buffer was not a healthy riparian area and was dominated primarily by invasive species. The applicant proposed improving the buffer by planting 106 native species trees and 331 shrubs to provide food and shelter for birds and improve the quality of the stream buffer. The applicant further planned to plant grasses to reduce invasive plant cover and provide additional diversity along the stream corridor. The Planning Board found that the proposed development had no disturbance to 76% of the 50-foot stream buffer, and that only 9% of the proposed activities within the 50-foot buffer were associated with impervious surfaces. The Board further found that measures taken within the 50-foot buffer, including crossings and drainage outfalls, were designed to minimize any adverse impacts on the stream. The foregoing is sufficient to demonstrate the Planning Board satisfied its obligations under SEQRA in determining that the project would not have an adverse impact on Raiche Run.

Petitioners next claim that the Planning Board's determination must be annulled because the Planning Board failed to include the Village of Fishkill as an involved agency in its SEQRA review.

Petitioners assert this was required because, although the project was located in the Town of Fishkill, it proposed to obtain water from the Village of Fishkill.

Under SEQRA, an "involved agency" is any agency that has jurisdiction to make a discretionary decision to fund, approve or undertake an action. 6 NYCRR 617.2(t). The project in question lies entirely within the Town of Fishkill. Respondent's property is already connected to a water district that receives water from the Village of Fishkill pursuant to an agreement between the Town of Fishkill and the Village of Fishkill. The project does not involve the construction of new water infrastructure to connect it to the existing water supply. Respondents currently have a request pending with the Town Board to extend the existing water district to provide additional water to the property in support of the proposed development. There is nothing in the record demonstrating that the Village of Fishkill has any discretion over the proposed development. Its only connection to the project is based entirely on a prior agreement between the two municipalities in connection with an existing water district. The mere fact that the project proposes to obtain its water from that water district did not make the Village of Fishkill an involved agency under SEQRA.

Petitioners further contend that the Planning Board failed to consider whether the proposed development was consistent with the Town's comprehensive plan as required by SEQRA. They also contend that the Planning Board failed to consider whether the project met development standards set forth in Town Zoning Code §§150-98 and 150-106A.

The Town of Fishkill's comprehensive plan states as an objective to work with municipal officials and other interested parties to preserve portions of the historic Fishkill Supply Depot lands that remain undeveloped and explore how these lands can be best used to commemorate activities that occurred on these grounds. Petitioners fail to establish that the issuance of the amended negative declaration and site plan approval constituted a clear conflict with this provision of the comprehensive plan. See generally Youngewirth v. Town of Ramapo Town Board, 155 AD3d 755 (2nd Dept 2017). There was significant evidence presented to the Planning Board that not all lands located within the greater Fishkill Supply Depot are of historic importance. There was conflicting evidence before the Planning Board about whether the portion of the site Respondents sought to develop had any present historic or archeological significance. The Planning Board resolved the conflict as expressed in its determination, as is within its purview. The Board incorporated within its negative declaration the preservation of the known burial grounds on the property. Finally, the substantial commercial development in the vicinity of the site lends support for the Planning Board's determination that the proposed development did not conflict with the Town's comprehensive plan. Accordingly, Petitioners fail to establish that the Planning Board's issuance of the amended negative declaration was arbitrary, capricious or lacked a rational basis based upon a failure to consider the Town's comprehensive plan.

Petitioners also fail to establish that vacatur of the Planning Board's determination is warranted based on an alleged failure to comply with the Town's Zoning Code. Section 150-106A of the code provides that in issuing special use permit approval the Planning Board must find that a project's location, size and use are in harmony with the appropriate and orderly development of

the district. Section 150-98 states that when granting site plan approval the Planning Board must find that the project will "harmoniously and satisfactorily fit in with contiguous land and buildings and adjacent neighborhoods." The proposed project lies adjacent to the intersection of Route 9 and Interstate 84. A lot containing a gas station is directly contiguous. Within the vicinity of the proposed development are numerous hotels and large retail stores. Thus, there is rational support in the record for the Planning Board's issuance of site plan approval based on its finding that the proposed development was actually less intense than the surrounding land uses.

Petitioners further contend that the Planning Board prejudged the application and was biased in favor of Respondents. In support of this assertion they cite comments of the Planning Board Chair at a June 11, 2015 meeting. At that meeting she stated:

> "On the one hand, I, believe it or not, I absolutely understand [FOFSD's] concern, but I am not gonna let them roll over this planning board. I'm not afraid of some hysterical society. I understand your concern and will address your concern but [inaudible]."

Petitioners further cite the Planning Board's rejection of submissions opposing the project made in December 2016 and March 2017. To vacate a Planning Board's determination based on alleged bias, a petitioner must make a factual demonstration supporting the allegation of bias and submit proof that the challenged outcome flowed from it. 1616 Second Ave. Rest., Inc. v. NYS Liquor Auth., 75 NY2d 158, 164-65 (1990). While the use of the term "hysterical society" was certainly not appropriate, the statement as a whole does not demonstrate a prejudgment of the specific facts and determination to be made by the Planning Board. Initially, the comment was made early on in the process in June 2015. Over four years elapsed since that date until the challenged determination. During that period the Planning Board heard extensive comments from the public and experts pertaining to the application before it. It took the measure of obtaining its own archeological expert to address the concerns FOFSD raised. Based on the content of that report and the other significant evidence before the Planning Board supporting its ultimate determination in conjunction with this court's review of the approximately twenty-three Planning Board meetings at which the application was addressed, Petitioners fail to demonstrate that this comment constituted sufficient bias to warrant vacating the challenged determination. Nor does the Planning Board's rejection of letters outside the public comment period establish bias. The Planning Board was entitled to establish parameters for the receipt of public comments and Petitioners had no right to submit comments outside of the established deadlines. Petitioners offer nothing but speculation and innuendo that the Planning Board hired PaleoWest because it had little revolutionary war era experience and thus would not critically assess the archeological potential of the property.

Petitioners' final claim is that the Planning Board accepted new information about the project after the close of the public hearing in violation of their procedural due process rights. They assert that the Planning Board's final public comment session for its SEQRA review closed on September 25, 2017, but that it accepted new information from the applicant about the project thereafter. Petitioners further claim that the Planning Board accepted new information from the applicant after

the public hearing held on June 13, 2019. They assert that the Planning Board's failure to afford the public the opportunity to comment on the new information submitted was a procedural due process violation.

The requirements of procedural due process apply only to the deprivation of interests encompassed by the 14th Amendment's protection of liberty and property. See Twin Town Little League Inc. v. Town of Poestenkill, 249 AD2d 811 (3rd Dept 1998). Thus, a party's interest in a land-use regulation is protected by the 14th Amendment only if it has a legitimate claim of entitlement to the relief being sought. Id. A legitimate claim of entitlement arises where, absent the alleged denial of due process, there is a certainty or very strong likelihood that the benefit would have been granted. Gagliardi v. Vill. of Pawling, 18 F.3d 188, 192 (2nd Cir. 1994).

The Planning Board had significant discretion with respect to the decision whether to issue a negative declaration and grant site plan approval. Thus, Petitioners' procedural due process claim must fail. Moreover, Petitioners received adequate notice and the opportunity to be heard. Prior to adopting its amended negative declaration, the Planning Board gave the public three separate 90-day public comment periods during which it accepted written submissions. It then conducted a public hearing on the application on June 14, 2019 during which Petitioners had the opportunity to be heard. The Planning Board acted within its authority in placing limitations on public comments and was not required to accept written submissions made outside the public comment periods. See Matter of Davis v. Zoning Bd. of Appeals of Buffalo, 177 AD3d 1331 (4th Dept 2019). Reviewed as a whole, the record demonstrates that Petitioners' objections to the project were squarely before the Planning Board prior to its making its final determination. The mere fact that the Planning Board gave Respondents the opportunity to respond to public comments and considered additional information submitted subsequent to the public hearing without affording Petitioners the opportunity to reply does not serve as a basis for annulling the challenged determination. Bowers v. Aron, 142 AD2d 32, 35 (3rd Dept 1998). Based on the foregoing, it is

ORDERED that the amended petition seeking to vacate the resolution of the Town of Fishkill Planning Board adopted on December 12, 2019 granting conditional site plan and special use permit approval and issuing a negative declaration under SEQRA is denied. It is further

ORDERED that to the extent Respondents seek dismissal based on a lack of standing or for failure to state a claim, those applications are rejected for the reasons set forth in this court's decision and order dated July 13, 2020.

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

Dated: December 11, 2020 ENTER:
Poughkeepsie, New York

MARIA G. ROSA, J.S.C.

Scanned to the E-File System only

Pursuant to CPLR §5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

Rodenhausen Chale & Polidoro, LLP
55 Chestnut Street
Rhinebeck, NY 12572

Buchanan Ingersoli & Rooney, P.C.
640 Fifth Avenue, 9th Floor
New York, NY 10019

Van DeWater & Van DeWater, LLP
85 Civic Center Plaza
Poughkeepsie, NY 12601