At a Term of the Supreme Court, held in and for the County of Greene, in the Village of Catskill, New York, on the 13th day of September, 2019.

PRESENT: HON. RAYMOND J. ELLIOTT, III
Justice

SUPREME COURT
COUNTY OF GREENE STATE OF NEW YORK

In the Matter of the Application of
FRIENDS OF FLINT MINE SOLAR,
by its president Giuseppina Agovino,
GIUSEPPINA AGOVINO, LUCIANO AGOVINO,
ERIC MEIER, DIANE ORINGER, FRANK ORINGER,
and MARY LOU ZIMMERMAN,

Petitioners-Plaintiffs,

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

DECISION AND ORDER
INDEX NO. 19-0216

-against-

TOWN BOARD OF THE TOWN OF COXSACKIE,
and TOWN OF COXSACKIE and RICHARD K. HANSE,
in his capacity as Town Supervisor of the Town of Coxsackie,

Respondents-Defendants.

APPEARANCES: MICHAEL B GERRARD, ESQ
LAURA L. COTTINGHAM, ESQ. (admitted *Pro Hac Vice*)
Arnold & Porter Kaye Scholer LLP
250 West 55th Street
New York, NY 10019
Attorneys for Petitioners-Plaintiffs

JOHN J. HENRY, ESQ.
GABRIELLA R. LEVINE, ESQ.
Whiteman Osterman & Hanna LLP
One Commerce Plaza
Albany, NY 12260
Attorneys for Respondents-Defendants

RAYMOND J. ELLIOTT, III J.S.C.

Before the Court is the question of the extent local governments must specifically address the issue of climate change as part of its environmental review and in the context of adopting a local law imposing new zoning regulations.

FACTS

In June 2016, Respondent-Defendant Town of Coxsackie (hereinafter the Town) adopted Local Law 1 of 2016, which established local regulations of solar collection systems within the Town but did not restrict in which zones such systems could be placed [Petitioners' Exhibit B]. In 2017, the Town adopted a six-month town-wide moratorium on the installation of utility-scale solar energy systems [Petitioners' Exhibit E].

During this moratorium, Respondent-Defendant Richard Hanse, Town Supervisor of the Town of Coxsackie, spoke at a Respondent-Defendant Town Board of the Town of Coxsackie (hereinafter Town Board) meeting about the lack of authority the Town had regarding utility-scale solar arrays due to Public Service Law article 10 (hereinafter Article 10)[1] [Petitioners' Exhibit F]. It was noted during the meeting that a group of residents had formed an association expressing concerns with such installations, including "visual impacts, environmental issues, noise and increase of traffic while being built, reduction of property values, water contamination, effects on wildlife/habitats, [the] decommissioning process obsolete panels being buried, unattractiveness of big berms and

[1] Public Service Law article 10 allows the New York State Board on Electric Generation Siting (hereinafter the Siting Board) to preempt any local ordinance which it deems "is unreasonably burdensome in view of the existing technology or the needs of or costs to ratepayers whether located inside or outside of such municipality" (Public Service Law § 168 [3] [e]; *see generally* 3

high fences, no real benefit to property owners, lack of trust in solar companies" and the lack of local control under the Article 10 process [Petitioners' Exhibit F].

At a subsequent meeting, the Town Board extended the moratorium for an addition six months [Petitioners' Exhibit G]. At least one member of the public spoke about a group organizing against siting utility-scale solar within the Town [Petitioners' Exhibit G]. A Town Boardmember reported at the meeting that the Board continued to work on a revised solar law noting that "[t]he process of determining the law is very involved and [the Town Board] would like to get the solar law just right" [Petitioners' Exhibit G].

Meanwhile, on February 9, 2018, Flint Mine Solar LLC filed a Public Involvement Program Plan with the Siting Board for the Flint Mine Solar Project as the first step under Article 10 to constructing a utility-scale solar collection system within the Town [Petitioners' Verified Petition ¶ 40; Petitioners' Exhibit C]. As part of its outreach, Flint Mine Solar held open houses in the Town as well as posted information online relating to their proposal [Petitioners' Verified Petition ¶ 42-43]. In November 2018, Flint Mine Solar filed a scoping statement describing the intention to construct a 100 MW solar electric generating facility on approximately 1,700 acres of private land [Petitioners' Verified Petition ¶ 41; Petitioners' Exhibit D].

At Town Board meetings in September, October, November of 2018, Respondents-Defendants (hereinafter collectively referred to as Respondents) heard comments regarding Proposed Local Law 2 of 2018, a new zoning ordinance that, in

---

NY Zoning Law & Prac § 32A:38 [October 2018 Update]).

relevant part, restricted utility-scale solar collection systems to commercial and industrial zones [Petitioners' Exhibits H, J & L]. Each meetings included public comments in favor of and in opposition to the proposed law as well as written comments [Petitioners' Exhibits H & J]. In November 2018, Respondents adopted Local Law 2 of 2018 [Petitioners' Exhibits A & L]. Prior to adoption, the Town completed only a short Environment Assessment Form (hereinafter EAF) as part of its State Environmental Quality Review[2] [Petitioners' Exhibit R] and, subsequently, adopted a negative declaration [Petitioners' Exhibit L].

In March 2019, Petitioners-Plaintiffs (hereinafter collectively referred to as Petitioners) commenced this hybrid proceeding and action challenging the adoption of the local law by the Town. Petitioners state three causes of action: (1) Respondents violated the procedural requirements of SEQRA by improperly failing to classify Local Law 2 of 2018, as a Type I action requiring a full EAF, (2) Respondents violated the substantive requirements of SEQRA by failing to take a "hard look" at the potential environmental impact caused by banning utility-scale solar from the majority of the Town, and (3) seeking a declaratory judgment voiding Local Law 2 of 2018, as *per se* arbitrary and capricious and lacking a rational basis.[3]

---

[2] *see* Environmental Conservation Law article 8 (hereinafter SEQRA).

[3] This cause of action was improperly labelled as pursuant to CPLR 7803 and 7806. The Court notes that the Verified Petition-Complaint was brought pursuant to CPLR article 78 and CPLR 3001. "It is well settled that an article 78 proceeding is not available to review a legislative act" (*Harby Assoc. v City of Gloversville*, 82 AD2d 1003, 1004 [3d Dept 1981], citing *Matter of Merced v Fisher*, 38 NY2d 557, 557 [1976]). While the cause of action is mislabeled, the Petition-Complaint properly notes it seeks a declaratory judgment and, further, this Court has the authority to treat a proceeding as an action where there is no question of jurisdiction and necessary parties; therefore, the Court will proceed appropriately as explained in this hybrid proceeding (*see* CPLR 103 [c]; *Matter of Kovarsky v Housing & Dev. Admin. of City of N.Y.*, 31

In May 2019, Respondents introduced Local Law 1 of 2019, intending to supersede Local Law 2 of 2018 [Respondents' Exhibit B]. The new law was identical in form and substance; however, Respondents have now classified the act as a Type I action under SEQRA and completed a full EAF before adopting a negative declaration [Respondents' Exhibits C, D, & E]. At the end of May 2019, prior to the adoption of the new law but after the SEQRA determination, Respondents filed a Motion to Dismiss pursuant to CPLR 7804 (f). Specifically, Respondents asserted that their subsequent curative acts had rendered Petitioners' first two causes of action moot. Regarding Petitioners' third cause of action, Respondents contend that Petitioners' have failed to state a claim upon which relief may be granted. Further, Respondents assert that Petitioners lack standing, and the case is not yet ripe for judicial review. After Petitioners responded in opposition to the Motion but before it was returnable, Respondents further informed the Court that Local Law 1 of 2019, had been adopted.

DISCUSSION

I. RESPONDENTS' ADOPTION OF LOCAL LAW 1 OF 2019 DOES NOT MOOT THIS PROCEEDING AS THE NEW LAW SUFFERS THE SAME ALLEGED INFIRMITIES AS THE OLDER LAW.

Respondents contend that the adoption of Local Law 1 of 2019, has rendered the proceeding moot. Specifically, Respondents assert that the new law was adopted after a full EAF as required for a SEQRA Type I action and; therefore, Petitioners' challenge to Local Law 2 of 2018 asserting that Respondents failed to comply with the procedures of SEQRA has been cured. Petitioners opposed the Motion to Dismiss being granted on

---

NY2d 184, 192 [1972]).

mootness grounds because (1) at the time of the Motion and the opposition brief, Local Law 1 of 2019, had yet to be adopted, and (2) the new local law would/does suffer from the same infirmities substantively as Local Law 2 of 2018.

"It is a fundamental principle of our jurisprudence that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal" (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 713 [1980]; *accord Matter of Kagan v New York State Dept. of Corr. & Community Supervision*, 117 AD3d 1215, 1216 [3d Dept 2014]). However, "[t]he adoption of a new law does not moot a challenge to the validity of an older law, even when the older law has been superseded, when both laws suffer from the same alleged infirmities such that a challenge to the new law will be affected by the resolution of the claims regarding the older law" (*Matter of New York State Corr. Officers and Police Benevolent Assn., Inc. v New York State Office of Mental Health*, 138 AD3d 1205, 1207 [3d Dept 2016]; *accord Matter of Dry Harbor Nursing Home v Zucker*, ___ AD3d ___, 2019 NY Slip Op 06034, *2 [3d Dept 2019]; *see also Matter of City of Glens Falls v Town of Queensbury*, 90 AD3d 1119, 1120 [3d Dept 2011]; *Matter of Westbury Trombo v Board of Trustees of Vil. of Westbury*, 307 AD2d 1043, 1045 [2d Dept 2003]; *see generally Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 812 [2003], *cert denied* 540 US 1017 [2003]).

Notably, Petitioners opposition was prior to the adoption of Local Law 1 of 2019. While the Court notes the difficulty of arguing a fluid situation, the Court has not received a request for an extension of time to respond due to these changing

circumstances, nor a request for a sur-reply based on the new information. Therefore, as there is no argument currently before the Court regarding procedural defects in the adoption of Local Law 1 of 2019 and, more significantly, there is no showing that any possible new defects are the same as the alleged infirmities in the old law, the Court must grant dismissal to the first Cause of Action of the Verified Petition-Complaint as the controversy is now academic (*see Matter of Sullivan Farms IV, LLC v Village of Wurtsboro*, 134 AD3d 1275, 1279 [3d Dept 2015]; *Matter of City of Gloversville v Town of Johnstown*, 210 AD2d 760, 762 [3d Dept 1994]; *Matter of Weinstein Enters. v Town of Kent*, 171 AD2d 874, 874 [2d Dept 1991]).

While the first cause of action has been rendered moot, a different result is clear regarding the second cause of action. To the extent that Petitioners assert that there were substantive violations of SEQRA, specifically alleging that the reviews failed to consider (1) the New York State Energy Plan and its renewable energy target; (2) the pending Flint Mine Solar project; (3) the impact on fossil fuel emissions; and (4) global climate change, such alleged infirmities remain in the new local law and, thus, the second cause of action is not moot (*see Matter of City of Glens Falls v Town of Queensbury*, 90 AD3d at 1120; *cf. Matter of Dry Harbor Nursing Home v Zucker*, 2019 NY Slip Op 06034, *2; *Matter of New York State Corr. Officers and Police Benevolent Assn., Inc. v New York State Office of Mental Health*, 138 AD3d at 1207; *Matter of Westbury Trombo v Board of Trustees of Vil. of Westbury*, 307 AD2d at 1045).

II. PETITIONERS HAVE STANDING TO CHALLENGE BOTH THE SEQR DETERMINATION AND LOCAL LAW 1 OF 2019.

Respondents further assert that, even if the hybrid proceeding is not moot,

Petitioners lack standing to assert the relevant causes of action. Respondents specifically assert that Petitioners have only alleged an economic interest, which would not give rise to standing under SEQRA, and, additionally, that Petitioners fail to allege a particularized injury-in-fact that gives rise to standing.

"Standing is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria" (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 769 [1991] [citations omitted]; *accord Matter of Association for a Better Long Is., Inc. v New York State Dept. of Envtl. Conservation*, 23 NY3d 1, 6 [2014]). "While standing principles are broadly construed in matters involving zoning and land use development" (*Matter of Center Sq. Assn., Inc. v City of Albany Bd. of Zoning Appeals*, 9 AD3d 651, 652 [3d Dept 2004]; *see Matter of Douglaston Civic Assn. v Galvin*, 36 NY2d 1, 6 [1974] [Notably the Court of Appeals has opined that it was "troubled by the apparent readiness of our courts in zoning litigation to dispose of disputes over land use on questions of standing without reaching the merits, an attribute which is glaringly inconsistent with the broadening rules of standing in related fields"]; *but see Save the Pine Bush, Inc. v Common Council of City of Albany*, 13 NY3d 297, 306 [2009] ["Thus, while we decline to erect standing barriers that will often be [insurmountable], we are also conscious of the danger of making these barriers too low"]), a "petitioner must demonstrate, among other things, that he or she 'would suffer direct harm, injury that is in some way different from that of the public at large'" (*Matter of Morabito v Martens,* 149 AD3d 1316, 1316 [3d Dept 2017], *lv denied* 29 NY3d 916

[2017], quoting *Society of Plastics Indus. v County of Suffolk*, 77 NY2d at 774).

a. Petitioners have standing to challenge SEQR.

"Petitioners have the burden of establishing both an injury in fact and that the asserted injury is within the zone of interests sought to be protected by the statute alleged to have been violated" (*Matter of Animal Legal Defense Fund, Inc. v Aubertine*, 119 AD3d 1202, 1203 [3d Dept 2014] [internal quotation marks and citations omitted]; *see Matter of Village of Woodbury v Seggos*, 154 AD3d 1256, 1258 [3d Dept 2017]). In this regard, "[t]o qualify for standing to raise a SEQRA challenge, a party must demonstrate that it will suffer an injury that is environmental and not solely economic in nature" (*Matter of Mobil Oil Corp. v Syracuse Indus. Dev. Agency*, 76 NY2d 428, 433 [1990]; *see Matter of Sun-Brite Car Wash v Board of Zoning & Appeals of Town of N. Hempstead*, 69 NY2d 406, 415-416 [1987]). However, the mere "presence of an economic motive for bringing a proceeding will not [by itself] defeat standing" (*Matter of Duke & Benedict v Town of Southeast*, 253 AD2d 877, 878 [3d Dept 1998]). Further, "[w]here the challenge is to the SEQRA review undertaken as part of a zoning enactment, the owner of property that is the subject of rezoning need not allege the likelihood of environmental harm" (*Matter of Gernatt Asphalt Prods. v Town of Sardinia*, 87 NY2d 668, 687 [1996], citing *Matter of Har Enters. v Town of Brookhaven*, 74 NY2d 524, 526 [1989]; *see Matter of Rossi v Town Bd. of Town of Ballston*, 49 AD3d 1138, 1142 [3d Dept 2008]).

To assess the zone of interest protected by SEQRA, the Court must consider the broad scope of the statute. The promulgated regulations note that SEQRA review is for

any action "that *may* affect the environment" (6 NYCRR 617.2 [b] [1] [emphasis added]). Further, "environment" is broadly defined to include "the physical conditions that will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, resources of agricultural, archeological, historic or aesthetic significance, existing patterns of population concentration, distribution or growth, existing community or neighborhood character, and human health" (6 NYCRR 617.2 [e]). Notably, abstract interests, such as where a person can prove that he or she uses and enjoys a natural resource more than most other members of the public, can provide a basis for standing (*see Matter of Save the Pine Bush, Inc. v Common Council of the City of Albany*, 13 NY3d at 301; *see also Lujan v Defenders of Wildlife*, 504 US 555, 562-563 [1992] ["the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing"]). Additionally, "an entirely proper avenue of inquiry, even within SEQRA," embraces "the overall character of the community" including such issues as "an increased vacancy rate" (*Matter of Wal-Mart Stores v Planning Bd. of Town of N. Elba*, 238 AD2d 93, 98 [3d Dept 1998]).

Here, Petitioners Luciano Agovino, Guiseppina Agovino, Eric Meir, Diane Oringer, Frank Oringer, and Mary Lou Zimmermann (hereinafter collectively the Property Owner Petitioners) all submitted affidavits attesting to the fact that they are concerned about fossil fuel consumption and wish to be part of efforts to burn less fossil fuel by utilizing renewable energy instead. It is uncontested that their land is affected by this zoning ordinance. Their intentions are concrete in that they are seeking to imminently use their land for renewable energy generation. Further, the Property Owner Petitioners

also expressed their concerns regarding the difficulty of farming and the ability of solar to revitalize a distressed farming community.

It is asserted that the law would make it more difficult for the Property Owner Petitioners to build utility-scale solar on their properties, as they have sworn that they intend to attempt to do. Likewise, the Property Owner Petitioners have expressed their personal interest in using their land to generate renewable energy, not simply a generalized environmental concern about climate change or a solely economic concern about the value of their contracts. They have further expressed concern regarding the viability of agricultural pursuits on their land and the need to use renewable energy production as an alternative use that can protect long-term viability of these properties. The Court is cognizant that a concern for economic viability by itself is not a viable claim under SEQRA or else almost any economic claim could be shrouded as an environmental claim. However, the Court also notes that, in the very limited context where the claim is not a pure economic profit motive but articulated as a viability objective towards an environmental goal and in the context of other environmental concerns, the consideration is not completely outside of SEQRA.

Therefore, this Court finds the Property Owner Petitioners have standing to challenge Respondents' SEQRA determination based on their ownership of property affected by the new local law, their personal and imminent intention to use their land to help combat climate change by generating renewable energy, and their concern regarding the necessity of allowing utility-scale solar energy collection as a means to maintain the viability of their land, thereby preventing vacancy and maintaining the overall

community character.

b. Petitioners have standing to challenge Local Law 1 of 2019.

Likewise, the Property Owner Petitioners have stated an injury-in-fact based on Local Law 1 of 2019. "As petitioners are owners of property that is located within one of the zoning districts to which the new zoning law applies and, as a result, the zoning scheme for their property has been changed, they 'would suffer direct harm, injury that is in some way different from that of the public at large'" (*Matter of Rossi v Town Bd. of Town of Ballston*, 49 AD3d at 1142, quoting *Society of Plastics Indus. v County of Suffolk*, 77 NY2d at 774). Additionally, it is beyond reasonable dispute that the new local law creates an additional hurdle for the proposed Flint Mine Solar project. Public Service Law article 10 allows the Siting Board to preempt any local ordinance which it deems "is unreasonably burdensome in view of the existing technology or the needs of or costs to ratepayers whether located inside or outside of such municipality" (Public Service Law § 168 [3] [e]; *see generally* 3 NY Zoning Law & Prac § 32A:38 [October 2018 Update]). Therefore, while the Siting Board could still potentially preempt this local law, for the property owners to gain the benefit of their contracts, both the economic benefit and the less tangible benefit of personally contributing to combatting climate change, Flint Solar must show that the local regulation is "unreasonably burdensome," an additional hurdle. Further, where an environmental review is ripe for review, the local law and the environmental review are properly reviewable together as to do otherwise would be "a result clearly contrary to the public interest" (*Red Wing Props., Inc. v Town of Milan*, 71 AD3d 1109, 1111 [2d Dept 2010], *lv denied* 15 N.Y.3d 703 [2010], quoting *Matter of*

Har Enters. v Town of Brookhaven, 74 NY2d at 529).

c. Petitioner Friends of Flint Mine Solar has organizational standing.

To establish organization standing, Petitioner Friends of Flint Mine Solar must show: "First, if an association or organization is the petitioner, the key determination to be made is whether one or more of its members would have standing to sue; standing cannot be achieved merely by multiplying the persons a group purports to represent. Second, an association must demonstrate that the interests it asserts are germane to its purposes so as to satisfy the court that it is an appropriate representative of those interests. Third, it must be evident that neither the asserted claim nor the appropriate relief requires the participation of the individual members. These requirements ensure that the requisite injury is established and that the organization is the proper party to seek redress for that injury" (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d at 775). The first prong is established by the previous two sections of this decision. The final prong is not contested. Respondents contend that the alleged economic motive tied to the group defeats its standing as the interests it asserts are therefore not germane (*see Society of Plastics Indus. v County of Suffolk*, 77 NY2d at 775; *Matter of Real Estate Bd. of N.Y., Inc. v City of New York*, 165 AD3d 1, 7-8 [1st Dept 2018]).

Petitioner Giuseppina Agovino, in her capacity as president of Petitioner Friends of Flint Mine Solar, swears that "[t]he mission of Friends of Flint Mine Solar is to promote the Flint Mine Solar Project and educate the public about its many benefits. Our members believe that the Flint Mine Solar Project will have positive effects on the local community, local lands, and the environment, and we are in favor of seeing the Flint

Mine Solar Project developed for the benefits that it will bring to our local economy and environment." Additionally, Agovino states the organization has led a public information campaign regarding Article 10 and utility-scale energy projects.

Friends of Flint Mine Solar is clearly distinguishable from the trade associations at issue in *Society of Plastics Indus. v County of Suffolk*, (*supra*) and *Matter of Real Estate Bd. of N.Y., Inc. v City of New York* (*supra*). In each of those cases, petitioners were groups formed for the economic benefit of their members. Here, Friends of Flint Mine Solar is sworn to be an unincorporated citizen association pushing for the same environmental concerns expressed by the individual members who this Court has found to have standing. To the extent that the association's purpose benefits the members economically, economic benefit does not bar standing as long as it does not stand alone. Therefore, this Court finds Friends of Flint Mine Solar have organizational standing.

III. Respondents SEQRA determination included the required "hard look."

Petitioners contend that Respondents violated the substantive requirements of SEQRA by failing to take the requisite hard look at issues raised by members of the public, including: (1) the New York State Energy Plan and its renewable energy target; (2) the pending Flint Mine Solar project; (3) the impact on fossil fuel emissions; and (4) global climate change. Further, Petitioners contend that Respondent's "analysis only considered how preventing utility-scale solar will maintain the status quo in terms of localized environmental impacts but does not recognize that the status quo is actively detrimental in the face of changing environmental circumstances" as well as the cumulative impact of such regulations. Respondents assert "that the town board as lead

agency here properly concluded that the proposed action, legislation of a regulatory nature which does not authorize or implement any activity or project, could not have an impact of the sort exemplified by the criteria in 6 NYCRR 617.11" (*Niagara Recycling v Town Bd. of Town of Niagara*, 83 AD2d 335, 339 [4th Dept 1981], *affd*, 56 NY2d 859 [1982]; *see also Matter of Gernatt Asphalt Prods. v Town of Sardinia*, 87 NY2d at 688 ["The potential environmental impact of a specifically proposed project . . . may be entirely distinguishable from an amendment to a local zoning ordinance that limits an environmentally related land use, and thus the nature of the environmental impact assessment undertaken by the agencies in relation to such actions will be correspondingly different"]; *Matter of Philger Realty Corp. v Town Bd. of Town of E. Hampton*, 262 AD2d 564, 565 [2d Dept 1999]).

SEQRA review requires strict compliance with the statute (*see Matter of New York City Coalition to End Lead Poisoning v Vallone*, 100 NY2d 337, 348 [2003]; *Matter of King v. Saratoga County Bd. of Supervisors*, 89 NY2d 341, 347 [1996]; *Matter of Save the Pine Bush v Planning Bd. of City of Albany*, 96 AD2d 986, 988 [3d Dept 1983]). In assessing the significance of a proposed action under SEQRA, the lead agency must "thoroughly analyze the identified relevant areas of environmental concern to determine if the action may have a significant adverse impact on the environment; and . . . set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation" (6 NYCRR 617.7 [b] [3], [4]; *see Matter of Adirondack Historical Assn. v Village of Lake Placid/Lake Placid Vil., Inc.*, 161 AD3d 1256, 1259 [3d Dept 2018]). An Environmental Impact Statement (EIS) "must

be prepared regarding any action that 'may have a significant effect on the environment'" (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 415 [1986], quoting ECL 8-0109 [2]). A Type I action, such as the adoption of zoning regulations or a comprehensive land use plan, "carries with it the presumption that it is likely to have a significant adverse impact on the environment" (6 NYCRR 617.4 [a] [1]; *see Matter of Land Master Montg I, LLC v Town of Montgomery*, 54 AD3d 408, 411 [2d Dept 2008], *lv dismissed* 1 NY3d 864 [2008]). However, a lead agency may issue a negative declaration obviating the EIS requirement even for Type I actions if the 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]; *see Matter of Gabrielli v Town of New Paltz*, 116 AD3d 1315, 1316 [3d Dept 2014]). "A record evincing an extensive legislative process, however, is neither a substitute for strict compliance with SEQRA's reasoned elaboration requirement nor sufficient to prevent annulment" (*Matter of Troy Sand & Gravel Co., Inc. v Town of Nassau*, 82 AD3d 1377, 1379 [3d Dept 2011]).

Judicial 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 Troy Sand & Gravel Co., Inc. v Town of Nassau*, 82 AD3d 1377, 1378 [3rd Dept 2011] [internal quotation marks and citations omitted]; *see Matter of Spitzer v Farrell*, 100 NY2d 186, 190 [2003]). If the agency has failed to take the required hard look or set forth a reasoned elaboration for its determination, its action will

be annulled as arbitrary and capricious (*see Matter of Merson v McNally*, 90 NY2d 742, 752 [1997]). Critically, the Court of Appeals has cautioned that "[w]hile judicial review must be meaningful, the courts may not substitute their judgment for that of the agency for it is not their role to 'weigh the desirability of any action or [to] choose among alternatives'"(*Akpan v Koch*, 75 NY2d 561, 570, quoting *Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d at 416).

Here, Respondents adopted a six-page negative declaration that stated there would be no impact, relying primarily on the fact it was a regulatory action rather than an approval or disapproval of a particular project. The declaration further specifically considered the community character, agriculture, and protecting open space. The declaration also noted that there are other alternatives for siting utility-scale solar collector systems, both in commercial and industrial zones within the Town as well as in other locations throughout the State, therefore no impact on the use of any form of energy was directly attributable to the legislative action. The local law itself was an attachment to the declaration. The law states its intent is to balance the potential impact on neighbors and preserve the rights of property owners "in light of competing public interest in other existing uses." It further stated that the law was meant to ensure that solar collection systems will not have a significant adverse impact on the environment or on the aesthetic qualities and character of the Town.

It is well settled that "not every conceivable environmental impact, mitigating measure or alternative must be identified and addressed . . . [and the] degree of detail with which each factor must be discussed obviously will vary with the circumstances and

nature of the proposal" (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 417). Respondents were "not required to evaluate, on a conceptual basis, potential impacts" based on conjecture and facts not yet in existence (*Matter of Highview Estates of Orange County, Inc. v Town Bd. of Town of Montgomery, Orange County, N.Y.*, 101 AD3d 716, 720 [2d Dept 2012]). Further, local governments are not required to consider the statewide impact of their local prohibitions (*see Patterson Materials Corp. v Town of Pawling*, 694 AD2d 510, 512 [2d Dept 1999], *lv denied* 95 NY2d 754 [1999]). "In reviewing a lead agency's compliance with SEQRA, a court does not weigh the desirability of the action," and, thus, no matter if a lesser measure could have been more prudent, even a town-wide ban of a type of use may be upheld (*Red Wing Props., Inc. v Town of Milan*, 71 AD3d at 1112 [internal quotation marks and citation omitted]). Here, Respondents took a more measured approach then a complete ban and it is certainly not in the Court's purview to reevaluate the wisdom of the decision based on statewide goals. Additionally, contrary to Petitioners' contention, the declaration did not ignore the proposed project.

IV. Local Law 1 of 2019 is a valid exercise of a local government's police power.

Petitioners' final contention is that Local Law 1 of 2019 itself is invalid as arbitrary and capricious. Petitioners explain that they did not challenge the constitutionality of the law or the authority of Respondents to enact it. Instead, they assert that the law's process was irrational because it failed to properly consider evidence in the record. This argument is without merit.

"A town's zoning determination is entitled to a strong presumption of validity;

therefore, one who challenges such a determination bears a heavy burden of demonstrating, 'beyond a reasonable doubt, that the determination was arbitrary and unreasonable or otherwise unlawful' " (*Matter of Bergami v Town Bd. of the Town of Rotterdam*, 97 AD3d 1018, 1019 [3d Dept 2012], quoting *Matter of Rotterdam Ventures, Inc. v Town Bd. of the Town of Rotterdam*, 90 AD3d 1360, 1361-1362 [3d Dept 2011]). "[R]espondents need only show that the zoning amendment was adopted for a legitimate governmental purpose and the amendment will not be considered arbitrary unless there is no reasonable relation between the end sought to be achieved by the regulation and the means used to achieve that end" (*Matter of Birchwood Neighborhood Assn. v Planning Bd. of the Town of Colonie*, 112 AD3d 1184, 1185-1186 [3d Dept 2013] [internal quotation marks and citations omitted]).

In carrying out its important duty of protecting the environment, the State and its local government subdivisions share legislative authority. "Article IX, the 'home rule' provision of the New York Constitution, states that 'every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law . . . except to the extent that the legislature shall restrict the adoption of such a local law'" (*Matter of Wallach v Town of Dryden*, 23 NY3d 728, 742 [2014], quoting NY Const, art IX, § 2 [c] [ii]). "To implement this constitutional mandate, the state legislature . . . authorized towns to enact zoning laws for the purpose of fostering 'the health, safety, morals, or the general welfare of the community'" [*Matter of Wallach v Town of Dryden*, 23 NY3d at 742-743, quoting Town Law § 261]). "As a fundamental precept, the legislature has recognized that the local regulation of land use is

'[a]mong the most important powers and duties granted . . . to a town government'" (*Matter of Wallach v Town of Dryden*, 23 NY3d at 743, quoting Town Law § 272-a [1] [b]).

The State of New York has recognized by statute that climate change is "adversely affecting economic well-being, public health, natural resources, and the environment of New York" including through "an increase in the severity and frequency of extreme weather events, such as storms, flooding, and heat waves, which can cause direct injury or death, property damage, and ecological damage . . . rising sea levels, which exacerbate damage from storm surges and flooding, contribute to coastal erosion and saltwater intrusion, and inundate low-lying areas, leading to the displacement of or damage to coastal habitat, property, and infrastructure; . . . a decline in freshwater and saltwater fish populations; . . . increased average temperatures, which increase the demand for air conditioning and refrigeration among residents and businesses; . . . exacerbation of air pollution; and . . . an increase in the incidences of infectious diseases, asthma attacks, heart attacks, and other negative health outcomes" (L 2019, ch 106). The expansion of renewable energy, including solar power, and the corresponding reduction in greenhouse gas emissions is, therefore, a critical part of the State's efforts to combat this existential threat (*see e.g.* 9 NYCRR 8.166). However, solar power, like other energy resources, has documented negative impacts, and legislative bodies may consider this intricate balancing when making critical decisions regarding land use (*see generally* Sarah Pizzo, Note, *When Saving the Environment Hurts the Environment: Balancing Solar Energy Development with Land and Wildlife Conservation in A Warming Climate,*

22 Colo J Intl Envtl L & Poly 123 [2011]).

Likewise, the State has also recognized the importance of protecting farmland and open space (*see e.g.* 6 NYCRR § 617.7 [c] [1] [vii]). Courts as well have recognized that "[c]learly, the preservation of farmland confers a benefit upon the public, since it enables residents of the Town to enjoy locally grown produce and scenic view" (*Matter of Aspen Cr. Estates, Ltd. v Town of Brookhaven*, 47 AD3d 267, 274 [2d Dept 2007], *affd*, 12 NY3d 735 [2009]). Acknowledging the importance of protecting agricultural lands, "[t]he 'residential-agricultural' zone is quite common. The juxtaposition of potentially incompatible land uses is already built-in to many zoning ordinances utilizing the RA zoning area designation. Generally, the purpose of a residential district is to provide for areas where there is low density residential development, and where agricultural land uses and general open space land uses can co-exist in harmony" (2 NY Zoning Law & Prac § 14:02 [October 2018 Update]).

Recognizing that land use control is one of the core powers of local governance, it is not this Court's place to determine the underlying wisdom of the State's or its local government subdivisions' exercise of their legislative power as "[t]hese are major policy questions for the coordinate branches of government to resolve" (*Matter of Wallach v Town of Dryden*, 23 NY3d at 754). Further, it is well settled that "[c]ourts should be wary of substituting their economic and business judgment for that of legislative bodies, and should avoid the temptation, however attractive, to sit as a 'super-legislature to weigh the wisdom of legislation'" (*Kaufman v O'Hagan*, 64 AD2d 46, 59 [1st Dept 1978], *affd* 46 NY2d 808 [1978], quoting *Day-Brite Light v Missouri*, 342 US 421, 423 [1952]). When

the argument is that a legislative body has been unwise, the remedy lays not in the courts, but at the ballot box (*see Ferguson v Skrupa*, 372 US 726, 732 [1963]).

In clear contradiction to Petitioners' contention that Respondents' motive was an "inappropriate, politically motived local law that was enacted contrary to the evidence in the record," the evidence submitted shows a long legislative process with significant public input from multiple contradicting perspectives. Petitioners argument, taken at face value, would invalidate many environmental protection local laws, such as local bans on hydrofracturing and mining, because it would deny local governments their constitutional right under Home Rule to enact laws not preempted, merely because of a broad state policy existing on the topic.

Considering the broad power of local governments to enact local land use controls, the difficult balance between important, and at times competing, priorities that must be made by legislative bodies in exercising this power, and the deference appropriately given to elected legislative bodies carrying out this function, this Court finds this Petition/Complaint must be dismissed.

According, it is

ORDERED, Defendant's Motion for Summary Judgment dismissing the Amended Complaint is granted.

This shall constitute the Decision, Order and Judgment of the court. This Decision, Order and Judgment is being returned to the attorneys for Respondents. All original supporting documentation is being filed with the Greene County Clerk's Office. The signing of this Decision, Order and Judgment shall not constitute entry or filing

under CPLR 2220. Counsel is not relieved from the applicable provision of that rule relating to filing, entry and notice of entry.

SO ORDERED AND ADJUDGED

ENTER.

Dated: September 13, 2019
Catskill, New York

RAYMOND J. ELLIOTT, III
Supreme Court Justice

Papers Considered:

1. Verified Petition dated March 9, 2019; Annexed Exhibits A-R; Petitioners' Memorandum of Law in Support of the Verified Petition dated March 11, 2019.
2. Affidavits of Petitioners Luciano Agovino, Guiseppina Agovino, Eric Meir, Diane Oringer, Frank Oringer, and Mary Lou Zimmermann received March 14, 2019.
3. Respondents' Notice of Motion to Dismiss dated May 22, 2019; Affidavit of John J. Henry sworn May 22, 2019; Annexed Exhibits A-H.
4. Affidavit of Bambi Hotaling sworn May 22, 2019; Annexed Exhibit A.
5. Respondents' Memorandum of Law in Support of the Motion to Dismiss dated May 22, 2019.
6. Petitioners' Memorandum of Law in Opposition to Respondents' Motion to Dismiss dated June 28, 2019.
7. Respondents' Reply Affidavit of John J. Henry sworn July 12, 2019; Annexed Exhibits A-D.
8. Respondents' Memorandum of Law in Further Support of the Motion to Dismiss dated July 12, 2019.