**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF NASSAU**

**PRESENT HON._____**
**JUSTICE OF THE SUPREME COURT**

**----------X**

RICHARD A. BRUMMEL,
15 Laurel Lane
East Hills, N.Y. 11577,

Petitioner

**Index Number**

**_____/_____**

For a Judgement Pursuant to Article 78, Section 6311 and 6313 of the Civil Practice Law and Rules ("CPLR")

-against-

**Memorandum of Law in Support of Order to Show Cause and Petition**

THE VILLAGE OF NORTH HILLS, N.Y.,
1 Shelter Rock Road
North Hills, N.Y. 11576
(516) 627-3451,

MIDTOWN NORTH HILLS LLC,
C/O RXR CO REALTY LLC
625 RXR PLAZA
UNIONDALE, NEW YORK, 11556
(516) 506-6000,

X-CELL REALTHY ASSOCIATES III LLC,
a/k/a X-CELL III REALTY ASSOCIATES LLC,
2110 NORTHERN BOULEVARD
MANHASSET, NEW YORK, 11030
(516) 627-8700

Respondents and Necessary Parties

**----------X**

# Table of Contents

## Introduction

Petitioner seeks to compel the Village of North Hills, N.Y. (hereinafter "the Village") to make the requisite inquiry under state law into the necessity of undertaking a supplemental environmental review -- a Supplemental Environmental Impact Statement ("EIS") -- of pending land-development projects in a forested parcel because changes in circumstances since prior environmental reviews have raised substantial questions of whether those reviews remain valid. The New York State Environmental Quality Review Act ("SEQRA"), Environmental Conservation Law ("ECL") Article 8 and regulations promulgated thereunder by the Department of Environmental Conservation ("DEC") as 6 NYCRR 617 et seq., mandate thorough analysis and consideration of the adverse environmental impacts associated with government actions, but have been violated in numerous respects with respect to these land-developments, including by the Village's failure to take a "hard look" at the need for updated environmental analyses. .

The main vehicle for environmental analysis under NY state law is the Environmental Impact Statement ("EIS"). In the present case, the Village has followed a circuitous decision-process on two side-by-side developments proposed to be constructed upon 26 contiguous acres of forest and appurtenant largely-undeveloped land by two firms, Midtown North Hills LLC (known herein as "RXR" for its parent-company affiliation) and X-Cell Realty Associates III LLC, a/k/a X-Cell III Realty Associates LLC, (hereinafter "X-Cell").

In evaluating the environmental impacts of the two projects -- each of which

proposes to remove all trees and vegetation, and completely level the natural environment found on its site, with minor exceptions -- the Village relied, in whole or in part, on a Draft EIS and Final EIS compiled in 2005 and 2006 by RXR. The most recent decision by the Village Board on the two projects occurred on December 18, 2013 when the Village Board approved changes in the RXR project that the developer claimed would finally allow the project to proceed.

Neither project has been built to date. The forest land had remained largely intact throughout the projects' histories, but on January 2 and/or 3, 2014, without any notice, during or after a blizzard, all the trees on half the parcel was pulled down. However, the land where the trees had been was not graded or otherwise rendered ecologically non-viable, upon information and belief, so much of the ecosystem remains intact or readily remediable.

In a hearing on October 23, 2013 before the Village Board with respect to the RXR project, and in two letters afterward, Petitioner Brummel joined with three citizen groups concerned with the environment, and/or leaders thereof, in emphatically urging that the Village protect the forest, and at very least impose the requirement of a Supplemental Environmental Impact Statement (SEIS), as provided by law, to re-consider environmental issues that have arisen since the completion of the Draft and Final EIS's.

At issue was particularly but not exclusively the level of official NY State concern and attention to the state-wide health and viability of multiple species of wildlife -- and/or flora -- presented by the earlier environmental analyses as indigenous to the project sites.

The Village in two separate overt actions, and otherwise by constructive action, denied the request for the Supplemental EIS. But in doing so it failed to hold any hearings or provide any forum for an inquiry into the necessity thereof, and it failed to elaborate its reasons for rejecting each of the issues rased by the Petitioner and others, as required by law.

At present, the Village and RXR are, upon information and belief, finalizing or have in some large way finalized the permitting process for the clearing and development of the RXR site, and the Village and X-Cell, based on statements by the Village Mayor and the record of Village approvals o the project, are ready at any time to proceed with the final stages of permitting and forest-removal for that project. In both cases the permitting would allow the destruction -- or further destruction -- of the forest and appurtenant undeveloped land.

Petitioner seeks to enjoin the three Respondents from taking action that would damage or disturb the forest and the wildlife therein, or continue such actions as have commenced, while the Village makes a proper determination regarding the necessity for a Supplemental EIS, and to assure that such a Supplemental EIS, when and if created, will properly consider the environmental impact of both projects together, and that SEQRA review of various elements of the RXR project that was lacking is properly conducted.

Additionally the Village failed to make certain other valid findings with respect to environmental impacts in the approval of various elements of the RXR project. Specifically, the Village failed to make a reasoned elaboration of its negative declaration with respect to zoning incentives in 2013, and failed to make any

determination of significance with respect to the site plan and subdivision plan.

Furthermore, Petitioner has identified jurisdictional defects that render void the granting of "zoning incentives" upon which the projects are both based, because the Village failed to make the requisite environmental impact inquiries prior to promulgating incentive zoning programs under NY Village Law rules.

**Point I: The Village of North Hills Should Have Fully Evaluated The Need For A Supplemental EIS**

The law requires a robust environmental review:

> SEQRA was designed to insure that agency decision-makers -- enlightened by public comment where appropriate -- will identify and focus attention on any environmental impact of proposed action, that they will balance those consequences against other relevant social and economic considerations, minimize adverse environmental effects to the maximum extent practicable, and then articulate the bases for their choices. The law is well settled that "judicial review of a SEQRA determination is limited to determining whether the challenged determination was affected by an error of law or was arbitrary and capricious, an abuse of discretion, or was the product of a violation of lawful procedure" In reviewing the lead agency's determination, the court must determine whether the lead 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.
>
> In the Matter of Halperin v. City of New Rochelle, 24 AD 3d 768, 809 N.Y.S.2d 98 (2nd Dep't 2005) (internal citations and quotation marks omitted)

With respect to the SEIS:

> A lead agency's determination whether to require a SEIS—or in this case a second SEIS—is discretionary. The relevant SEQRA regulations provide that: '[t]he lead agency may require a supplemental EIS, limited to the specific significant adverse environmental impacts not addressed or inadequately addressed in the EIS that arise from: (a) changes proposed for the project; (b) newly discovered information; or (c) a change in circumstances

related to the project' (6 NYCRR 617.9 [a] [7] [i]).

Matter of Riverkeeper, Inc. v. Planning Bd.of Town of Southeast, 9 N.Y.3d 219, 851 N.Y.S.2d 76 (2007)

The agency decision on an SEIS is "discretionary" but not 'optional'. The agency is required to take a "hard look" at the issues as it is with any other determination under SEQRA and to make a "reasoned elaboration" of its decision.

> "Judicial review of an agency determination under SEQRA 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' This standard of review applies to a lead agency's determination regarding the necessity for a SEIS." *ibid*. (emphasis added, internal citations and quotation marks omitted)

In Riverkeeper, supra, the lower court annulled the Town's initial refusal to grant the SEIS sought by the Petitioner. Subsequently, the Town conducted a detailed analysis of the environmental issues that were raised -- looking at reports and data, and assigning its own expert to evaluate the new information -- and only then was the Town's decision not to require an SEIS sustained.

> Judge Nicolai remitted the matter to the Board to determine whether a second SEIS was necessary in light of subsequent developments....After remittal, the chairman of the Board reexamined Meadows' file, which had been supplemented with the local wetlands permit application before the Town of Southeast Conservation Commission and the Town Board; the application for a State Pollutant Discharge Elimination System (SPDES) permit before the New York State Department of Environmental Conservation (NYSDEC); the application for a wetlands activities permit before USACE; and the application for approval of the Stormwater Pollution Prevention Plan (SPPP) before NYCDEP. The Board then reviewed two reports from the Town Conservation Commission's independent wetlands consultant, Stephen

> Coleman, and another report from Glickenhaus's engineering consultant. Finally, the Board's own environmental and planning consultant examined the file and circulated a draft resolution for Board review. *ibid*.

A properly comprehensive analysis by the Town was what SEQRA required, and that course of action told the court it could reject a challenge to the decision when it was supplied:

> "[The Town] both took the requisite hard look at project and regulatory changes that arose after the filing of a SEQRA findings statement, and made a reasoned elaboration that a second supplemental environmental impact statement (SEIS) was not necessary to address those changes." *ibid*. (emphasis added)

Again,

> "'[T]he lead agency...has the responsibility to comb through reports, analyses and other documents before making a determination; it is not for [the] reviewing court to duplicate these efforts' (Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast, 9 NY3d at 232),'"
>
> Matter of Shop Rite Supermarkets Inc. v. Town of Wawarsing Planning Board, NY Slip Op 1764 (3rd Dep't 2011)

And

> "The record reveals that the Authority did not properly 'identif[y] the relevant areas of environmental concern' and, thus, did not take a 'hard look" at them,'"
>
> Matter of Riverso v. Rockland County Solid Waste Mgt. Auth., 96 AD 3d 764, 946 N.Y.S.2d 175 (2nd Dep't 2012) (internal citations omitted)

In the present matter, Petitioner and others -- leaders of environmental organizations or of a political organization that has as a primary goal the protection of the environment -- testified before the Village Board that, among

other things, significant changes in the state-designation of wildlife species found at the site of the proposed building had apparently been upgraded in their level of 'endangerment' since the FEIS of 2006.

They also submitted written testimony to that effect.

Petitioner submitted three letters to the Village updating the list of such wildlife species, and additional updated environmental issues. The letters also noted the increased level of development, traffic, and general intensity of use of resources in the locale of the development since 2006, and suggested those changes may well have undermined the accuracy of other specified areas of environmental impacts that were addressed in 2006.

In fact the Village was under an official notice, by the Nassau County Planning Commission, that an out-dated environmental review on which it was previously relying -- a review dated 1996 of the X-Cell project used in the Village's reconsideration thereof in 2008 -- should be re-done because of local changes of an environmentally-significant nature in the interim period.

The passage of time is a factor by itself in the validity of an environmental review used for decision-making:

> Additionally, the Authority, as part of its review, did not conduct an investigation into the effects of the condemnation and acquisition upon the groundwater on the remainder of Riverso's land, since that step had already been taken in connection with the 1989 Order on Consent. However, the passage of more than 10 years since that investigation has been conducted necessitates further review under SEQRA to ensure that no new environmental concerns exist (see 6 NYCRR 617.9 [a] [7] [i]; Matter of Doremus v Town of Oyster Bay, 274 AD2d 390 [2000]). Matter of Riverso, *supra* (emphasis added)

But here, the Village of North Hills, took no such "hard look" nor performed other such diligent decision-making on the SEIS request by Petitioner and others.

The Village rejected the need for an SEIS in a section of a resolution not previously publicized in any manner adopted at a "special meeting" 12 days after the Village Board's SEQRA hearing.

The resolution, was not publicized in advance or distributed at the meeting. It contains a cursory, conclusory statement that the Board considered and rejected the need for an SEIS.

There is no indication of a "hard look" or a "reasoned elaboration" of the Village's decision decision on the SEIS either in the minutes of the meeting or in the text of the resolution.

The Village held no hearing nor appeared to seek out other information on the subject.

> [A] lead agency's failure to solicit comments before determining that a SEIS is not required may at times evidence the lack of a "hard look,"' Riverkeeper, *ibid*.

Petitioner made two further requests for an SEIS after the November 4, 2013 meeting, both of which describe the numerous (sixteen) species of wildlife and two species of plants that are currently state-designated as at-risk in some fashion but are not so-described in the RXR DEIS, FEIS, or Notice of Finding promulgated by the Village in 2005 and 2006.

As documented in the Petition, the Village relied on the EIS created by RXR, among other non-X-Cell SEQRA and/or other environmental data when in 2008 it

re-considered the X-Cell project in light of changes proposed.. The Village Board then approved a "negative declaration" under SEQRA.

As such the X-Cell approval process was based substantively on the EIS process, and the provisions of SEQRA mandating an SEIS to remedy the obsolescence of a prior EIS would similarly apply.

As noted, even in 2008 the Nassau County Planning Commission had advised the Village to update its environmental information with respect to the X-Cell project, because its data was so old.

Based on the foregoing facts and law, the Village's decision not to require an SEIS for the RXR and X-Cell projects is arbitrary and capricious, an abuse of discretion, reflects and error of law, and is in violation of lawful procedure.

Accordingly the Village should be required to undertake or cause to be undertaken an inquiry with respect to the necessity for an SEIS to address wildlife issues and other matters of environmental concern that may reasonably be believed to have changed in the period since the FEIS was completed.

And in the interim no permits should be issued or work undertaken at the RXR or X-Cell sites unless and until the proper SEIS is compiled and re-consideration by the Village of both projects in light thereof shall be conducted.

**Point II: The Negative Declaration by the Village on November 4, 2013 Improperly "Segmented" the Village SEQRA Process**

"[O]ne of the purposes of SEQRA is to assure the preparation and availability of an environmental impact statement at the time <u>any authorization is granted</u> that may generate significant environmental impact."

> Citizens Concerned for the Environment for the Harlem Valley v. Town Board of the Town of Amenia, 264 A.D.2d 394, 694 N.Y.S.2d 108 (2d Dep't 1999) lv denied 94 NY2d 759 (internal citations omitted, emphasis added)

> "Furthermore, in determining whether a given action 'may' have a significant effect on the environment, the agency should consider reasonably related effects of the action, 'including other simultaneous or subsequent actions which are: (1) included in any long-range plan of which the action under consideration is a part; (2) likely to be undertaken as a result thereof; or (3) dependent thereon' (17 NYCRR 15.11 [b])."
>
> Matter of Defreestville Area Neighborhoods Assn Inc. v. Town Board of the Town of North Greenbush, 299 AD 2d 631, 750 N.Y.S.2d 164 (3rd Dep't 2002) (internal court citations omitted)

The 3rd Department cited the same statutory clause with respect to a discussion of impermissible "segmentation," Matter of Bergami v. Town Bd of the Town of Rotterdam, 97 AD 3d 1018, 949 N.Y.S.2d 245 (3rd Dep't 2012).)

The SEQRA regulations state:

"Actions commonly consist of a set of activities or steps. The entire set of activities or steps must be considered the action, whether the agency decision-making relates to the action as a whole or to only a part of it."(617 NYCRR 617 (3) (g))

Clearly an action that can play a critical role in a project that otherwise would require a "positive declaration" of adverse environmental impact is itself an action that requires a positive declaration.

In June 2013 the developer RXR submitted a Full Environmental Assessment

Form (FEAF) to the Village as its description of the environmental impact of several changes it proposed to its development in North Hills.

The Village Board held a series of hearings and voted at a Special Meeting on November 4, 2013 to issue a negative declaration that stated "the proposed action is an application to amend a previously issued incentive zoning permit...." (Minutes 11/4/13 Village Board, Exhibit 27)

The cases cited above, and most of the cases discussing "segmentation" with respect to SEQRA, discuss zoning challenges; but the language of the law itself does not either specify or limit the subject to zoning.

As it is, the North Hills vote did deal with a question of zoning -- the "incentive zoning" granted to the developer to exceed otherwise given specifications.

The 'action' the Village was evaluating -- granting the incentive zoning -- was an essential step in facilitating the entire project. The developer's own explanation of the need for the changes says as much, given what it said were difficult market conditions.

As such the action by the Village will have as its "reasonably related effect" (Matter of Defreestville, *supra*) the entire project proposed. Hence the action cannot be considered to have "no significant adverse environmental impact" given that the project as a whole has is determined to have such an impact.

Had it determined that its action would have a significant adverse environmental impact, the Village would properly have considered the project in its entirety and either determined the need for more environmental data or not,

pursuant to SEQRA.

Given the new data presented to the Village by Petitioner and others, the decision would reasonably have been to require an SEIS.

(That the Village Board claimed that one was not necessary -- inadequately as we have argued -- would have been a less convincing act were it to acknowledge its obligation to have a full environmental record before it based on the proper Positive Declaration for the entire project.)

The Village reached the wrong decision on the significance of the environmental impact of its decision on zoning, due to asking the wrong question in an impermissibly "segmented" review process.

Thus the Negative Declaration was affected by an error of law or was arbitrary and capricious, an abuse of discretion, or was the product of a violation of lawful procedure

By doing so, the Village avoided having to review the EIS's upon which the project was based, and needing to determine whether an SEIS would be needed -- likely a public process of inquiry.

Petitioner and the public were thereby deprived of the proper levels of scrutiny of an action affecting the environment, and proper protection of natural resources required by SEQRA.

Petitioner will suffer damage to his use and enjoyment of the forest as a result of those deficiencies.

The court should therefore annul the Negative Declaration and require the Village to make a Positive Declaration and review the adequacy of its data upon

which to act with an understanding that the entire project is before it.

## Point III: Petitioner Brummel Enjoys Legal Standing

A person has legal standing with respect to actions that affect a natural resource under by SEQRA when his use and enjoyment of the resource is greater than that of a typical member of the public:

> "We hold that a person who can prove that he or she uses and enjoys a natural resource more than most other members of the public has standing under the State Environmental Quality Review Act (SEQRA) to challenge government actions that threaten that resource."
> In the Matter of Save the Pine Bush Inc. v. Common Council of the City of Albany, 13 N.Y.3d 297, 890 NYS 2d 405 (2009)

The Court's central finding was that Petitioner visited the Pine Bush and used that resource more than other members of the general public:

> "Here, Petitioner allege that they 'use the Pine Bush for recreation and to study and enjoy the unique habitat found there.' It is clear in context that they allege repeated, not rare or isolated use. This meets the Society of Plastics test by showing that the threatened harm of which Petitioner complain will affect them differently from 'the public at large.'" (*ibid*., at 305).

Petitioner meets the tests set out in Pine Bush:

### 1. Petitioner Uses and Enjoys the Natural Resources of the Forest More than Most Other Members of the Public

Petitioner Brummel has spent many hours both in the forest at issue and in public meetings and the media, as well as in private communications with a broad range of interested parties to inform and mobilize their support for protecting the forest.

Petitioner Brummel has made visits to the Forest at least several times

monthly over a period of six months, from September 2013, walking the woods and documenting the nature there with photographs, and enjoying the natural setting. His interest in the forest is both as a significant remaining part of a storied "Oak-Tulip" forest, as an endangered resource, and as a special vestige of the type of landscape that prevailed in that part of the nearby geography.

Petitioner Brummel also spends time in forested areas closer to his home, such as the lands around the Nassau County Museum of Art (a former Frick Estate), which is different in its landscape, and Petitioner Brummel therefore appreciates the differences the Grace Forest represents.

**2. Petitioner is Injured by the Decision to Destroy the Forest**

Petitioner will lose the enjoyment of the forest if it is altered as planned by the RXR and X-Cell developments.

Both projects are foreseen to level the entire interior of the forest on their sites, leaving only screening trees on part of the peripheries.

The development plans of both projects also entail the grading the bare land, which will result in the destruction of most of the wildlife there directly or through the removal of its necessary habitat. Given the isolated nature of the Forest such habitat destruction will leave many animals with nowhere to go.

That destruction and killing will eliminate the potential to enjoy or use the forest, and will cause considerable distress and sadness on behalf of the natural flora and fauna so destroyed.

**Point IV: The Appropriate Statute of Limitations for this Application in All Respects is Four Months**

Village actions in this matter, with the exception of site-plan approval, are subject to the four-month Statute of Limitations prescribed in CPLR 217 (1):

> Unless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner or the person whom he represents in law or in fact, or after the respondent's refusal, upon the demand of the petitioner or the person whom he represents, to perform its duty.

In the current proceeding, the decisions subject to statutes of limitations to be reviewed by the Court are (1) the negative declaration with respect to incentive zoning for RXR by the Village Board November 4, 2013; (2) the denial of the SEIS request in the resolution approved by the Village Board on the same date; (3) the "Decision" approved by the Village Board on December 18, 2013; (4) the actual denial of the SEIS for both RXR and X-Cell within that same resolution on that date; and (5) the constructive denial of an SEIS for X-Cell in the period after the request was made therefor on December 3, 2013 and December 18, 2013.

In none of the decisions has a shorter statute of limitations been established, although NY Village Law does enumerate a number of 30-day statutes of limitations for land-use related actions by a Village.

It is well established by precedent that village actions falling outside the specific exceptions are subject to the four-month period instead. For example:

> "The Supreme Court properly granted that branch of the separate motions which was to dismiss the third cause of action, which sought review of the finding of consistency with the LWRP, as time-barred by the applicable four-month statute of limitations (see

> CPLR 217 [1]). The consistency determination of the Board of Trustees pursuant to Village Code § 81-30 (H), made on October 13, 2010, was a final and binding determination that began the running of the four-month limitations period,"
>
> In the Matter of Shepherd v Maddaloni 103 A.D.3d 901 960 N.Y.S.2d 171 (2nd Dep't 2013) (emphasis added)(Section 81-30 of the Village code of Head of the Harbor, Suffolk County, provides for the procedure of Village Board review of conflicting rulings by subordinate agencies regarding proposals related to the Local Waterfront Revitalization Program. There is no provision modifying or addressing Article 78 review.)

The Shepherd Court distinguished the shorter statute of limitations for a planning board decision on a "site plan":

> "Pursuant to Village Law § 7-725-a (11), a proceeding pursuant to CPLR article 78 to challenge a planning board's decision on a site plan application must be commenced 'within thirty days after the filing of a decision by such board in the office of the village clerk.'" *ibid*.

Similarly, a village agency dealing with architectural review was subject to a four-month statute of limitations:

> "Since the petitioner was precluded from other avenues of review, and because any subsequent determinations by other Village agencies with respect to the building project would not have affected the ARC's approval of the building design, the ARC determination was final for the purposes of CPLR article 78 review and established the point from which the applicable four-month statute of limitations began to run (see CPLR 217 [a])". (sic)
>
> Matter of Lagin v. Village of Kings Point Committee of Architectural Review, 62 AD 3d 709, 879 N.Y.S.2d 491 (2nd Dep't 2009) (emphasis added)

Village Law Section 7-725-a (11), with respect to Zoning Boards of Appeal are identical to those in Town Law Section 16-267-c with respect to the statute of

limitations for Article 78 applications. And the 30-day exceptions are largely identical as well.

A rezoning action, taken by a Town Board subject to SEQRA, was deemed subject to the four-month period:

> An article 78 proceeding brought to review a determination by a body or officer "must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner" (CPLR 217 [1]). ....The issue to be decided here is whether Petitioner suffered "concrete injury" from the alleged SEQRA violations on April 28, 2004, when the SEQRA process culminated in the issuing of a findings statement, as the Appellate Division held; or on May 13, 2004, when the Town Board enacted the rezoning, as Supreme Court held.
>
> Eadie v. N. Greenbush Town Bd. 7 N.Y.3d 306, 821 N.Y.S.2d 142 (2006) (emphasis added)

Under Village law, the otherwise applicable four-month statute of limitations for Article 78 proceedings is modified in land-use decisions only for zoning board of appeals actions (7-712-C), site plan determinations (7-725-A), special use permits (7-725-B), planning board action on a plat or changing zoning thereon (7-740), or actions of an agency created under inter-municipal cooperation (7-741).

Petitioner's Article 78 application is timely filed with this Court in all relevant respects because it is being filed within the fourth-months of the Village Board vote on the Negative Declaration of November 4, 2013 and the Village Board "Decision" of December 18, 2013, as well as the other actual and constructive decisions which Petitioner are challenging.

With respect to the X-Cell project, this application is being filed within four

months of the time the Village Board constructively denied Petitioner's request to require an SEIS for the X-Cell project after the hand-delivery of letters of request on December 3 2013 and December 16, 2013, and/or actually denied it in the Decision of December 18, 2013. .

It is immaterial for statute of limitation purposes at what date those actions were ultimately filed with the Village Clerk, since in neither case could such have occurred prior to the votes themselves, which are fully within the four-month period.

**Point V: The X-Cell Project Should Also Be Subject to Review Through An SEIS**

Because an SEIS is required when an EIS that was used as the basis for an agency decision-making under SEQRA becomes out of date, the Village was required to undertake a proper inquiry into the necessity of an SEIS with respect to the X-Cell project as well.

The last deliberation by a board of the Village on the X-Cell project occurred in 2008, upon information and belief, but that does not negate the need for an SEIS on the project.

SEQRA does not limit when an SEIS may be required. The law does not state that it should be contingent on a specific type of agency action or decision.

SEQRA says simply that an SEIS is appropriate when, among other reasons, there is "(b) newly discovered information; or (c) a change in circumstances related to the project" (6 NYCRR 617.9 [a] [7] [i]).

Furthermore,

> Once an agency has undertaken the full EIS procedure, a lead agency's determination whether to require a SEIS—or in this case a second SEIS—is discretionary. The relevant SEQRA regulations provide that: the lead agency may require a supplemental EIS, limited to the specific significant adverse environmental impacts not addressed or inadequately addressed in the EIS that arise from: (a) changes proposed for the project; (b) newly discovered information; or (c) a change in circumstances related to the project.
>
> Matter of Riverkeeper, Inc. v. Planning Bd.of Town of Southeast, 9 N.Y.3d 219, 851 N.Y.S.2d 76 (2007) (internal citations and quotations omitted)

In neither 1996 nor 2008, did the Village Board or Planning Board require an EIS to be created to evaluate the environmental impacts of destroying the natural content of 8.5 acres of Oak-Tulip forest and other wood-land present at the site, nor of building one 185,000 square foot office complex or two 92,500 square foot office complexes on the site.

The agencies simply required of the applicant a perfunctory Full Environmental Assessment Form (FEAF) completed in 1996 for the entire deliberation on the project, even after having required an EIS for the RXR project.

But by its own statements the Village Board later relied upon the RXR EIS and unspecified other environmental reviews in its decision-making, given the aged (and cursory) record it had for the X-Cell action.

In fact, it appears the EIS documents created for other tracts of the forest, which were not per se applicable to the X-Cell project, were indeed indispensable to the Village's evaluation of the X-Cell environmental issues, and hence by its own actions the Village acknowledged the deficiency of its prior

process -- both due to time and substance.

When Nassau County Planning Commission challenged the age of the environmental record the Village provided it in 2008, the Village Attorney disputed the concerns, arguing that the environmental reviews of nearby sites would be used.

The Village Board adopted a resolution taking the attorney's position. It said reviews of "adjacent sites" and in particular that performed for RXR via EIS were being utilized in the Village's current environmental review.

The Village stated,

> [T]he Village has considered, and approved, development of other properties adjacent to the [X-Cell] property and/or in the immediate vicinity...and those prior reviews and approvals have included consideration and evaluation of environmental impacts....[T]he Village has in particular conducted an extensive review of the adjacent [RXR] property....[I]n the course of that review, the Village considered the traffic and other environmental impacts from the project proposed at the [X-Cell] site, in addition to the environmental impacts of the projects proposed at the adjacent or immediate vicinity sites....[T]he Board of Trustees has given extensive consideration to the proposed site plan modifications and the minimal extent to which they create or result in any environmental impacts in addition to those impacts fully studied previously with respect to this projects and other projects on adjacent properties or properties in the immediate vicinity...." (Village Board Minutes November 19, 2008, Exhibit 28)

The Board then approved a "Negative Declaration" for the X-Cell property.

As such the Village relied on at least one EIS in its environmental review of the X-Cell project, and effectively willingly brought the process under the EIS/ SEIS framework in SEQRA.

On that basis the provisions of SEQRA with respect to the EIS are properly

invoked as applicable.

To argue otherwise would be to permit an end-run around the SEQRA process -- whereby an agency could claim -- as this one did -- that it made a reasonable decision based on an EIS, but it would then claim to be immune from the court-mandated requirement to make sure that EIS is up-to-date through the SEIS process, or otherwise.

It is a classic case of "having it both ways", and "having your cake and eating it too". As a legal principle it is untenable, and as a government policy it is corrupted.

The letters Petitioner submitted to the Village on December 3, 2013 and December 16, 2013 describing changes in the circumstances of at-risk wildlife and plants described the need for an SEIS to be conducted for both the RXR and X-Cell projects, since they are on adjacent sites in the same forest and were obviously ecologically near-identical as the reasoning by the Village, above, affirms.

Thus the Village should conduct the inquiry upon the necessity of an SEIS with respect to the X-Cell project also, as requested, notwithstanding that it failed to require an EIS process in the first instance.

**Point VI: The Village Should Not Have Ignored SEIS Requests After November 20, 2013**

The SEIS process as defined in SEQRA is a very open one that imposes no deadlines or limits on when or how a lead agency is to be requested to perform or require an SEIS (see (6 NYCRR 617.9 (a)(7))).

The regulations say only:

> (ii) The decision to require preparation of a supplemental EIS, in the case of newly discovered information, must be based upon the following criteria:(a) the importance and relevance of the information; and (b) the present state of the information in the EIS. (iii) If a supplement is required, it will be subject to the full procedures of this Part." (6 NYCRR 617.9 (a)(7))

While Petitioner Brummel and the others who testified regarding the need for an an SEIS spoke to the Village Board during its hearing on the Amendment to the RXR project, their comments and concerns applied to the entire project, as they made clear at the time.

The fact that the Village Board concluded its hearing on November 20, 2013 did not end its obligation to consider the need for an SEIS with respect to the RXR project as a whole, or with respect to the DEIS and FEIS that were prepared for the project.

Petitioner Brummel's letters to the Village Board of December 3, 2013 and December 18, 2013, which recited additional species of wildlife and plants believed present in the forest sites that were listed by the State as in need of conservation attention, did not limit its subject of concern to the current changes in the RXR project.

In its Decision the Village implies that is was relieved of the obligation to consider those letters, or nay other information received after the close of the hearings, "because other parties would not and did not have any opportunity to respond to those materials."

But in fact the Village failed to conduct the requisite inquiry upon the

information it received that would have performed that very act -- provide all relevant parties with a full opportunity to examine the record and provide the Village Board all the information it was legally obligated to consider to from a reasoned decision on the need for an SEIS.

Indeed the purpose of SEQRA is to open the process of information gathering, not to close it arbitrarily:

> "SEQRA was designed to insure that agency decision-makers—enlightened by public comment where appropriate—will identify and focus attention on any environmental impact of proposed action, that they will balance those consequences against other relevant social and economic considerations, minimize adverse environmental effects to the maximum extent practicable, and then articulate the bases for their choices,
> In the Matter of Halperin, supra

Absent other limitations on its discretion, of which there were none so constraining the Village, the proper remedy for the lack of process to evaluate new information is not to ignore it, especially where SEQRA mandates a robust public inquiry, but to provide a proper forum to conduct the requisite inquiry.

The lead agency is indeed judged on whether it fully evaluated information presented for the SEIS:

> "Judicial review of an agency determination under SEQRA 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. This standard of review applies to a lead agency's determination regarding the necessity for a SEIS." Matter of Riverkeeper, *supra*, (emphasis added, internal citations omitted)

It might be argued that there are fixed time periods to comment upon a DEIS or FEIS, e.g. :

> "[C]omments will be received and considered by the lead agency for no less than 30 calendar days from the first filing and circulation of the notice of completion, or no less than 10 calendar days following a public hearing at which the environmental impacts of the proposed action are considered, whichever is later." (6 NYCRR 617.9 (a )(4)(iii))

And,

> "Prior to the lead agency's decision on an action that has been the subject of a final EIS, it shall afford agencies and the public a reasonable time period (not less than 10 calendar days) in which to consider the final EIS before issuing its written findings statement." (6 NYCRR 617.11 (a))

But the courts have made clear that there is no similar time restraint on the challenge to a previously promulgated Findings Statement that submits the necessity for an SEIS:

> At the heart of the two appeals before us is the impact of environmental and regulatory change on a residential development that has been in the planning and review stages for nearly 20 years....On February 25, 1991, the Board issued a SEQRA findings statement determining that SEQRA's requirements had been met and that the project "minimized or avoid[ed] adverse environmental effects to the maximum extent practicable."
> .....
> The Board granted preliminary subdivision approval on August 10, 1998, and conditional final approval on June 10, 2002.
> .....
> On February 3, 2003, Supreme Court Justice Francis A. Nicolai annulled the conditional final approval because of the Board's failure to take a hard look at certain areas of environmental concern. Judge Nicolai remitted the matter to the Board to determine whether a second SEIS was necessary in light of subsequent developments.... In the Matter of Riverkeeper, *supra*.

There was no basis for the Village Board to ignore the letters presenting information that argued for the preparation of an SEIS base on time limitations not contained in SEQRA.

As such the Village Board's refusal to consider the need for an SEIS for the RXR and X-Cell projects as presented in the letters of December 3, 2013 and December 18, 2013, was erroneous as a matter of law.

The deadlines asserted should have no impact on Petitioner's claim that the Village's actions in refusing the SEIS's, constructively or actually, were unlawful.

.

**Point VII: The Village Failed to Obtain Jurisdiction to Grant Incentive Zoning**

The RXR and X-Cell developments were approved under the Village R-3 and C1-A incentive zoning programs, respectively, as provided for in Village Code Sections 215-14, 174-13.

As a result of allowances the RXR development would consist of at least 10 buildings providing 244 condominium units over 17 acres. Each building is to be approximately 60 feet tall. Those attributes are substantially larger than the normal R-3 dwelling, so the "incentive" provides a significant benefit to the developer.

The Village's incentive zoning was also the basis upon which X-Cell was granted approval in the C1-A district zone to build two office buildings of 92,500 square feet each and appurtenant parking and other facilities.

Upon information and belief the Village did not create a GEIS pursuant to Village Law Section 7-703 prior to creating the incentive zoning policy of Village Code section 215.

Furthermore, upon information and belief, the Village did not approve a

Determination of Significance ((617 NYCRR 617.7(b)) in compliance with the State Environmental Quality Review Act ("SEQRA"), to justify its failing to create the GEIS otherwise so required.

Village Code states with respect to the R-3 incentive program: "The Board of Trustees hereby further finds that there will be no significant environmentally damaging consequences if incentives or bonuses are awarded as provided herein...." (Section 215-12).

With respect to the C-1A incentive program, the Village Code states: "The Board of Trustees hereby further finds that there will be no significant environmentally damaging consequences if incentives or bonuses are awarded as provided herein...." (Section 215-21).

The purpose of the GEIS is to inform public policy before the law implementing potentially 'for-profit' relaxation of zoning restrictions is approved. Such a GEIS is stipulated in Village Law, but is defined by SEQRA.

In SEQRA the function of a GEIS is described as follows:

> "They may identify the important elements of the natural resource base as well as the existing and projected cultural features, patterns and character. They may discuss in general terms the constraints and consequences of any narrowing of future options. They may present and analyze in general terms a few hypothetical scenarios that could and are likely to occur. A generic EIS may be used to assess the environmental impacts of: (1) a number of separate actions in a given geographic area which, if considered singly, may have minor impacts, but if considered together may have significant impacts..." (6 NYCRR Section 617.10)

New York Village Law section 7-703 provides for the establishment by villages of the incentive zoning programs.

It requires the preparation of a generic environmental impact statement

("GEIS") when the impact of the incentives and bonuses for development may create "significant impact":

> "A generic environmental impact statement pursuant to article eight of the environmental conservation law and regulations adopted by the department of environmental conservation shall be prepared by the village board of trustees for any zoning district in which the granting of incentives or bonuses may have significant effect on the environment before any such district is designated, and such statement shall be supplemented from time to time by the village board of trustees if there are material changes in circumstances that may result in significant adverse impacts." (NY Village Law Section 7-703)

Further the GEIS must be updated by supplementation when needed:

"[S]uch statement shall be supplemented from time to time by the village board of trustees if there are material changes in circumstances that may result in significant adverse impacts." *ibid*.

The decision whether or not to create a GEIS is however governed by the same strict decision-making process that requires a robust rational and written decision by the agency:

> "[The 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 (4) set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation. (617 NYCRR 617.7 (b ))

In the Village code section creating the incentive zoning program, and upon information and belief in such other records as the Village may provide pursuant to Petitioner Brummel's FOIL request, there is no further elaboration of the environmental issues nor a GEIS than noted.

Thus the decision not to create a GEIS for the zoning incentive plan in either district was based upon an overly general and conclusory statement of 'non-significance' that failed to comply with SEQRA requirements for a process that would "thoroughly analyze" the impacts, providing a "reasoned elaboration" in written form.

As such the Village failed to obtain jurisdiction to promulgate either zoning incentive plan. The zoning incentive plans are thus nullities.

The Village lacks jurisdiction to grant incentive zoning approval for projects in its putative incentive zoning districts because the Village never completed a GEIS, a condition precedent to obtaining jurisdiction over any incentive zoning projects in that district, or a reasoned elaboration in compliance with SEQRA as to why such a GEIS was not needed.

Lacking a legal basis to grant zoning incentives, the Village's approval of the zoning incentives for RXR and X-Cell, and all other grants of permits or approvals consequent thereupon, are affected by an error of law or were arbitrary and capricious, an abuse of discretion, or the product of a violation of lawful procedure.

**Point VIII: Petitioner is Entitled to Injunctive Relief**

A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do or is doing or procuring or suffering to be done an act in violation of a plaintiff's rights respecting the subject of the action, and tending to render the judgement ineffectual or in any action where

the plaintiff has demanded and would be entitled to a judgement restraining the defendant from the commission or continuance of an act which if continued or committed during the pendency of the action would produce injury to the plaintiff (CPLR Section 6301).

Courts have held that a preliminary injunction is appropriate and should be granted when three elements are shown: A likelihood of success on the merits; irreparable injury to the movant; the balancing of equities lies in the movant's favor. See e.g. Melvin v Union College, 195 A.D.2d 447, 600 N.Y.S.2d 141 (2nd Dep't 1993) (granting preliminary injunction in Article 78 proceeding).

Petitioner satisfies the three conditions:

(a) There is a likelihood of success on the merits: Petitioner has described the legally deficient deliberative process followed by the Village in its purported decision not to require an SEIS with respect to the RXR and/or the X-Cell projects, whereby the Village failed to take a "hard look" at the issues presented and failed to produce a "reasoned elaboration" of its decision.

Furthermore by virtue of Petitioner's demonstrable interest in and use of the forest at issue, Petitioner has standing to challenge the Village's decision insofar as it affects his "use and enjoyment" of that resource in a special and specific way.

Furthermore this action is timely and sanctioned by law.

(b) Irreparable harm will occur in the absence of injunctive relief: Both RXR and X-Cell have plans to destroy all the vegetation within their tracts, by removing all trees and grading the soil, leaving only some minute buffers of trees or other vegetation at certain points on the extreme edges of their respective tracts. According to the Mayor of the Village, both developers could be

authorized at any time to proceed with their plans. In fact RXR has severely but not irremediably degraded its tract or a large portion thereof, in a hasty manner likely intended to frustrate litigation such as this. The destruction of the forest and the soil that is the foundation of the ecosystems therein will deprive Petitioner of his use and enjoyment thereof, and it would be an irremediable act of finality for the span of several lifetimes.

(c) The balance of equities is in favor of the Petitioner: RXR has had approval for construction since 2006 from the Village, and X-Cell has been approved since 1997. But neither developer has put its plans into effect. With winter here with intermittently freezing weather, outdoor construction activities typically subside. The practicality and urgency of starting construction immediately is belied by atmospheric conditions and the history of the projects. The damage caused by loss of time in the project schedules has long since occurred, repeatedly. Respondents cannot claim a delay for adjudication of legitimate issues will create a new injury that is significantly beyond those they have already suffered.

That being said Petitioner has been concerned that one or both developers would begin destroying the forest to forestall legal action, or to demonstrate some 'progress', or to take some advantage of available manpower, or some other but not especially compelling or urgent reason, and in fact that process has begin.

On the other hand, the equity on Petitioner's side argues for a legitimate and compelling review of demonstrably-deficient decisions by the Village under

SEQRA as well as Village Law with respect to the Incentive Zoning program.

In the face of requests from Petitioner and three environmental or environmentally-oriented groups that requested the SEIS based upon factual evidence they provided to it, the Village failed to hold any hearings, to seek any public dialogue, or to even divulge the information upon which it decided to peremptorily reject the request for an SEIS.

As such the Village's decision-making cries out for review, and the delay consequent upon that review would only marginally delay projects that have already been in abeyance for from seven to seventeen years.

**Conclusions**

For the foregoing reasons, Petitioner should prevail in his claims and the Respondents should be required to comply with state law in all respects, and take no action or further action adversely to affect the environment in their custody or care until that occurs. The Village was required to fully evaluate the need for an Supplemental EIS for the RXR and X-Cell projects, the Village was required to consider the requests for an Supplemental EIS submitted after November 20, 2013, the Village was required to consider the entire RXR project from a SEQRA perspective in the course of its recent deliberations, the Village was required to make SEQRA findings with respect to its "Site Plan and Subdivision Approvals" for the RXR project on its recent deliberations, Petitioner's petition is timely, Petitioner Brummel has standing to bring this special proceeding, and the Village failed to obtain jurisdiction with respect to

the incentive zoning program.

Dated: January 4, 2014
East Hills, N.Y.

_____

Richard A. Brummel
15 Laurel Lane
East Hills, N.Y. 11577
Tel. (516) 669-1741
Email (not for service)
rbrummel@att.net