STATE OF NEW YORK
SUPREME COURT COUNTY OF RENSSELAER

JESSICA BENNETT,

Petitioner,

-against- Index No. EF2022-271878

TROY CITY COUNCIL,

Respondent.

**PLEASE TAKE NOTICE**, that the within is a true copy of an Order of the Honorable Laura M. Jordan, dated March 23, 2023 and duly entered in the Office of the Clerk of the within named Court on March 23, 2023.

Dated: March 24, 2023.

By: _____
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**STATE OF NEW YORK**
**SUPREME COURT COUNTY OF RENSSELAER**

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In the Matter of the Application of

**JESSICA BENNETT,**

**Petitioner,**

**DECISION AND ORDER**
Index No. EF2022-271878

-against-

**TROY CITY COUNCIL,**

**Respondent.**

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

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All Purpose Term
Hon. Laura M. Jordan, Supreme Court Justice

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Jordan, J.

Petitioner commenced this proceeding to challenge two determinations made by Respondent, Troy City Council (Dkt. No. 1). Petitioner challenges Respondent's June 3, 2022 decision to rezone tax map parcel 70.64-1-1 and the Council's issuance of a negative declaration as part of their analysis pursuant to the State Environmental Quality Review Act ("SEQRA") leading up to the re-zoning decision (*Id.* at ¶ 1). Respondent opposes. Petitioner filed the instant

petition on July 2, 2022 (*Id.*). On August 16, 2022, Respondents filed an answer with objections in point of law (Dkt. No. 19). On August 24, 2022, Petitioner filed her reply (Dkt. No. 47). Oral argument was held on September 21, 2022. For the following reasons, the petition is denied and dismissed.

**A. Background**

On May 21, 2020, a developer named Kevin Vandenburgh presented an idea to the Troy City Council Planning Committee for the development of a multi-family apartment building complex along the Hudson River (Dkt. No. 1 at ¶ 2). The complex would contain a total of 231 apartments on approximately ten acres on Tax Map Parcel Number 70.64-1-1 (*Id.*). On August 27, 2020, the City Council Planning Committee referred the proposal to the Troy Planning Commission for a recommendation on the request for rezoning of the parcel at issue from "R1" (single family, detached) to "P" (planned development) (*Id.* at ¶ 3). Following a review of the Environmental Assessment Form, the Troy Planning Commission recommended against the rezoning on January 28, 2021 (*Id.* at ¶ 4).

On May 11, 2021, the State Environmental Quality Review for the proposed rezoning project commenced (*Id.* at ¶ 5). On June 3, 2021, Respondent passed a resolution declaring itself as the lead agency for the review (*Id.* at ¶ 6). On May 5, 2022, Respondent issued a negative declaration following its review (*Id.* at ¶ 7). Respondent passed a resolution rezoning the property at issue on June 3, 2022 (*Id.* at ¶¶ 8-9).

Petitioner now challenges two decisions made by Respondent (Dkt. No. 1). First, Petitioner argues that Respondent's decision to rezone Tax Map Parcel Number 70.64-1-1 is contrary to law because it constitutes illegal spot zoning (*Id.* at ¶ 1). Second, Petitioner argues that Respondent improperly issued and relied on a negative declaration made pursuant to

SEQRA (*Id.*). In opposition, Respondent argues that the Petition must be dismissed for failure to join a necessary party (Dkt. No. 44 at 4). Alternatively, Respondent argues that the negative declaration complies with the law and was neither arbitrary nor capricious and that the decision to rezone the property at issue is not spot zoning (*Id.* at 6-20).

**B. Applicable Law**

Respondent "opted to interpose these objections in its answer rather than in a motion to dismiss (*see* CPLR 7804 [f]). Therefore, "[t]he court will 'pass not only upon [Respondent's] objections but also upon the merits of the proceeding'" (*Matter of McCrory v Village of Mamaroneck*, 34 Misc3d 603, 621 [Sup Ct, Westchester County, 2011] [quotation omitted]). "It is well settled that a special proceeding is subject to the same standards and rules of decision as apply on a motion for summary judgment, requiring the court to decide the matter 'upon the pleadings, papers, and admissions to the extent that no triable issues of fact are raised'" (CPLR 409 [b]); (*Karr v Black*, 55 AD3d 82, 86 [1st Dept 2008]). Here, Respondent has filed objections in point of law. The parties have briefed the issues extensively and the Court finds that there are no issues of fact which would prevent the Court from issuing a decision in this matter.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*see Ferluckaj v Goldman Sachs & Co.*, 12 NY3d 316, 320 [2009]; *Smalls v AJI Industries, Inc.*, 10 NY3d 733, 735 [2008]; *Ayotte v Gervasio*, 81 NY2d 1062 [1993]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of NY*, 49 NY2d 557, 562 [1980]). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Smalls*, 10

NY3d at 735, quoting *Alvarez*, 68 NY2d at 324). Once a *prima facie* showing has been made, the burden shifts to the party opposing the motion for summary judgment to submit evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman*, 49 NY2d at 562; *Alvarez*, 68 NY2d 320). The Court's function is to view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference, and to determine whether there is any triable issue of fact outstanding (*see Wells v 3M Corp.*, 137 AD3d 1556, 1559 [2016]; *McKenna v Reale*, 137 AD3d 1533, 1534 [2016]).

"Article 78 of the CPLR is the main procedural vehicle to review and challenge administrative action in New York" (*Hensley v Williamsville Cent. Sch. Dist.*, 72 Misc3d 1097, 1101 [Sup Ct, Erie County, 2021]. CPLR § 7803 provides for review of a municipality's actions to determine whether such action was "made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." A municipal agency "'has broad discretion in reaching its determination on applications ... and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary, or an abuse of discretion'" (*Mantello v Town of Southampton Planning Bd.*, 2011 NY Misc LEXIS 4089, *20 [Sup Ct, Suffolk County 2011] [quoting *Matter of Kearney v Kita*, 62 AD3d 1000, 1001 [2nd Dept 2009] [other quotations omitted]). "'The [municipality]'s determination should be sustained upon judicial review if it was not illegal, has a rational basis, and is not arbitrary and capricious'" (*Id.* at 21 [quoting *Kearney*, 62 AD3d at 1001]).

"Under the 'arbitrary and capricious' standard, the 'determination should not be disturbed unless the record shows that the agency's action was "arbitrary, unreasonable, irrational or indicative of bad faith"'" (*Matter of Zutt v State of New York*, 99 AD3d 85, 97 [2nd Dept 2012]

[quoting *Matter of Halperin v City of New Rochelle*, 24 AD3d 768, 770 [2005] [other quotations omitted]]. "The arbitrary and capricious test chiefly relates to whether a particular action should have been taken or is justified ... and whether the administrative action is without foundation in fact. Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (*Hensley v Williamsville Cent. Sch. Dist.*, 72 Misc3d 1097, 1101 [Sup Ct, Suffolk County, 2021] [quoting *Matter of Pell v Board of Ed. Union Free School District*, 34 NY2d 222 [1974]]).

***1. Failure to Join a Necessary Party***

Respondent first argues that the Petition should be dismissed for failure to join a necessary party: Starlight Development LLC, the developer and owner of the property at issue (Dkt. No. 47 at 5). Respondent argues that Starlight is a necessary party because, as the owner of the property at issue, it has an interest in the outcome of this proceeding and would be adversely impacted if Respondent's zoning decision were annulled (*Id.*). In opposition, Petitioner argues that she challenges a general zoning decision – not one related to a specific application or variance by Starlight – and, thus, Starlight is not a necessary party in this action (Dkt. No. 47 at 5).

"A party whose interest may be inequitably or adversely affected by a potential judgment must be made a party in a CPLR article 78 proceeding" (*Manupella v Troy City Zoning Bd. of Appeals*, 272 AD2d 761, 763 [3rd Dept 2000] [citing *Matter of Ayres v New York State Commr. of Taxation & Fin.*, 252 AD3d 808, 810; CPLR 1001]). "The owner of real property subject to a variance challenge generally is a necessary party" (*Id.* [citations omitted]). However, the Appellate Division, Third Department has differentiated between challenges to variance and other property specific decisions and those related to general zoning ordinances (*Matter of*

INDEX NO. EF2022-271878
RECEIVED NYSCEF: 03/23/2023

*Hudson River Sloop Clearwater, Inc. v Town Bd. of the Town of Coeymans*, 144 AD3d 1274, 1275-76 [3rd Dept 2016]).

In *Matter of Hudson River Sloop Clearwater, Inc.*, the municipality enacted a local law which reclassified nine parcels of land from residential-agricultural use to industrial use (*Id.* at 1274-75). When a company that owned three of the parcels at issue brought an Article 78 petition against the municipality, the town argued that the petition should be dismissed for failure to join the remaining property owners (*Id.* at 1275). The Third Department held that courts "have long entertained challenges to municipalities' legislative actions in regard to zoning ordinances without requiring the joinder of every property owner whose rights are affected by the ordinance at issue" (*Id.* at 1275-76 [citations omitted]). In doing so, the Third Department noted that this is true "even when the ordinance at issue is one that, on its face, is likely to dramatically affect the property rights held by real property owners." (*Id.* at 1276 [citing *Matter of Wallach v Town of Dryden*, 23 NY3d 728, 740 [2014]). The court ultimately found that a property owner is a necessary party in a challenge to a municipal ordinance affecting their property only where "the owners had obtained an actual approval pursuant to the challenged zoning ordinance that would be adversely impacted by a judgment annulling that ordinance" (*Id.* [citations omitted]).

The ordinance at issue here, which was passed on June 3, 2022, rezones tax map parcel number 70.64-1-1 from "R-1," or single-family residential district to "P," or planned development district (Dkt. No. 43). Respondent has not demonstrated, nor does the record support, that the developer obtained any additional approvals which would be impacted by a judgment annulling that ordinance such that they would be a necessary party in this action. Thus, the Court finds that the developer is not a necessary party in this action.

*2. Negative Declaration*

Petitioner argues that Respondent's decision to issue the negative declaration and rezone the property at issue was arbitrary, capricious, and contrary to law because it ignored various significant adverse impacts that could be caused by the project, which should have led to the issuance of a positive declaration and further review (Dkt. No. 10 at 16). In so arguing, Petitioner takes issue with Respondent's consideration of the following five categories under SEQRA review: (1) archeological and historical significance; (2) water, air, noise, and flooding; (3) population density; (4) forest and habitat loss; and (5) community plans (*Id.* at 17-27). Respondent opposes arguing that it considered each of the required criteria in issuing its decision and that the decision is supported by the record (Dkt. No. 44 at 6-19).

"Pursuant to SEQRA, an environmental impact statement (hereinafter EIS) 'must be prepared regarding any action that "'may have a significant effect on the environment'"' (*Matter of Troy Sand & Gravel Co., Inc. v Town of Nassau*, 82 AD3d 1377, 1378 [3rd Dept 2011] [quoting *Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400 [1988]; ECL 8-0109[2]]). "A type I action ... 'carries with it the presumption that it is likely to have a significant adverse impact on the environment'" (*Id.* [quoting 6 NYCRR 617.4 [a] [1]; *Matter of Land Master Montg. I, LLC v Town of Montgomery*, 54 AD3d 408]). "Nevertheless, 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'" (*Id.* [quoting 6 NYCRR 617.7 [a] [2]; *Matter of New York City Coalition to End Lead Poisoning v Vallone*, 100 NY2d 337, 347 [2003]). "[R]eview 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" (*Id.* [quotations omitted]). "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" (*Id.* [citing *Matter of Merson v McNally*, 90 NY2d 742, 752 [1997]).

Here, the parties agree that this project is a Type I action (Dkt. No. 1 at ¶ 5; Dkt. No. 44 at 8). However, a negative declaration was issued after Respondent found that the proposed project will not have significant adverse environmental impacts (Dkt. No. 2 at 1-2). Petitioner first argues that the Respondent failed to identify the relevant areas of environmental concern (Dkt. No. 4 at ¶ 13). However, upon review of the Negative Declaration, it is clear that Respondent properly identified all of the relevant areas of environmental concern required by SEQRA (Dkt. No. 2; 6 NYCRR § 617.7 [c] [1] [i]-[xii]). Thus, Petitioner's argument fails in this respect.

Alternatively, Petitioner argues that Respondent failed to take a hard look at certain factors and provide a reasoned elaboration for the basis of its determination (Dkt. No. 1 at ¶ 13). Petitioner claims that the following five factors were not properly considered by Respondent: (1) archeological and historical significance; (2) water, air, noise, and flooding; (3) population density; (4) forest and habitat loss; and (5) community plans (*Id.* at ¶ 14). The Court will address each in turn.

**a. Archeological & Historical Significance**

Petitioner first argues that Respondent ignored the major historical and archeological significance of the property at issue (Dkt. No. 10 at 19-20). Within the proposed site are areas in which archeologists have discovered artifacts from indigenous populations who used the land for hundreds of years (*Id.* at 19). Although Petitioner does not point to specific archeological finds

on the property at issue itself, she notes that the property falls within a larger archeological complex which include burial sites, tool making quarries, and settlements, thereby increasing the significance of the property as a site which potentially holds yet-undiscovered artifacts (Dkt. No. 10 at 19-20).

In opposition, Respondent notes that it reviewed various reports regarding the historical significance and archeologic potential of the property – including a report from the New York State Office of Parks, Recreation, and Historic Preservation ("NYS OPRHP") – prior to issuing the negative declaration (Dkt. No. 44 at 9-10). The report identified one site within the property where impacts to the site should be avoided or minimized (Dkt. No. 34 at 28). The recommendation was that the applicant, in consultation with the NYS OPRHP, the Department of Environmental Conservation, and the Stockbridge-Munsee Community, shall develop a retrieval plan which details the measures that will be taken to collect, record, and preserve information about the identified site (*Id.*). Respondent, citing this recommendation, argues that any portions of the significant site that will be impacted by the project will be subjected to "mitigation measures"[1] (Dkt. No. 44 at 10).

In the narrative portion of Respondent's negative declaration, there is significant discussion of the historic and archaeological issues raised by Petitioner (Dkt. No. 2 at 23-24). Respondent indicates that there was a portion of the property which was identified as eligible under the National Register of Historic Places (*Id.* at 23). Respondent provided a detailed history of the various archaeological reviews of the site conducted by the various organizations dating back to 2008 (*Id.* at 23-24). Thus, it appears that Respondent reviewed and relied on

[1] In reply, Petitioner argues that this response demonstrates that this is an impermissible conditional negative declaration. This argument is addressed in greater detail below.

multiple studies conducted over twelve years in finding that the project will not create any significant adverse impacts to historic and archaeological resources (*Id.*). Accordingly, the Court finds that Respondent properly took the requisite hard look, conducted its review of this factor, and provided a reasoned elaboration for its determination.

**b. Water, Air, Noise, and Flooding**

Next, Petitioner alleges that Respondent failed to properly consider the significant impacts that the project will have on the surrounding water and air pollution, noise levels, and flood patterns (Dkt. No. 10 at 21-23). Specifically, Petitioner argues that the project risks an increase of contaminants in the Hudson River as a result of increased waste production and disruption of the GE Superfund Site[2] (*Id.* at 21). Petitioner alleges that loss of trees and increased traffic will result in increased air population (*Id.*). Additionally, Petitioner claims that increasing the population in the area will result in increased noise pollution (*Id.*). Finally, Petitioner argues that disruption of the existing waterfront will risk flooding on properties downriver (*Id.* at 22).

In addressing each of Petitioner's arguments, Respondent notes that the issues raised are either speculative or they were considered and found not to be significant impacts (Dkt. No. 44 at 11-14). Respondent argues that Petitioner's concern regarding disruption of the GE Superfund Site is speculative and, regardless, the sediment of the riverbed will not be disrupted as the project proposes a floating dock which does not disturb the riverbed (*Id.* at 12). Respondent also notes that the proposed project does not include development within the flood plain, therefore, there is no support for the argument that the project will result in increased flooding downriver

[2] The portion of the Hudson River which the property bordered has been designated as a "Superfund Site" by the Environmental Protection Agency due to pollution by PCBs which were deposited and mixed with sediments on the riverbed.

(*Id.* at 12-13). With respect to air pollution, Respondent notes that the SEQRA review process requires it to review *direct* impacts of a project to air quality – such as air emissions, fuel combustion, waste incineration, etc. – but that this project, which is purely residential in nature, does not have any such emissions (*Id.*). Finally, Respondent argues that Petitioner's claim regarding noise pollution is purely speculative and that the property will be subject to any applicable noise ordinances (*Id.*).

In its negative declaration, Respondent discusses various considerations related to water (Dkt. No. 2). Respondent considered the impact of the project on surface water, ground water, and flooding (*Id.* at 20-21). In its consideration of the impacts on surface water, Respondent discussed the minimal increase in water usage as a result of the project and the various systems that will be put in place to minimize the discharge of any potential stormwater pollutants during construction (*Id.* at 20). Respondent also noted that the minimal increase in demand for water once the project is complete is well within the capability of the City's water system (*Id.* at 20-21). Finally, Respondent noted that the property will not be developed within any floodways and that the project includes a stormwater management system which will decrease the risk of flooding to adjacent properties (*Id.* at 21). In light of this, the Court finds that Respondent took the requisite hard look in considering the potential adverse impacts on water quality and flooding and provided a reasoned justification for its decision.

As Respondent correctly notes, the project does not involve any direct means of air pollution which would be reviewed as part of the SEQRA process (*Id.* at 21). Thus, pursuant to the SEQRA provisions, Respondent's review of this factor is sufficient.

Respondent also explicitly considered the potential adverse impacts related to noise pollution in issuing its decision (*Id.* at 26-27). Respondents noted the restricted hours in which

construction is permitted (*Id.* at 27). Additionally, the negative declaration includes discussion of the minimal increase in noise based on the proposed residential use, as opposed to industrial or commercial (*Id.*). Accordingly, the Court finds that Respondent properly took the requisite hard look in conducting its review of each of these factors and provided a reasoned elaboration for its determination.

**c. Population Density**

Petitioner also argues that Respondent failed to properly consider the impact that the project will have because it will encourage large numbers of people to the property for more than a few days, compared to the number of people who would come without the project and that Respondent failed to provide a reasoned decision as to this factor (Dkt. No. 10 at 23). In opposition, Respondent argues that it considered the population growth and found it to be in line for the goals of the City's Comprehensive Plan (Dkt. No. 44 at 14-15).

The proposed project contemplates the addition of 240 units to the area (Dkt. No. 2 at 27). In its rationale, Respondent indicates that the increased population density will increase and improve the City's housing stock while preserving waterfront land (*Id.* at 27-28). Additionally, the proposed plan supports compact growth, rather the sprawling development that the City seeks to avoid (*Id.* at 28). Finally, Respondent notes that the population density which would result from the proposed project is consistent with the nearby surrounding areas and other developments along the Hudson River (*Id.* at 22-23). Accordingly, the Court finds that Respondent properly took the requisite hard look in reviewing this factor and provided a reasoned rationale for its decision.

**d. Forest & Habitat Loss**

Petitioner next argues that the project is likely to result in significant adverse environmental impacts because excavation of the site would require removal of more than 1000 tons of natural materials (Dkt. No. 10 at 23-24). This, Petitioner argues, would disturb the habitats of endangered bat species and other rare flora and/or fauna (*Id.* at 24). Finally, Petitioner argues that disruption of the riverbed would negatively impact mussel populations in the river (*Id.* at 25).

Respondent argues that it considered a variety of reviews and studies of the area which indicate that there are no significant natural communities or habitats on the property (Dkt. No. 44 at 15). Additionally, Respondent notes that while the property appears in certain mappers as an area which *may* contain certain rare or protected wildlife, ecological studies of the property found that the site is not supportive of any of the wildlife noted by Petitioners (*Id.*).

In issuing its decision, Respondent's rationale includes discussion of the potential impact on plant and animal life on the property (Dkt. No. 2 at 22-23). The discussion lists the multiple sources which Respondent reviewed and relied upon in rendering its decision (*Id.*). Additionally, Respondent notes that an ecological review of the site was conducted to determine whether the property was home to any rare plants or animals (*Id.* at 23). The ecologist conducting the review found that no rare, threatened, or endangered species were present on the project site (*Id.*). Accordingly, the Court finds that Respondent adequately performed its obligations pursuant to SEQRA as it relates to this factor.

**e. Community Plans**

Finally, Petitioner argues that the proposed project is in conflict with the Troy Comprehensive Plan, which is indicative of a significant environmental impact (Dkt. No. 10 at 25). Petitioner identifies six ways in which she believes the project is contrary to community

plans (*Id.* at 25-27). Essentially, she argues that the population density and building height exceeds the permissible limit, the nature of a large apartment building is contrary to the character of the existing single-family structures in the neighborhood, the open space to dwelling unit ratio is non-compliant with the City Code, and the project would violate the preservation of the natural landscape as required by the City Code (*Id.*).

In opposition, Respondent argues that it considered the issues raised by Petitioner prior to reaching its determination and found that the project is not inconsistent with community plans (Dkt. No. 44 at 16). Respondent addresses each of the areas raised by Petitioner, noting that the developer is required to comply with the City Code or receive variances for particular issues (*Id.*). Regardless, Respondent argues that the proposed project furthers many of the goals of the Troy Comprehensive Plan, including the City's goals to increase and update its housing stock while encouraging low-impact design and expanding community access to the Hudson River waterfront (*Id.* at 17-18).

In considering the consistency of the project with community plans, Respondent's rationale included an acknowledgment that the proposed project will be different from the current land use patterns, but noted that the proposed use will not be in sharp contract with the land use patterns (Dkt. No. 2 at 27). Respondents detailed the many ways that the proposed project will further the objectives of the Troy Comprehensive Plan (*Id.* at 27-29). The negative declaration includes discussion of the building height and population density, the nature of the higher density residential building, and the proposals regarding open spaces (*Id.*) Accordingly, the Court finds that Respondent adequately conducted the required review as it relates to this factor and gave a reasoned justification for its decision.

**f. Conditional Negative Declaration**

In her reply, Petitioner argues that Respondent's arguments demonstrate that the negative declaration here is actually an impermissible conditioned negative declaration (Dkt. No. 47 at 9-10). This issue was addressed at oral argument and Respondent disputes Petitioner's characterization of the negative declaration as conditional.

A conditioned negative declaration is "a negative declaration issued by a lead agency for an unlisted action, involving an applicant, in which the action as initially proposed may result in one or more significant adverse environmental effects; however, mitigation measures identified and required by the lead agency will modify the proposed action so that no significant environmental impacts will result" (*Merson v McNally*, 90 NY2d 742, 752 [1997]). To determine whether a negative declaration has been impermissibly conditioned, the court must examine the following factors: "(1) whether the project, as initially proposed, might result in the identification of one or more 'significant adverse environmental effects'; and (2) whether the proposed mitigating measures incorporated into part 3 of the EAF were 'identified and required by the lead agency' as a condition precedent to the issuance of the negative declaration" (*Id.* at 753).

"[W]here the lead agency has identified potentially significant impacts, or where the record supports an inference that the identified impacts would have to be considered potentially significant, or where the identified impacts fall within typically environmentally sensitive areas or locations, the second prong of the test must be identified" (*Id.* [internal citations omitted]). "At the second phase of analysis, a court must examine whether the proposed mitigating measures, incorporated as part of an open and deliberative process, negated the project's potential adverse effects" (*Id.*). "Under such circumstances, the proposal, as revised, could still result in a determination of nonsignificance and the issuance of a valid negative declaration" (*Id.*).

"However, a lead agency clearly may not issue a negative declaration on the basis of conditions contained in the declaration itself" (*Id.*). "Nor could the lead agency achieve the same end by other means, such as supporting the negative declaration with a statement that conditions would be imposed only on an underlying special use permit to reduce environmental impacts; extracting concessions from the developer as necessary prerequisites to the issuance of the negative declaration ...; or requiring specific mitigation measures, and then approving a proposal that has been revised in compliance with the mandate of the lead agency (*Id.* [internal citations omitted]).

Here, both parties agree that this is a Type 1 action under SEQRA (Dkt. No. 1 at ¶ 7; Dkt. No. 19 at ¶ 20). Additionally, in its negative declaration, Respondent identified certain potentially significant impacts (Dkt. No. 2 at 20-29). Specifically, Respondent identified potentially significant impacts in the following categories: (1) surface water, (2) plants and animals, (3) aesthetic resources, (4) historic and archaeological resources, (5) transportation, and (6) consistency with community character (*Id.*).

Petitioner, however, fails to address whether the proposed mitigation measures were "identified and required" by Respondent or if the mitigation measures were proposed by the developer or reached as part of an open and deliberative process (Dkt. No. 47 at 9-12). For that reason, Petitioner has failed to demonstrate that the negative declaration was improperly conditioned.

Alternatively, the Court finds the record does not support Petitioner's argument that the negative declaration was improperly conditioned. The developer submitted a written proposal in January 2021 which includes a detailed discussion of its proposed stormwater management plans and avoidance of wetlands (Dkt. No. 26 at 22, 30). With respect to potential impacts to plant and animal life, it was determined after ecological study that the site does not house any rare,

threatened, or endangered species (Dkt. No. 2 at 21-22). The mitigation measures cited when considering the impact to aesthetic resources, were included in the developer's proposal from January of 2021 (*Id.* at 23; Dkt. No. 26 at 17-18).

Respondent's decision regarding their finding that there will be no significant adverse impact on historic and archaeological resources is supported primarily by data from the various archaeological studies of the property which resulted in significant findings in only a small portion of the property (Dkt. No. 2 at 24-25). It was the organization that conducted the Phase II archeological site evaluation – Hartgen Archeological Associates, Inc. – that recommended either avoidance of the small portion with archeological findings or a Phase III recovery study prior to development (*Id.*). The potential impacts on transportation were found to be insignificant following a study by an engineering firm (Dkt. No. 2 at 25). Finally, the potential impacts on the community character are to be mitigated by measures proposed by the developer in its January 2021 proposal (Dkt. No. 2 at 29; Dkt. No. 26 at 33).

The record demonstrates that the mitigation measures intended to address potentially significant impacts identified by Respondents in its negative declaration were proposed by the developer. There is no support in the record for Petitioner's argument that Respondent both identified and required the mitigation measures as a condition precedent to its negative declaration. Accordingly, the Court finds that the negative declaration was not improperly conditioned.

***3. Re-zoning Decision***

Finally, Petitioner argues that Respondent's decision to rezone the property at issue was arbitrary, capricious, and contrary to law because it constitutes illegal spot zoning (Dkt. No. 10 at 27). Respondents oppose (Dkt. No. 44 at 19-21).

"Generally, zoning determinations enjoy a strong presumption of validity and will only be overcome by a showing, beyond a reasonable doubt, that the determination was arbitrary and unreasonable or otherwise unlawful (*Matter of Rotterdam Ventures, Inc. v Town Bd. of the Town of Rotterdam*, 90 AD3d 1360, 1361-62 [3rd Dept 2011] [citations omitted]). "Spot zoning '"is defined as the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area for the benefit of the owner of said property to the detriment of other owners"'" (*Id.* at 1362 [quotations omitted]). "In evaluating a claim of spot zoning, courts '"may consider several factors, including whether the rezoning is consistent with a comprehensive land use plan, whether it is compatible with surrounding uses, the likelihood of harm to surrounding properties, the availability and suitability of other parcels, and the recommendations of professional planning staff"'" (*Id.* [quotations omitted]).

Petitioner first argues that the proposed use of the parcel is not compatible with the surrounding uses (Dkt. No. 10 at 30). Specifically, Petitioner argues that although the proposed use is residential, the nature of a large apartment complex is categorically different than the single-family residential neighborhood existing now (*Id.* at 30). Additionally, Petitioner claims that the rezoning is inconsistent with the City's Comprehensive Plan which is indicative of likelihood of harm to the surrounding properties (*Id.* at 31). More specifically, Petitioner argues that the proposed project is inconsistent with the goal of promoting residential growth in the City Center, rather than areas like the property at issue (*Id.* at 32). The proposal is also inconsistent with the City's Comprehensive Plan in that it decreases access to open spaces, has a detriment to the environment, and destroys a historical and cultural site (*Id.* at 33-36). Petitioner points to the fact that the Planning Commission recommended against rezoning the property as an indicator of