

Form-based Zoning Code Continues to be Challenged

By Jananne Abel, Editor

March 25, 2021



Port Chester's form-based zoning code, adopted in May 2020, remains the subject of litigation. While one Article 78 proceeding against the village and its Board of Trustees has been found by the court in favor of the municipality, another was filed earlier this month by the City of Rye. And the original litigants are not satisfied with the court's findings and plan to appeal.

Port Chester's new approach to zoning, also called character-based zoning, "would allow for higher and more dense building on core city blocks, reducing the parcels zoned for industrial uses and rezoning these to classifications which will allow commercial and/or housing uses," according to the Statement of Facts in the City of Rye's legal document.

Sustainable Port Chester Alliance, the Port Chester/Rye Branch of the NAACP and three individuals sought to annul as "arbitrary and capricious" Port Chester's May 20, 2020 findings statement which allowed for adoption of the new zoning code and filed a legal action on Sept. 21, 2020.

The village argued that the Board of Trustees took the required "hard look" in its State Environmental Quality Review Act evaluation and that "the findings statement was rational and fully supported by the record."

Honorable Anne E. Minihan, Acting Justice in the Westchester County State Supreme Court, agreed with the village, denied the petition and dismissed the proceeding on Mar. 9, 2021.

The socioeconomic impact of downtown development the form-based zoning code allows for was not sufficiently quantified or mitigated, claimed the lawsuit.

However, the court agreed with the village that "it was anticipated the implementation of the Proposed Action would have adverse socioeconomic impacts with respect to housing, jobs and employment" and the Board of Trustees committed to certain mitigation measures. The Board found that implementation of the zoning code would add to the village's supply of affordable housing, with a minimum required 10 percent set-aside of affordable units in new residential or mixed-use construction.

The Board recognized that the code's implementation would result in direct residential displacement, particularly of low-income tenants who may struggle to find alternative housing. To mitigate, the Board committed to a comprehensive Housing Needs Assessment within 60 days of adoption of the zoning code to understand the actual regional and local need for affordable housing.

As far as anticipated commercial displacement, the Board committed to "procuring a report within 60 days of the adoption...that researches various commercial displacement initiatives across the country... and the applicability for Port Chester."

The village also committed to implementing specific measures recommended by the report to mitigate impacts to businesses that would be impacted by implementation of the zoning code.

Petitioners in the Article 78 proceeding argued that the Board "failed to adequately study the effects that the rezoning would have on residential and commercial displacement and failed to meaningfully consider alternatives or possible mitigation measures" and that the studies should have been done before the final environmental impact statement was complete.

The village argued that these impacts could not be quantified with any accuracy and were therefore considered on a broader, more general level.

"Not every conceivable environmental impact, mitigating measure or alternative must be identified and addressed before a FEIS will satisfy the substantive requirement of SEQRA," stated Acting Supreme Court Justice Minihan in her decision. "In short, courts review the record to determine whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them and made a 'reasonable elaboration' of the basis for its determination."

She found the Board of Trustees took that hard look at the proposed form-based code and made a "'reasoned elaboration' of the basis for its determination, which had a rational basis in the record."

Neither Mayor Richard “Fritz” Falanka nor Trustee Bart Didden chose to comment on Minihan’s finding in favor of the village.

However, Gregg Hamilton, volunteer Executive Director of [Sustainable Port Chester Alliance](#), said on Wednesday, March 24 that “we disagree with the judge’s decision. We feel it was not substantive, so we are filing an appeal. We will take it to a body of five judges.”

“We are at the same time open to negotiations,” added Hamilton. “If the village wants to discuss terms, some modifications to the form-based code, we would be willing to withdraw the suit. We are looking for some fairness. The village’s response was tantamount to admitting guilt - that the form-based code needed modifications and tweaking.”

Hamilton said doing studies after the fact “is not the way it’s supposed to work.”

“We had a whole bunch of meetings with the public,” he agreed. “It seemed like plenty.” However, “if you look at the Village of Rhinebeck, they had many more meetings,” 200 plus meetings over the course of seven years, and Port Chester only had 45 meetings over the course of two-and-a-half years.

“These studies are supposed to be done ahead of time,” Hamilton concluded. “We are arguing the village did not do a fair assessment of the socioeconomic impact to the residents and the small businesses. If you are going to change the zoning code, you have to have a fair assessment of its impact on everybody. Everybody should benefit, not just investors and developers.”

City of Rye sues over incomplete traffic analysis

The City of Rye’s Article 78 seeks to annul the Findings Statement adopted May 20, 2020 by the Board of Trustees approving the village-wide zoning code, annul the adoption of the Character Based Code, remand the matter back to the Board of Trustees to comply with the mandates of the SEQRA process, including a comprehensive traffic study and providing the city with a reasonable review period.

Attorney Kristen K. Wilson of the law firm Blanchard & Wilson, LLP also requests in her 16-page document dated Mar. 3, 2021 that the State Supreme Court Westchester County award the city costs and disbursements related to the legal proceeding.

Rye City’s document claims the board failed to take the requisite “hard look” under SEQRA of the traffic impacts of its rezoning and did not propose concrete and realistic mitigation measures. The board also did not give the city its right to review and be heard on the environmental impacts “by deliberately excluding a traffic impact analysis from its Draft Generic Environmental Impact Statement (DGEIS),” then “released the Final Generic Environmental Impact Statement (FGEIS) with an incomplete traffic analysis and did not provide the City additional time to comment...”

Finally, it claims the board conducted an incomplete examination and failed to take the required hard look at the consequences of the Character Based Zoning. This flawed analysis and ignoring the city’s request for further opportunity to comment concluded that there were no adverse impacts.

Among the statements about omitting the analysis critical to determining traffic impacts are that “the Final Generic Environmental Impact Statement states that this rezoning will spur demolition and replacement of existing structures, their residences and businesses,” but “make no projections as to the magnitude of the impact on traffic on roads including Boston Post Rd or Midland Ave, which connect the City and the Village.”

“How could the City possibly submit any comments on a topic that the BOT purposefully omitted from its document?” the Article 78 asks.

The City stated its need for more time to analyze and comment on the traffic impacts at a May 14, 2020 village board meeting followed up in a May 20 letter.

“The BOT blatantly ignored the City’s request and in turn adopted its Findings Statement on May 20, 2020,” the legal document states.

That action followed numerous comments about the lack of traffic impact analysis received and included in the DGEIS.

Because of COVID-19 and the closure of the courts until Nov. 3, 2020, more time was given to commence an Article 78 proceeding.

Mark Chertok of Sive Paget Riesel in New York City will be representing the Village of Port Chester in defending this legal action. He also represented the village in the [Sustainable Port Chester Alliance](#) et al proceeding.

Rye City Mayor Josh Cohn did not respond to an email and Port Chester Mayor Falanka did not answer a voicemail or text for comment.
