

SUPREME COURT OF THE STATE OF NEW YORK
RENSSELAER COUNTY

JESSICA BENNETT

Petitioner,

Against

TROY CITY COUNCIL

Respondent.

Index No. _____

Petitioners, Jessica Bennett, by their attorneys, PACE ENVIRONMENTAL LITIGATION CLINIC, for their verified petition in this N.Y. C.P.L.R. Article 78 proceeding, respectfully allege and state:

PRELIMINARY STATEMENT

1. This matter arises from the Troy City Council’s (“Respondent”) impermissible decision to rezone Tax Map Parcel Number 70.64-1-1 on 2nd Avenue in North Troy contrary to illegal spot zoning laws (the “Rezoning Decision”). In addition, the Rezoning Decision is not in accordance with the *Realize Troy* City Comprehensive Plan and is inconsistent with the City’s own local law for “P Planned Development” districts. Finally, in making the Rezoning Decision, the Respondent improperly issued and relied on a negative declaration under the State Environmental Review Act (“SEQRA”), which ignored or disregarded multiple potential significant and adverse impacts associated with the Rezoning Decision and the underlying project.
2. On May 21st, 2020, during a planning committee workshop, local developer Kevin Vandenburg presented a project idea for three multi-family apartment buildings

containing a total of 231 apartments on approximately ten acres of property (Parcel 70.64-1-1) in the City of Troy. *See* Environmental Design Partnership, LLC., *Expanded Environmental Assessment Report, 2* (2021), <https://www.troyny.gov/wp->

- b. Significant adverse impacts to water quality and air quality as well as the increase of noise pollution and flooding risks.
- c. Significant adverse impacts relating to the increase of population density risks
- d. Significant adverse impacts resulting from the destruction of forest and destruction of habitat for potentially threatened species and state-rare species.
- e. Significant adverse impacts relating to substantial changes to the parcel not in accordance with community plans.

PARTIES

15. Jessica Bennett is a resident of Troy, New York and currently lives immediately adjacent to where the proposed multi-family apartment complex project will be built. Jessica Bennett is the co-founder of the Friends of the Mahicantuck and is a community organizer who helps preserve woodlands within the City of Troy.
16. The Friends of the Mahicantuck is a broad community coalition dedicated to the protection and preservation of Troy's last untouched waterfront forest and indigenous cultural site with national significance. Friends of the Mahicantuck, *Overview: We Are the Friends of the Mahicantuck, Who We Are*, (last visited June 21, 2022), <http://www.friendsofthemahicantuck.org/who-we-are/>). The Friends of the Mahicantuck work with a broad group of local, regional and statewide organizations, partners, indigenous groups, community advocacy groups and experts in order to preserve Troy's waterfront land. *Id.*
17. The Respondent Troy City Council operates from and has its offices at 433 River Street, Troy, NY 12180. The City Council works with the Executive Branch to enact laws and

1009 Second Avenue, Troy, New York and can observe the property of the proposed apartment project site from her home. *See* Affidavit of Jessica Bennett annexed hereto as Exhibit B.

20. Jessica Bennett enjoys the view of the serene landscape and enjoys living next to a forest that is considered a significant archaeological and historical site. *See Id.* Jessica Bennett can see the forest from her porch, and frequently watches the different species of animals from her porch. *See Id.* Jessica Bennett also frequently walks through this forest and paddles up to the shore of the forest when kayaking on the Hudson River. *See Id.*
21. If the proposed apartment project were to be built, Jessica Bennett would worry about the destruction of eleven acres of wildlife habitat and the possibility of nuisance animals wandering onto her property. Jessica Bennett is also concerned with the flooding of neighboring properties and the increase in temperature of the area due to the reduced green space and the increase in pavement. *See Id.* Lastly, Jessica Bennett is concerned about the destruction of important archeological sites that are found within this parcel of

approximately ten acres of property (Tax Map Parcel Number 70.64-1-1) in the City of Troy. City of Troy,

archaeological significance, ecological significance, ecosystem services and climate change impacts, neighborhood and cultural significance, and economic costs associated with the proposed multi-family apartment complex project. Each section lays out the potential significant and adverse impacts associated with the proposed project.

Additionally, the document details the ecological and archeological reports that have been conducted on Tax Map Parcel 70.64-1-1.

31. Furthermore, on January 28th, 2021, the Troy Planning Commission voted on their recommendation after being sent a full EAF and a Narrative Description Report of the apartment complex project, which defined the whole development project and the rezoning action. The Planning Commission ultimately recommended against the rezoning where 4 members voted against the rezoning and 1 voted for the rezoning request. City of Troy, *Planning Commission Minutes Agenda Archive*, (Jan. 28, 2021), <https://www.troyny.gov/wp-content/uploads/2021/02/PCminutes012821DRAFTreduced.pdf>.
32. Some Planning Commission members mentioned reasons for voting against the rezoning. City of Troy, *City Council Agenda & Minutes Archive*, 4 (April 27, 2021), <https://www.troyny.gov/wp-content/uploads/2021/04/CCPlanningAgenda042721.pdf>.
The first reason deals with the increased density within that particular area of the City of Troy. More specifically, the increase in human population density in this area would increase traffic and load on utilities. The Planning Commission remarked that this would be more of an issue with regards to apartment buildings when compared to single-family homes.

33.

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significance, directed the Troy City Council to withdraw the resolution.

37. On May 11th, 2021, the Troy City Council passed a resolution to initiate State Environmental Quality Review (“SEQR”) for the proposed rezoning on parcel 70.64-1-1. City of Troy, *City Council Agenda & Minutes Archive*, (May 11, 2021), <https://www.troyny.gov/wp-content/uploads/2021/05/CCPlanningAgenda051121.pdf>

Subsequently, the rezoning action was then considered a Type I action under the State Environmental Quality Review Act (“SEQRA”).

38. On June 3rd, 2021, the Troy City Council passed a resolution declaring the City Council as a 07 459 04. C8(ye) 10(s)-4(4)(c)-9(m)88 Tfd 2 07m 08.07 y 10(n) Jun (5) 2 12 /Span414(s) 1 1

<https://www.troyny.gov/wp-content/uploads/2021/08/CCRegularMinutes060321.pdf>.

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Minutes Archive, at 5 (July 8, 2021), <https://www.troyny.gov/wp-content/uploads/2021/08/CCRegularMinutes070821.pdf>. In addition, a protest petition signed by various City of Troy residents who live directly adjacent to the proposed multi-family apartment complex project was sent to the Troy City Council asking the City Council members to vote against the rezoning and oppose the proposed apartment complex project. City of Troy, *City Council Agenda & Minutes Archive*, at 12 (July 8, 2021), <https://www.troyny.gov/wp-content/uploads/2021/08/CCRegularMinutes070821.pdf>.

42. On May 5th, 2022, the Troy City Council issued a negative declaration on the rezone

such increase, and the destruction of forest and state-rare species within Parcel 70.64-1-1.

Therefore, due to these potential significant adverse impacts, and the need for further environmental review, the decision to declare a negative declaration was arbitrary, capricious, and contrary to law.

45. More specifically, the Troy City Council's disregard for a careful analysis of the local law in the light of SEQRA while comparing with the c

- b. Many of the artifacts found are of cultural significance to the Mahican peoples and other artifacts range to prehistoric times. This land was used by the Mahican people as a quarry for tool making, was identified as an area where semi-permanent and permanent settlements of the Mahican people resided, and according to a 2002 United States Environmental Protection Agency Study, this area has a strong indication for native burial sites. Environmental Protection Agency, *Responsiveness Summary Hudson River PCBs Site Record of Decision*, Appendix C (2002), <https://www3.epa.gov/hudson/ResponsivenessSummary.pdf>.
- c. Indigenous burial sites were uncovered at another site that was part of the larger archaeological complex. The Lansingburgh Historical Society, *Native American Burials*, <https://lansingburghhistoricalsocietyarchives.org/lansingburgh-cemeteries/native-american-burials/?fbclid=IwAR1x1x8WFOntASYAFA-Cq0YfiHQpXrxfyX9n13EHPqy5gXH6Spb9wpUXcE>. These burial sites are located less than two hundred feet south of the project site. *Id.* The project site and the site of the burials are part of the same larger archaeological complex. This raises the potential for burial sites on the project location at 1011 2nd Avenue.
- d. Moreover, the New York State Department of Environmental Conservation (NYSDEC) stated in a letter to the Troy City Council saying the project site is located with the potential for historical or archaeological sites.

Environmental Conservation, *Lead Agency Coordination Response Second Avenue Apartments*, 2 (2021), <https://www.troy.ny.gov/wp-content/uploads/2021/08/CCDECResponse061521.pdf>. The proposed action may affect the water quality of any water bodies within or downstream of the site of the proposed action, including the potential release of contaminants (due to the status of the river being a Superfund Site) contained in the Hudson River sediment associated with the installation, construction and use/operation of proposed docks.

- b. Air Quality will be negatively impacted, both directly and indirectly. The increased traffic associated with the development will diametrically impact the air quality of this neighborhood. Additionally, the loss of trees and natural space will further exacerbate air quality loss. The Nature Conservancy, *Planting Healthy Air*, 24 (2016), https://www.nature.org/content/dam/tnc/nature/en/documents/20160825_PHA_Report_Final.pdf.
- c. Currently zoned as R1, the rezoning will significantly increase noise levels due to increased population density, increased traffic, and the loss of green space as a natural noise shield; this will significantly disrupt the character, but also public health of the otherwise characteristically quiet neighborhood.
- d. The negative declaration states the “Project will not have any moderate to large impacts on flooding.” See negative declaration at 6, annexed hereto by Exhibit A. The project further states that “while the Property is located within a designated floodway or the 100- or 500-year floodplain, no development is proposed in those

areas.” *Id.* However, this is incorrect as the project proposes construction of a dock with 40 boat slips that is located within said area. *See* Narrative Description Report at 32, annexed hereto as Exhibit C. The City of Troy itself produced a future flood risk overlay map that shows the majority of the site covered. City of Troy, *Chapter 285: Land Use and Development Ordinance*, Recode Troy, at 165 (Jan. 12, 2022), https://www.recode-troy.com/files/ugd/fea6f4_60df3ffc6c6b4659bde0ba70dc29fbcd.pdf. Therefore, more studies need to be completed with regards to the flooding impacts and the potential significant adverse impacts associated with this project in the event of severe flooding.

- e. Studies have established that developments, such as the proposed, and the associated displacement of natural waterfront and channelization significantly increase river flood risks downstream. Xi Chen, Dingbao Wang, Fuqiang Tian, and Murugesu Sivapalan, *From channeliza*

production; a substantial increase in potential for erosion, flooding or drainage problems,” constitutes a significant impact. (6 NYCRR 617.11 (a) (1)).

Therefore, due to the outlined risks above, the development of the apartment project would cause a substantial change in things like water quality, air quality, flooding risks, etc, thus, having a significant adverse impact on the area and a need for further environmental review.

48. Increasing Population Density Risks

- a. The SEQR regulations state that, “the encouraging or attracting of a large number of people to a place or places for more than a few days, compared to the number of people who would come to such a place absent the action,” can constitute a potential significant impact. (6 NYCRR 617.11 (a) (3)). Developing three, 4-

goods that are currently unmitigated by the action, in addition to the identified

within its boundaries (see *id.* at 28, 61-62, 64). Indeed, the Plan explicitly provides:

The City of Troy is largely built out. Opportunities for change, development, growth and community revitalization will need to occur within developed areas, through intensification or infill development. Infill can support improvements to public transit as well as walking and cycling infrastructure. It can also revitalize neighborhoods and areas of the city that contain brownfield and greyfield sites. Infill development makes use of existing structures and infrastructure and is therefore considered a more sustainable city-building approach compared to continued outward expansion which has occurred in the counties of the Capital District.

(*Id.* at 61)

- b. Furthermore, Goal 1 clearly provides that residential use should be directed toward the City Center, which is specifically identified as a “key area for residential growth” (*id.* at 29 (emphasis added)). Certainly, doing so would mitigate the “high vacancy rates [that] are also contributing to neighborhood destabilization,” which is an important objective emphasized throughout the Plan (*id.* at 11).
- c. Therefore, the proposed rezoning would further contribute to the “built out” residential model that the Plan emphatically seeks to avoid, as the property, in fact, is located on the periphery of the City’s boundaries. See City of Troy, New York, *Official Zoning Map*, <https://www.troyny.gov/wp-content/uploads/2017/01/troyzoningmap.pdf>.

- d. The proposed rezoning is inconsistent with Goal 4 and Goal 5 of the Comprehensive Plan in the following three crucial ways: (1) it decreases access to important open spaces and nature-based recreational resources, including the Hudson River and its shoreline; (2) it is detrimental to the environmental and ecological health of the area; and (3) it would not only threaten, but would completely eviscerate an irreplaceable historical and cultural site.
- e. First, increased access to open space and nature-based recreation is a critical goal and theme weaved throughout the Comprehensive Plan. Specifically, it is highlighted by the following provisions: Troy's 7.5 miles of waterfront along the Hudson River also represents a *significant open space and recreational asset*. However, much of the waterfront is currently inaccessible to the public. City of Troy, New York, *Realize Troy Comprehensive Plan*, at 15 (2018), <https://www.troyny.gov/wp-content/uploads/2019/09/RealizeTroyComprehensivePlan>

interrupted or removed natural ecosystems. Due to this activity, sediment from the Hudson River is no longer deposited on the banks, and *limited habitat is available for fish and wildlife species*. (Comprehensive Plan at 16) (emphasis added). Existing ecological resources including wetlands and shoreline habitat *shall be protected*, preserved and *enhanced*. (*Id.* at 58) (emphasis added). For new development with frontage on the waterfront that is 500 square feet or greater, the City of Troy will require the submission of a construction management plan that demonstrates that the development *will not compromise* the Hudson riverbank. (*Id.*) (emphasis added).

- h. Therefore, in no uncertain terms, the Plan makes clear that protecting, preserving, and enhancing “[e]xisting ecological resources including wetlands and shoreline habitat” is a requirement — they “*shall be protected, preserved and enhanced.*” In fact, the property here is locb e a fa

Rightfully so, the Plan highlights Native American heritage as the very genesis of the city itself; specifically, on page 5, the Plan provides the following:

proposed rezoning also is inconsistent with these two goals of the Comprehensive Plan.

55. The Advising and Recommending by Professional Planning Staff to Not Rezone the Area

- a. On January 28th, 2021, the Troy Planning Commission voted against the rezoning after being sent a full EAF and the Narrative Description Report, annexed hereto as Exhibit C, of the apartment complex project, which defined the whole development project and the rezoning action. City of Troy, *Planning Commission Minutes Agenda Archive*, (Jan. 28, 2021), <https://www.troyny.gov/wp-content/uploads/2021/02/PCminute>

indeed is highly indicative of spot zoning. Accordingly, the fifth factor in the spot zoning analysis supports that the proposed rezoning is spot zoning.

57. Lastly, in addition to being highly inconsistent with the Comprehensive Plan, the proposed rezoning also is inconsistent with the City's own local law for "P Planned Development" districts. See Code of the City of Troy, New York, Art. IV, § 285-57 (available at <https://ecode360.com/11133910>) (last visited June 26, 2022) (the "City Code"). Specifically, the proposed rezo

foot-high, multi-family structures in a location that is currently undeveloped open space that is surrounded by single-family residences (See Narrative Description Report at 4, 5, annexed hereto as Exhibit C).

- e. “Landscaped open spaces or open areas left in their natural state should be provided at a ratio of not less than 1,000 square feet of open space for every dwelling unit” under § 285-57(H)(4) of the City Code, but it is highly unlikely that a 240-unit project with all of the attendant amenities,0(n)-14()8(s)-4(p)15(a)-

59. Petitioner Jessica Bennett, repeats and realleges every allegation contained in the preceding counts of this Verified Petition as if more fully set forth herein.

60. Specifically, as detailed above, Respondent's Rezoning Decision is illegal spot zoning for the following reasons:

- a. The proposed use of Parcel 70.64-1-1 is not compatible with the uses of the surrounding parcels.
- b. The rezoning is not consistent with the City of Troy's *Realize Troy* Comprehensive Plan.
- c. There is evidence linked to the likelihood of harm to surrounding properties
- d. The Troy City Council disregarded the advice and recommendations made by professional planning staff (the Troy Planning Commission) to not rezone Parcel 70.64-1-1.
- e. There are existing, available, and suitable parcels for this proposed multi-family apartment complex project.

61. Additionally, the Rezoning Decision is contrary to existing Troy City Code.

62. Therefore, Respondent arbitrarily, capriciously, and contrary to law, passed the Rezoning Decision resolution.

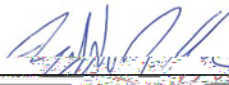
AS AND FOR A SECOND CAUSE OF ACTION (ARTICLE 78) - 5 (6 3 2 1 ' (1 7 ¶ 6
DECISION TO DECLARE A NEGATIVE DECLARATION WITH REGARDS TO THE
REZONING OF TAX MAP PARCEL 70.64-1-1 WAS ARBITRARY, CAPRICIOUS, AND
CONTRARY TO LAW DUE TO VARIOUS SIGNIFICANT ADVERSE IMPACTS THAT
WOULD OCCUR AS A RESULT OF THE APARTMENT COMPLEX PROJECT
REQUIRING A POSITIVE DECLARATION.

63. Petitioner Jessica Bennett, repeats and realleges each and every allegation contained in the preceding counts of this Verified Petition as if more fully set forth herein.

- b. An order vacating the Troy City Council's determination of significance resulting in a negative declaration of a Type I action that was arbitrary, capricious, or contrary to law.
- c. Any further relief that the Court may deem just and proper.

Dated: June 30, 2022
White Plains, NY

Respectfully submitted,

by: 

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