STATE OF NEW YORK : COUNTY OF ERIE
SUPREME COURT

In the matter of
AL ASPHALT CORPORATION,

Petitioner-Plaintiff,

vs.

Index # 000117/2019
MEMORANDUM
DECISION and JUDGMENT

TOWN OF HAMBURG PLANNING BOARD,
TOWN OF HAMBURG, NEW YORK,

Respondents-Defendants.

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

Appearances:

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Hon. Catherine Nugent Panepinto, J.S.C.

Petitioner-Plaintiff AL ASPHALT CORPORATION, filed an Order to Show Cause, granted on October 4, 2019 directing Respondents-Defendants to show cause why an order should not be issued compelling Respondents to immediately classify Petitioner's site plan application as a Type II Action pursuant to the New York State Environmental Quality Review Act (SEQRA). Petitioner submitted a Verified Petition/Complaint with exhibits, an Amended Verified Petition/Complaint with exhibits and Affidavit from Alexandra Lettieri, Founder/President of Petitioner.

Respondents responded with two motions to dismiss with two Attorney Affirmations with exhibits, two memorandums of law, two Attorney Affidavits with exhibits and two Affidavits from professional engineer, Andrew C. Reilly. Plaintiff replied with an Attorney Affirmation and memorandum of law in opposition to motion to dismiss. The parties appeared for Oral Argument January 3, 2020 and this Court reserved judgment.

Petitioner's argument is that Respondents among other things, erred in classifying Petitioner's proposed project as Unlisted and then issuing a positive SEQRA declaration. It asks this Court to declare the project Type II and thus, not subject to SEQRA review. Respondents argue among other things, the matter is not ripe for judicial review and as a result, this Court lacks subject matter jurisdiction.

> ... a proceeding under this article shall not be used to challenge a determination:
> 1. which is not final or can be adequately reviewed by appeal to a court or to some other body or officer ...
> *CPLR § 7801*

> ... the positive declaration requiring the preparation of a DEIS is, "like other SEQRA determinations, 'a preliminary step in the decision-making process' and, therefore, not ripe for judicial review". *Matter of Town of Coeymans v City of Albany*, 237 AD2d 856, 857, (3rd Dept., 1997), quoting *Matter of Young v Board of Trustees*, 221 AD2d 975, 977 (4th Dept., 1995)
> *Rochester Tel. Mobile Communications v Ober*, 251 AD2d 1053, 1054 (4th Dept 1998)

> First, the action must "impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process" *Matter of Essex County v Zagata*, 91 NY2d 447, 453 (1998), quoting *Chicago & S. Air Lines v Waterman S.S. Corp.*, 333 US 103, 113 (1948) In other words, "'a pragmatic evaluation [must be made] of whether the "decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury" *Essex County*, Supra. at 453. Further, there must be a finding that the apparent harm inflicted by the action "may not be 'prevented or significantly ameliorated by further administrative action or by steps available to the complaining party"' *Essex County*, Id. 453
> *Gordon v Rush*, 100 NY2d 236, 242 (2003)

> ... the ruling in *Gordon* was never meant to disrupt the understanding of appellate courts that a positive declaration imposing a DEIS requirement is usually not a final agency action, and is instead an

> initial step in the SEQRA process. See *Rochester Tel. Mobile Communications v Ober*, Supra at 1054. Instead, Gordon stands for the proposition that where the positive declaration appears unauthorized, it may be ripe for judicial review, as, for example, when the administrative agency is not empowered to serve as lead agency *(Gordon*, Supra. at 242-243), when the proposed action is not subject to SEQRA (*Matter of Center of Deposit, Inc. v Village of Deposit*, 90 AD3d 1450, 1452 [3rd Dept., 2011]), or when a prior negative declaration by an appropriate lead agency appears to obviate the need for a DEIS suggesting that further action is improper *Gordon,* Supra. at 243.
> *Ranco Sand and Stone Corp. v Vecchio*, 27 NY3d 92, 100 (2016)
>
> Board properly determined that petitioner's proposal was an unlisted action. (Citation omitted) As such, a DEIS was required only if the Board rationally determined that petitioner's proposed action included the potential for at least one significant adverse environmental impact. See ECL 8-0109 [2]; 6 NYCRR 617.7 [a] [1]; *Matter of Rafferty v Town of Colonie*, 300 AD2d 719, 722 (3rd Dept., 2002).
> *Ctr. of Deposit, Inc. v Vil. of Deposit*, Supra. at 1453 (3rd Dept., 2011)
>
> State Environmental Quality Review, Section 617.5.
> Type II actions...
> ...(c) The following actions are not subject to review under this Part:
> ...
> (9) construction or expansion of a primary or accessory/appurtenant, non-residential structure or facility involving less than 4,000 square feet of gross floor area and not involving a change in zoning or a use variance and consistent with local land use controls, but not radio communication or microwave transmission facilities;
> *6 NYCRR 617.5, SEQRA*

In accordance with the above, this Court hereby finds this matter not ripe for review. Respondents have "imposed an obligation" upon Petitioner to prepare and submit a DEIS; thereby causing Petitioner time and money. However, this apparent harm may be "significantly ameliorated by further administrative action" should Respondents ultimately approve the proposed asphalt project. Missing from the facts herein are any that would summon the exceptions to the rule identified in *Gordon;* to wit, lack of lead agency powers, mere division of land, or a prior negative declaration.

This Court is not persuaded by Petitioner's argument that its project is not subject to SEQRA, because it should have been classified as a Type II action. Though the project may involve less than 4,000 square feet, it is undetermined that

it is solely a structure or facility "consistent with local land use controls". Respondents reasonably relied upon the opinion of professional engineer Andrew C. Reilly, who submitted an Affidavit stating the proposed asphalt plant was not limited to a structure or facility, the project "encompasses multiple pieces of significant equipment,... [and] will emit air contaminants" within Hamburg's "Overlay District". Given Mr. Reilly's opinion, this Court declines to declare as a matter of law that Type II was the proper classification, thereby declaring the project not subject to SEQRA.

Accordingly, as stated above, this Court hereby determines this matter not final and it is unripe for judicial review. Respondents-Defendants motion to dismiss is hereby granted. This constitutes the Decision and Judgment of this Court. Submission of a Judgment granting the Motion to Dismiss is not necessary. The mailing of a copy of this Decision and Judgment by this Court to counsel and the Clerk's Office shall not constitute notice of entry and service.

Hon. Catherine Nugent Panepinto
Supreme Court Justice

Dated: January 15, 2020
Buffalo, New York

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